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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Monday 7 March 2016, at 10 a.m., at the Peace Palace,

President Abraham presiding,

***in the case regarding* Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands *v.* India)**

Jurisdiction

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le lundi 7 mars 2016, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire des* Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde)**

Compétence

COMPTE RENDU

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

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian, juges
M. Bedjaoui, juge *ad hoc*

M. Couvreur, greffier

The Government of the Republic of the Marshall Islands is represented by:

H.E. Mr. Tony deBrum,

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, United States of America,

Mr. Nicholas Grief, Professor of Law, University of Kent, member of the English Bar, United Kingdom,

Mr. Luigi Condorelli, Professor of International Law, University of Florence, Italy, Honorary Professor of International Law, University of Geneva,

Mr. Paolo Palchetti, Professor of International Law, University of Macerata, Italy,

Mr. John Burroughs, New York, United States of America,

Ms Christine Chinkin, Emerita Professor of International Law, London School of Economics, member of the English Bar, United Kingdom,

Mr. Roger S. Clark, Board of Governors, Professor, Rutgers Law School, New Jersey, United States of America,

as Counsel and Advocates;

Mr. David Krieger, Santa Barbara, United States of America,

Mr. Peter Weiss, New York, United States of America,

Mr. Lynn Sarko, Attorney, Seattle, United States of America,

as Counsel;

Ms Amanda Richter, member of the English Bar,

Ms Sophie Elizabeth Bones, LL.B., LL.M., United Kingdom,

Mr. J. Dylan van ***Houcke***, LL.B., LL.M., Ph.D. Candidate, Birkbeck, University of London, United Kingdom,

Mr. Loris Marotti, Ph.D. Candidate, University of Macerata, Italy,

Mr. Lucas Lima, Ph.D. Candidate, University of Macerata, Italy,

Mr. Rob van Riet, London, United Kingdom,

Ms Alison E. Chase, Attorney, Santa Barbara, United States of America,

as Assistants;

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

as Technical Adviser.

Le Gouvernement de la République des Iles Marshall est représenté par :

S. Exc. M. Tony deBrum,

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comme membre de la délégation ;

Mme Laurie B. Ashton, avocat, Seattle, Etats-Unis d'Amérique,

M. Nicholas Grief, professeur de droit à l'Université du Kent, membre du barreau d'Angleterre, Royaume-Uni,

M. Luigi Condorelli, professeur de droit international à l'Université de Florence, Italie, professeur honoraire de droit international à l'Université de Genève,

M. Paolo Palchetti, professeur de droit international à l'Université de Macerata, Italie,

M. John Burroughs, New York, Etats-Unis d'Amérique,

Mme Christine Chinkin, professeur émérite de droit international à la London School of Economics, membre du barreau d'Angleterre, Royaume-Uni,

M. Roger S. Clark, membre du conseil des gouverneurs et professeur à la faculté de droit de l'Université Rutgers, New Jersey, Etats-Unis d'Amérique,

comme conseils et avocats ;

M. David Krieger, Santa Barbara, Etats-Unis d'Amérique,

M. Peter Weiss, New York, Etats-Unis d'Amérique,

M. Lynn Sarko, avocat, Seattle, Etats-Unis d'Amérique,

comme conseils ;

Mme Amanda Richter, membre du barreau d'Angleterre,

Mme Sophie Elizabeth Bones, LL.B., LL.M, Royaume-Uni,

M. J. Dylan van Houcke, LL.B., LL.M, doctorant au Birkbeck College, Université de Londres, Royaume-Uni,

M. Loris Marotti, doctorant à l'Université de Macerata, Italie,

M. Lucas Lima, doctorant à l'Université de Macerata, Italie,

M. Rob van Riet, Londres, Royaume-Uni,

Mme Alison E. Chase, avocat, Santa Barbara, Etats-Unis d'Amérique,

comme assistants ;

M. Nick Ritchie, chargé de cours en sécurité internationale à l'Université d'York, Royaume-Uni,

comme conseiller technique.

The Government of the Republic of India is represented by:

Ms Neeru Chadha, Former Additional Secretary and Legal Adviser, Ministry of External Affairs,

as Agent;

Mr. Amandeep Gill, Joint Secretary, Disarmament and International Security Affairs, Ministry of External Affairs,

as Co-Agent;

Mr. Harish Salve, Senior Advocate, Supreme Court of India, Barrister, Blackstone Chambers, London,

Mr. Alain Pellet, Emeritus Professor, University Paris Ouest, Nanterre-La Défense, Former Chairperson, International Law Commission, member of the Institut de droit international,

as Counsel and Advocates;

H.E. Mr. J. S. Mukul, Ambassador of the Republic of India to the Kingdom of the Netherlands,

Mr. Vishnu Dutt Sharma, Director and Head (Legal and Treaties), Ministry of External Affairs,

Ms Kajal Bhat, First Secretary (Legal), Embassy of the Republic of India,

as Advisers;

Ms Chetna Nayantara Rai,

Mr. Benjamin Samson,

as Junior Counsel.

Le Gouvernement de la République de l'Inde est représenté par :

Mme Neeru Chadha, ancien *Additional Secretary* et conseiller juridique, ministère des affaires étrangères,

comme agent ;

M. Amandeep Gill, *Joint Secretary*, service des affaires de désarmement et de la sécurité internationale, ministère des affaires étrangères,

comme coagent ;

M. Harish Salve, avocat principal à la Cour suprême de l'Inde ; avocat, Blackstone Chambers, Londres,

M. Alain Pellet, professeur émérite à l'Université Paris Ouest, Nanterre-La Défense ; ancien président de la Commission du droit international ; membre de l'Institut de droit international,

comme conseils et avocats ;

S. Exc. M. J. S. Mukul, ambassadeur de la République de l'Inde auprès du Royaume des Pays-Bas,

M. Vishnu Dutt Sharma, directeur du service juridique et des traités, ministère des affaires étrangères,

Mme Kajal Bhat, Premier secrétaire (affaires juridiques), ambassade de la République de l'Inde (Pays-Bas),

comme conseillers ;

Mme Chetna Nayantara Rai,

M. Benjamin Samson,

comme conseils auxiliaires.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit à partir d'aujourd'hui pour entendre les plaidoiries des Parties sur la question de la compétence de la Cour en l'affaire des *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde).*

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Avant d'en venir à cette affaire, je souhaiterais, au nom de la Cour, rendre solennellement hommage à la mémoire de deux personnalités qui nous ont quittés récemment : il s'agit, d'une part, d'un ancien membre de la Cour, le juge Luigi Ferrari Bravo, qui s'est éteint le 7 février dernier, et, d'autre part, de l'ancien Secrétaire général des Nations Unies, le professeur Boutros Boutros-Ghali, décédé le 16 février

Né le 5 août 1933, Luigi Ferrari Bravo fit des études de droit à l'Université de Naples où il obtint le titre de docteur en 1956. Il entama immédiatement après ce qui devait être une longue et brillante carrière académique. D'abord assistant de l'un des grands maîtres de la doctrine italienne, le professeur Rolando Quadri, à la faculté de droit de l'Université de Naples, il fut chargé de cours en droit des organisations internationales puis en droit international à l'Université de Bari, et chargé de cours en droit international à l'Istituto Universitario Orientale de Naples avant de devenir, en 1968, professeur titulaire de droit international à la faculté de droit de l'Université de Bari, où il dirigea l'Institut de droit international de 1968 à 1974. Il enseigna également le droit communautaire, tout d'abord à l'Ecole supérieure d'administration publique de Rome, puis, à partir de 1979, à la faculté des sciences politiques de l'Université de Rome La Sapienza. A la faculté de droit de la même université, il enseigna ultérieurement le droit international public et le droit communautaire. Eminent professeur, Luigi Ferrari Bravo donna deux cours à l'Académie de droit international de La Haye ainsi que de nombreuses conférences de par le monde. Auteur de maints ouvrages et articles consacrés au droit international public et privé ainsi qu'au droit européen, il était membre de l'Institut de droit international. Il était également vice-président de la *Società italiana per l'organizzazione internazionale*.

Luigi Ferrari Bravo mena parallèlement à ses activités universitaires une très riche carrière diplomatique. En sa qualité de conseiller juridique et, de 1985 à 1994, de chef du service du contentieux diplomatique, des traités et des affaires législatives au ministère italien des affaires étrangères, il fut membre et souvent chef de la délégation italienne dans de nombreuses réunions internationales telles que la conférence de Vienne sur la codification du droit des traités entre Etats et organisations internationales en 1986. Il assista plusieurs années durant aux réunions de la Sixième Commission de l'Assemblée générale, Commission qu'il présida en 1978. Enfin, il fut membre de la Commission du droit international des Nations Unies (1997-1998) et président de l'Institut international pour l'unification du droit privé (UNIDROIT) (1995-1999).

Luigi Ferrari Bravo fut aussi très actif dans le domaine de la justice internationale. En sa qualité de chef du service du contentieux diplomatique, il fut l'agent du Gouvernement italien devant la Cour de Justice des Communautés européennes, la Commission et la Cour européennes des droits de l'homme, ainsi que devant la Cour internationale de Justice.

Luigi Ferrari Bravo succéda en 1995 à Roberto Ago en tant que juge à la Cour internationale de Justice, où il siégea jusqu'en 1997. Il sut rapidement mettre ses nombreux talents au service de la Cour et représenter avec honneur la grande école italienne du droit international. Le juge Ferrari Bravo était tenu en très haute estime par ses collègues, qui appréciaient, outre sa grande intégrité, sa vaste culture juridique, sa profonde connaissance de la vie du droit, son sens aigu de l'analyse, sa vivacité et son indépendance d'esprit, son précieux bon sens et son unique sens de l'humour.

Il fut ensuite juge à la Cour européenne des droits de l'homme, de 1998 à 2001.

Sa disparition constitue une grande perte pour les communautés académique, diplomatique et judiciaire, qu'il a servies avec une compétence et un dévouement exemplaires pendant toute sa longue et illustre carrière.

Au nom des membres de la Cour et en mon nom personnel, au nom du greffier et de l'ensemble des fonctionnaires du Greffe, permettez-moi de présenter nos sincères condoléances au Gouvernement italien et de réitérer celles adressées à l'épouse et aux proches du juge Ferrari Bravo.

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Je rendrai maintenant hommage, au nom de la Cour, à la mémoire de l'ancien Secrétaire général des Nations Unies, Boutros Boutros-Ghali, juriste, homme d'Etat et diplomate éminent.

Né au Caire le 14 novembre 1922, Boutros Boutros-Ghali obtint une licence en droit à l'Université du Caire en 1946. Il soutint, dès 1949, une thèse de doctorat d'Etat en droit international à l'Université de Paris, où il obtint également des diplômes en sciences politiques, en sciences économiques et en droit public. De 1949 à 1977, il fut professeur de droit international et de relations internationales à l'Université du Caire.

Sa brillante carrière diplomatique débuta en 1977, avec sa nomination aux fonctions de ministre d'Etat aux affaires étrangères, poste qu'il occupa jusqu'à ce qu'il soit élevé aux fonctions de vice-premier ministre aux affaires étrangères, en mai 1991 ; c'est pendant cette période que Boutros Boutros-Ghali prit part activement aux négociations des accords de Camp David, signés par l'Egypte et Israël en 1979. Il dirigea également à plusieurs reprises les délégations de son gouvernement aux réunions de l'Organisation de l'Unité africaine et du Mouvement des pays non alignés, ainsi qu'à l'Assemblée générale des Nations Unies ; il fut membre de la Commission du droit international des Nations Unies de 1979 à 1981.

En décembre 1991, l'Assemblée générale des Nations Unies le nomma aux fonctions de Secrétaire général de l'Organisation, poste qu'il occupa pendant cinq années, de 1992 à 1996, avant de devenir, en 1997, le premier Secrétaire général de l'Organisation internationale de la Francophonie, organisation dont il assura le rayonnement jusqu'en 2002.

Le professeur Boutros-Ghali, qui fut fait docteur *honoris causa* par plusieurs universités de par le monde et fut enseignant invité ou conférencier dans de nombreuses institutions académiques, est l'auteur d'une centaine de publications et de multiples articles portant sur les affaires régionales d'Afrique et du Moyen-Orient, ainsi que sur le droit international, la diplomatie et les sciences politiques. Il fut notamment membre de l'Institut de droit international — qu'il présida de 1985 à 1987 —, de l'Institut international des Droits de l'Homme, de la Société africaine d'études politiques, et correspondant de l'Académie des sciences morales et politiques de l'Institut de France. Dans le cadre de ce Palais, il marqua de sa personnalité l'Académie de droit international de La Haye dont il présida le Curatorium à partir de 2002 jusqu'à son décès.

Défenseur fervent de la place du droit international dans les relations entre les Etats, c'est en ami de la Cour qu'il rendit visite à celle-ci en 1994, en sa qualité de Secrétaire général des Nations Unies.

Au nom des membres de la Cour et en mon nom personnel, au nom du greffier et de l'ensemble des fonctionnaires du Greffe, permettez-moi de présenter nos sincères condoléances au Gouvernement égyptien, à l'épouse et aux proches de Boutros Boutros-Ghali.

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Je vous invite maintenant à vous lever pour observer une minute de silence à la mémoire du juge Ferrari Bravo et du professeur Boutros Boutros-Ghali.

La Cour observe une minute de silence.

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Le PRESIDENT : Veuillez vous asseoir.

J'en viens maintenant à l'affaire que la Cour est aujourd'hui appelée à entendre.

La Cour ne comptant sur le siège aucun juge de la nationalité des Iles Marshall, ces dernières se sont prévalues du droit que leur confère le paragraphe 2 de l'article 31 du Statut et elles ont désigné M. Mohammed Bedjaoui comme juge *ad hoc*.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonctions, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». En vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*.

Bien que M. Bedjaoui ait siégé en tant que juge *ad hoc* dans une autre affaire et qu'il ait déjà été appelé à prendre l'engagement solennel que le Statut prévoit, il lui faut, conformément au paragraphe 3 de l'article 8 du Règlement de la Cour, faire une nouvelle déclaration solennelle en la présente affaire.

Avant de l'inviter à faire cette déclaration, je dirai quelques mots de la carrière et des qualifications de M. Bedjaoui.

M. Mohammed Bedjaoui, de nationalité algérienne, est docteur en droit et docteur *honoris causa* d'universités de divers pays. M. Bedjaoui est bien connu de la Cour puisqu'il l'a servie comme juge de 1982 à 2001, et qu'il en a été le président entre 1994 et 1997. Il a par la suite été désigné juge *ad hoc* en différentes affaires. C'est à la suite d'une déjà longue et brillante carrière que M. Bedjaoui est entré en fonctions à la Cour. Il avait en effet été conseiller juridique du Gouvernement provisoire de la République algérienne et, une fois acquise l'indépendance de son pays, avait servi celui-ci de manière marquante ; tour à tour secrétaire général du Gouvernement algérien, ministre de la justice, ambassadeur d'Algérie à Paris et représentant permanent auprès des Nations Unies à New York. Parallèlement à ces prestigieuses fonctions exercées au nom de son Gouvernement, M. Bedjaoui a également assumé des responsabilités variées sur le plan international. A l'âge de 36 ans, il était déjà membre de la Commission du droit international des Nations Unies, au sein de laquelle il a exercé les fonctions de rapporteur spécial sur la succession des Etats dans les matières autres que les traités. M. Bedjaoui a en outre été coprésident de la Commission d'enquête des Nations Unies en Iran, vice-président du Conseil des Nations Unies pour la Namibie, et président du Comité pour l'élaboration d'une convention internationale contre le recrutement, l'utilisation, le financement et l'instruction des mercenaires. M. Bedjaoui a participé à plusieurs arbitrages importants, tels que ceux relatifs à la frontière maritime entre la Guinée et la Guinée-Bissau, et entre la Guinée-Bissau et le Sénégal. Après avoir quitté la Cour, M. Bedjaoui a de nouveau été appelé à assumer des responsabilités éminentes au service tant de son pays que de la communauté internationale. Il a ainsi été membre du Conseil exécutif de l'UNESCO, président du Conseil constitutionnel d'Algérie et ministre d'Etat, ministre des affaires étrangères. Il est par ailleurs membre émérite de l'Institut de droit international et membre de nombreuses autres sociétés savantes. M. Bedjaoui est l'auteur de plus de trois cents publications dont d'importants ouvrages de droit international.

J'invite maintenant M. Bedjaoui à prendre l'engagement solennel prescrit par l'article 20 du Statut et je demande à toutes les personnes présentes de bien vouloir se lever. Monsieur Bedjaoui.

M. BEDJAOUI :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»]

Le PRESIDENT : Je vous remercie. Veuillez vous asseoir. La Cour prend acte de la déclaration solennelle faite par M. Bedjaoui.

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Je vais maintenant rappeler les principales étapes de la procédure en l'affaire.

Par requête déposée au Greffe de la Cour le 24 avril 2014, la République des Iles Marshall a introduit une instance contre la République de l'Inde, faisant en particulier grief à celle-ci d'avoir manqué à des «obligations de droit international coutumier relatives à la cessation de la course aux armements nucléaires à une date rapprochée et au désarmement nucléaire».

Pour fonder la compétence de la Cour, les Iles Marshall invoquent les déclarations faites, en vertu du paragraphe 2 de l'article 36 du Statut de la Cour, par l'Inde le 15 septembre 1974 (déclaration déposée auprès du Secrétaire général le 18 septembre 1974) et par elles-mêmes le 15 mars 2013 (déclaration déposée auprès du Secrétaire général le 24 avril 2013).

Par lettre en date du 6 juin 2014, l'ambassadeur de l'Inde auprès du Royaume des Pays-Bas a notamment indiqué que «l'Inde consid[érait] … que la Cour internationale de Justice n'a[vait] pas compétence pour connaître du différend allégué».

Par ordonnance en date du 16 juin 2014, la Cour a estimé, en application du paragraphe 2 de l'article 79 de son Règlement, que, dans les circonstances de l'espèce, il était nécessaire de régler en premier lieu la question de sa compétence, et qu'en conséquence elle devrait statuer séparément, avant toute procédure sur le fond, sur cette question ; à cette fin, elle a décidé que les pièces de la procédure écrite porteraient d'abord sur ladite question et elle a fixé au 16 décembre 2014 et au 16 juin 2015, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire des Iles Marshall et d'un contre-mémoire de l'Inde. Le mémoire des Iles Marshall a été déposé dans le délai ainsi prescrit.

Par ordonnance en date du 19 mai 2015, la Cour, à la demande de l'Inde et en l'absence d'objection des Iles Marshall, a reporté au 16 septembre 2015 la date d'expiration du délai pour le dépôt du contre-mémoire. Cette pièce a été déposée dans le délai ainsi prorogé.

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Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après avoir consulté les Parties, a décidé de rendre accessibles au public, à l'ouverture de la procédure orale, des exemplaires des pièces de procédure et des documents annexés. En outre, l'ensemble de ces documents seront placés dès aujourd'hui sur le site Internet de la Cour.

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Je note la présence devant la Cour des agents, conseils et avocats des deux Parties. Conformément aux dispositions relatives à l'organisation de la procédure arrêtées par la Cour, les audiences comprendront un premier et un second tour de plaidoiries. Chaque Partie disposera d'une séance de trois heures pour le premier tour, et d'une séance de 90 minutes pour le second. Il s'agit bien évidemment d'un temps de parole maximal, que les Parties ne devront utiliser qu'en tant que de besoin. Le premier tour débute aujourd'hui et se terminera le jeudi 10 mars. Le second tour de plaidoiries s'ouvrira le lundi 14 mars et s'achèvera le surlendemain, c'est-à-dire le mercredi 16.

J'ajoute que, au cours des prochains jours, la Cour tiendra également des audiences distinctes dans deux autres instances introduites concomitamment par les Iles Marshall, à savoir les affaires des *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Pakistan)* et *(Iles Marshall c. Royaume-Uni).*

La République des Iles Marshall sera entendue la première aujourd'hui. Compte tenu du temps qu'a pris l'ouverture de ces audiences, la délégation des Iles Marshall pourra, si nécessaire, dépasser 13 heures d'une vingtaine de minutes.

Je donne à présent la parole à S. Exc. M. Tony A. deBrum, coagent des Iles Marshall. Excellence, vous avez la parole.

Mr. deBRUM:

OPENING STATEMENT

1. Mr. President, Members of the Court, it is a privilege and a great honour to appear before you as Co-Agent for the Republic of the Marshall Islands. My country has submitted this dispute with India to this esteemed body, as the principal legal organ of the United Nations, because the Marshall Islands is committed to the principles of the Charter of the United Nations, including specifically that nations resolve their legal disputes peacefully pursuant to Article 33 of the United Nations Charter. The Marshall Islands' counsel will address the legal arguments made by India. I will address my country's decision to bring this dispute before this Court, and various positions previously provided by India.

2. Chapter VI of the UN Charter is titled "Pacific Settlement of Disputes" and Article 33 therein provides States a list of options to take when seeking a solution to their disputes[1]. That provision specifies that the selection of the preferred option is a matter of a State's "own choice"[2]. The Marshall Islands' choice here is amongst the stated list of options — and the choice was and is to present this dispute for "judicial settlement" to this Court. We are here in peace, and our goal is no smaller than to obtain the required negotiations in good faith for nuclear disarmament.

3. Mr. President, Members of this Court, the Marshall Islands is a very small State, with a population of under 70,000 people; it is dwarfed by India, with a population surpassing 1.2 billion people. Before this Court, however, and as a member State in the United Nations, the Marshall Islands stands as an equal. Specifically, as reaffirmed in the Preamble to the United Nations Charter, nations "large and small" have "equal rights"[3]. Indeed as elaborated in Article 2 of the Charter, the United Nations "is based on the principle of the sovereign equality of all its Members"[4]. To a very small country, the rule of international law, and the equality of all States under such law, cannot be overstated and is acutely significant. The Marshall Islands rely on that rule of law before this Court.

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[1]UN Charter, Chap. VI, Art. 33 (1).

[2]*Ibid.*

[3]Preamble, UN Charter.

[4]UN Charter, Art. 2 (1).

4. The Marshall Islands has a unique and devastating history with nuclear weapons. While it was designated as a Trust Territory by the United Nations, no fewer than 67 atomic and thermonuclear weapons were deliberately exploded as "tests" in the Marshall Islands, by the United States. When the Marshall Islands brought their objections to this testing to the United Nations and called for it to stop, the United Nations did not heed the call and the nuclear explosions continued. Several islands in my country were vaporized and others are estimated to remain uninhabitable for thousands of years. Many, many Marshallese died, suffered birth defects never before seen and battled cancers resulting from the contamination. Tragically the Marshall Islands thus bears *eyewitness* to the horrific and indiscriminate lethal capacity of these weapons, and the intergenerational and continuing effects that they perpetuate even 60 years later.

5. One "test" in particular, called the "Bravo" test was one thousand times stronger than the bombs dropped on Hiroshima and Nagasaki. From approximately 200 miles away, I witnessed this shocking explosion as a nine-year-old child while fishing with my grandfather on the beach of Likiep Atoll: the entire sky turned blood red. This distance from which I witnessed this explosion was, in rough terms, approximately equal to the distance between The Hague and Paris — so a significant distance. As I mentioned, our people continue to bear the horrific brunt of these exposures, which we described in more detail in our Written Statement to the United Nations, in the *Legality of Threat or Use of Nuclear Weapons* proceedings in 1995[5]. As Foreign Minister John Silk publicly confirmed in 2010:

> "There is no question that the U.S. Government's detonation of sixty-seven atmospheric nuclear weapons in our country created profound disruptions to human health, the environment, as well as our economy, culture, political system, and virtually every aspect of life."[6]

6. Mr. President, Members of the Court, to be clear, while these experiences give us a unique perspective that we never requested, they are *not* the basis of this dispute. But they do explain why a country of our size and limited resources would risk bringing a case such as this regarding an

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[5]Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands; http://www.icj-cij.org/docket/files/95/8720.pdf [accessed on 9 February 2016].

[6]May 2010, Testimony on Marshall Islands Supplemental Nuclear Compensation Act: RMI Minister for Foreign Affairs John Silk to the Senate Committee on Energy and Natural Resources, available at http://yokwe.net/index.php?module=News&func=view&prop=Main&cat=10003&page=24.

enormous, nuclear-armed State such as India, and its breach of customary international law with respect to negotiations for nuclear disarmament and an end to the nuclear arms race.

7. The trusteeship of the Marshall Islands, authorized by the United Nations, was not terminated until December 1990, and the Marshall Islands was not admitted to the United Nations until 17 September 1991.

8. As early as 2010, my country began evaluating the potential for this Court to hear disputes concerning the existential threat to my country's very existence caused by rising sea levels and climate change. This was even reflected in the press. For example, I was quoted on 5 April 2013 as follows: "We will leave no stone unturned in our search for justice in this manner. If that means approaching the ICJ — the International Court of Justice — that will be an option that's left on the table."[7] This press report is at tab 1 of the judges' folders, and reflects my country's consideration of this Court for climate change proceedings. Such action to date has not occurred, as the States most susceptible to rising sea levels focused their efforts on the Paris Conference of last year.

9. In April of 2012, the International Physicians for the Prevention of Nuclear War published a study regarding the global effects that likely would ensue if a "small" or regional nuclear battle occurred between India and Pakistan. This was based on a "nuclear famine" that would ensue and threaten at least one billion people. In November 2013, this report was updated, and projected a loss of not one — but two — billion people, and disruption not only to the global food supply but likely to the global economy, political structure and rule of law. We referred to this in our Memorial[8]. This November 2013 report confirmed what this Court had observed earlier in its Advisory Opinion on Nuclear Weapons, that "[t]he destructive power of nuclear weapons cannot be contained in either space or time"[9].

10. The report also provided grounds, among others, for the Marshall Islands to seek judicial settlement of the disputes threatening its people — and humankind in general — such as this dispute involving whether India, including by its nuclear arms racing, is in breach of its

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[7]Pacific RISA – Managing Climate Risk in the Pacific, Hawaii Conference on Pacific Islands Climate Change Featured in Climate Wire, 9 April 2013, available at http://www.pacificrisa.org/2013/04/09/hawaii-conference-on-pacific-islands-climate-change-featured-in-climatewire/; judges' folders, tab 1.

[8]See Memorial of Marshall Islands (MMI), paras. 7-9.

[9]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 243, para. 35.

international legal obligations to negotiate in good faith nuclear disarmament and an end to nuclear arms racing.

11. Mr. President, Members of this Court, a key issue in the dispute in this case concerns India's current nuclear arms racing — including the production of new weapons[10]. I submit to you the following: "The production of weapons which have the capacity to destroy all mankind cannot in any manner be considered to be justified or permitted under international law."[11] That quote I just read, while entirely endorsed by the Marshall Islands, is a quote from India, and specifically from India's submission to this very Court — the International Court of Justice — on 20 June 1995, in the *Legality of Threat or Use of Nuclear Weapons* proceedings[12].

12. While the lawyers here will today address India's claims regarding jurisdiction, I wish to respectfully add here certain additional facts that I trust will be helpful to this Court. Specifically, India also agreed in its official 1995 Statement that nuclear weapons could not be produced for deterrence purposes because deterrence is "abhorrent to human sentiment" and "disarmament must be given priority and has to take precedence over deterrence"[13].

13. Speaking directly to the issue of whether other States are necessary parties to this legal dispute with India, I would like to add that India likewise affirmed in its 1995 Statement to this Court that the obligation to not use nuclear weapons — which is explained to include also the production of such weapons — "is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances"[14].

14. Mr. President, Members of the Court, the Marshall Islands officially and publicly declared in February 2014 at the Conference on the Humanitarian Impact of Nuclear Weapons in Mexico, that the States possessing nuclear arsenals are failing to fulfil their legal obligations under customary international law[15]. An official delegation from India attended this Conference, and it is

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[10]Application of Marshall Islands (AMI), paras. 30-34, 58-60.

[11]Letter dated 20 June 1995 from the Ambassador of India to the International Court of Justice, together with Written Statement of the Government of India, p. 6, available at http://www.icj-cij.org/docket/files/95/8688.pdf.

[12]*Ibid.*

[13]*Ibid.*, p. 5.

[14]*Ibid.*, p. 2.

[15]Second Conference on the Humanitarian Impact of Nuclear Weapons, *Nayarit, Mexico, 13-14 February 2014* (http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf), judges' folders, tab 2

without question that India is a State possessing a nuclear arsenal. India's statement to this February 2014 Conference included the following confirmation:

> "We cannot accept the logic that a few nations have the right to pursue their security by threatening the survival of mankind. It is not only those who live by the nuclear sword who, by design or default, shall one day perish by it. All humanity will perish."[16]

This official statement is at tab 3 of the judges' folders.

15. Mr. President, Members of the Court, the Marshall Islands' claims in this dispute are based on India's own conduct, and India's own breach of customary international law, not the conduct and breaches of other States. In particular, the Marshall Islands alleges that contrary to the obligation to pursue in good faith negotiations on nuclear disarmament including cessation of the nuclear arms race, India's conduct includes the quantitative build-up and qualitative improvement of its nuclear arsenal.

16. And India alleges, on the contrary, that its conduct — including its production of nuclear weapons — complies with its international obligations[17]. The Marshall Islands brings this dispute to this august body with the sincere hope and expectation that it can be resolved peacefully and to the benefit not only of the Marshall Islands, but all of mankind.

17. Mr. President may I kindly request that you give the floor to my colleague Mr. Phon van den Biesen. Thank you very much.

Le PRESIDENT: Merci, Excellence. Je donne la parole à Monsieur van den Biesen, coagent des Iles Marshall.

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[16]India's participation in the Second Conference on the Humanitarian Impact of Nuclear Weapons, Mayarit, Mexico, February 13-14, 2014, Suggested Talking Points, p. 1, quoting Prime Minister Rajiv Gandhi, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/India.pdf; judges' folders, tab 3.

[17]See Counter-Memorial of India (CMI), para. 56.

Mr. van den BIESEN:

GENERAL OBSERVATIONS

1. Mr. President, Members of the Court, it is a great honour, an exceptional privilege and a great pleasure for me to appear today before this highly esteemed Court; this time, to represent the people of the Marshall Islands, the Republic of the Marshall Islands, in its effort to have a far greater power than itself live up to one of its most crucial obligations under international law. An obligation of which the very concept was present in the very first resolution of the United Nations General Assembly, which called for specific proposals for

> "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction"[18].

2. Mr. President it is unfortunate that the Court needed to schedule only three days for this week's opening sessions instead of nine. Actually it is a shame that the other six nuclear-armed States have decided that, for them, there was no need to respond to the Marshall Islands' Applications of 24 April 2014.

3. Mr. President, the times, they are frightening. The use of armed force is rapidly spreading and escalating, which is additionally dangerous given the involvement of States that possess nuclear arsenals. Also, all nuclear powers seem to be substantially modernizing their nuclear forces. The Respondent in this case certainly belongs to that category. Everybody in this Great Hall of Justice, Mr. President, everybody, without any exception, knows that once the threshold to the use of nuclear weapons is crossed, the law will be a joke and justice will be just a relic of the past.

4. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that in the long run "international law, and with it the stability of the international order . . . are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons" (*I.C.J. Reports 1996 (I)*, para. 98). Precisely for that

[18]UN General Assembly resolution 1(I) A/PV.17.

reason the Court recognized the existence of an obligation for all States, which obligation is central to the present case.

5. As we have stated in both the Application (p. 3, para. 2) and our Memorial (pp. 20-21, paras. 45-47) this case was not submitted in order to reargue the Advisory Opinion or any particular part thereof. On the contrary, the Advisory Opinion is the catapult that launched this case on a course that leads directly to the Marshall Islands' submissions. This Court found 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"[19].

6. Although advisory opinions, as such, are not binding, the findings of the Court in advisory opinions carry the same precedential value as those in judgments of the Court. Through its advisory opinion the Court states the law as it is. As Judge Shahabuddeen said: "although an advisory opinion has no binding force under Article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings"[20].

7. The importance and the effects thereof are further enhanced if such findings are unanimous, which is so with the obligation that is central to the present case.

8. Mr. President this hearing is only about jurisdiction. The Marshall Islands' Memorial of 16 December 2014 is drafted in accordance with the President's Order of 16 June 2014 in which the President decided "that the written pleadings shall first be addressed to the question of the jurisdiction of the Court". The Marshall Islands duly followed this instruction, but notes that, apparently, India was not at all times able to withstand the temptation to begin discussing the merits of this case. We object to that, not only because it violates the Order, but also because the Marshall Islands has, deliberately, avoided arguing the merits and we do not envisage beginning to do so today, or later on during these oral pleadings.

9. So, this morning, the Marshall Islands will deal with issues such as the existence of a dispute, the question of third parties being indispensable or not, the limitations set by the Parties' declarations made under Article 36, paragraph 2, of the Statute and the value of obtaining the

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[19] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* p. 267, para. 105, point 2 F.

[20] M. Shahabuddeen, *Precedent In The World Court,* Grotius Publications, Cambridge University Press, Cambridge, 1996, p. 171.

Judgment sought by the Marshall Islands. At this point, I will make a few observations on some of these issues.

10. As I said the Marshall Islands aimed to have all nine States possessing nuclear weapons appear before this Court and still thinks that all of them should have been here this week. India takes a similar position, albeit for entirely different reasons, and it states that without the other six States being present, presumably in one single case, this Court is unable to reach the requested Judgment and therefore not even allowed to rule on the merits of this case. Mr. President, the Indian approach lacks any basis in law. The so-called "selectivity" about which India complains in its Counter-Memorial (para. 89) does not exist: *each and every State* is under the obligation spelled out by this Court in its Advisory Opinion. And each and every State is — in the light of that obligation — to be judged on its own particular behaviour. During these oral pleadings there are three separate cases being heard and not just one.

11. All of this may possibly have been different if the Marshall Islands had alleged the existence of some sort of "joint nuclear enterprise" along the lines of the concept of "joint criminal enterprise" that has been developed in international criminal litigation. This would then include the necessary existence of some level of effective co-operation and planning between the members of such enterprise. It is not the Marshall Islands' position that the nine States should be seen as participating in some sort of "joint nuclear enterprise", since there exists no such association between the nine States that possess nuclear weapons. Each State draws up its own plans, its own policies and in any event each of them is at liberty to determine its own choices regarding nuclear weapons and also has its own responsibilities in that respect, including its own legal responsibilities.

12. This case against India, therefore, needs to be adjudged on its own, particular, merits, which will lead to a Judgment that clearly is only binding between the Marshall Islands and India (Article 59 of the Statute). Obviously, such a Judgment may provide reasons for other States to rethink their own behaviour and policies. But that is true for most judgments and most advisory opinions delivered by this Court and it is certainly never a reason for the Court to not deliver a Judgment.

13. Mr. President, India, alleges that — in reality — the Marshall Islands is arguing this case as if it were based on Article VI of the Non-Proliferation Treaty. This is not so, first and foremost for the obvious reason: India is not a party to the NPT. The Marshall Islands' approach is clearly demonstrated in its submissions and also in the text of the Application (para. 6) and in the Memorial (para. 13): this case is founded on an obligation that flows from customary international law. Discussing the scope and substance of that rule of customary international law belongs to the proceedings on the merits of this case. Nevertheless, we will elaborate somewhat on this topic, but only to the extent necessary to demonstrate that there is no artificial, no abusive, character to the Marshall Islands' claims as suggested by India.

14. Basically, at this stage of the proceedings, the main task for the Court is to verify whether the Parties' declarations under Article 36, paragraph 2, of the Statute have the effect of establishing jurisdiction for this particular case. We will deal with this question at length.

15. As explained by the Co-Agent this morning, the Marshall Islands contemplated coming to this Court with an eye on climate-change litigation. This was at a point in time long before it decided to file the nuclear disarmament cases. So, there was no "exclusivity" in the sense of India's declaration, let alone that there is or has been any form of abuse of the rights provided by Article 36, paragraph 2, of the Court's Statute.

16. In its Counter-Memorial, India repeats its position that this Court cannot deliver an effective judgment as long as all nine States possessing nuclear weapons are not parties to the current case. Again, for this position, there is no basis in law. Mr. President, disarmament treaties are usually multilateral. It is not unusual that negotiations for such treaties are initiated and conducted by a limited group of States. At the same time these treaties always include conditions governing the particular treaty's entry into force. Usually that entails such matters as a stipulated number of ratifications (e.g., the Certain Conventional Weapons Convention 1981; also the Chemical Weapons Convention 1993) and sometimes such a provision not only contains a quantitative threshold, but also — and this may actually be relevant for the Nuclear Weapons Convention — a qualitative one (e.g., the Biological Weapons Convention 1972, with the "Depositaries" as a specific category) and also the Comprehensive Nuclear-Test-Ban Treaty of 1996, that specifically lists 44 States with nuclear power or research reactors. There is no reason to

expect, Mr. President, that this model will not be followed in the case of a nuclear weapons convention.

17. Mr. President, this ends my presentation. May I kindly request that you give the floor to my colleague and friend Professor Nick Grief.

Le PRESIDENT: Merci. Je donne la parole au professeur Grief. Monsieur le professeur, vous avez la parole.

Mr. GRIEF:

THE OBLIGATION'S CUSTOMARY STATUS AND ITS IMPLICATIONS FOR INDIA: SOME INITIAL OBSERVATIONS

1. Mr. President, Members of the Court, it is a great honour for me to appear before you today as a representative of the Republic of the Marshall Islands.

Introduction

2. In these submissions I will refute India's argument at paragraph 93 (iii) of its Counter-Memorial that Article VI of the Non-Proliferation Treaty "cannot acquire customary law character imposing an obligation on a non state party who has persistently objected to the treaty itself and the obligations contained thereunder".

3. Let me begin by reiterating that the Marshall Islands is not arguing that India is in breach of obligations under Article VI of the Treaty. India, a third State as far as the NPT is concerned, is clearly not bound by Article VI. But the *res inter alios acta* principle does not preclude India from being bound by a parallel rule of customary international law which is separate from and at the same time equivalent to Article VI.

4. The existence and precise content of this customary rule and whether or not India's conduct is compatible with it are clearly questions for the merits. They do not simply "touch upon subjects belonging to the merits of the case", as the Permanent Court put it in the case concerning *Certain German Interests in Polish Upper Silesia*[21]. Rather, in the words of this Court in the

[21] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I. J., Series A, No. 6,* p. 15.

Barcelona Traction case, they are "inextricably interwoven" with the merits[22] and are thus not of an exclusively preliminary character within the meaning of Article 79, paragraph 9, of the Rules of Court. As the Court observed in the *Fisheries Jurisdiction* case:

> "There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties."[23]

5. However, Mr. President, since India repeatedly insists that the Marshall Islands is attempting to enforce the NPT against it, I will briefly address the existence of the customary international law obligation relied upon by the Marshall Islands in order to demonstrate, as you have heard, that there is no artificial or abusive character to the claims.

The existence of the obligation under customary international law

6. Suffice it to say here that the existence of a general, customary rule equivalent to Article VI was recognized by this Court in its unanimous conclusion in point 2 F of the *dispositif* in the Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*[24]*;* and that this rule is confirmed by the application of the criteria set out in the *North Sea Continental Shelf* cases, whereby a fundamentally norm-creating treaty provision can generate a rule of custom[25].

7. Mr. President, Members of the Court, the United Nations General Assembly has contributed to the development of this customary rule. In the Advisory Opinion, besides relying on and construing Article VI, at paragraph 101 the Court referred to the very first General Assembly resolution, which was unanimously adopted on 24 January 1946. The Court then noted that "[i]n a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament", and the Court cited unanimously adopted resolution 808 A (IX) of

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[22]*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I. C. J. Reports 1964*, p. 46.

[23]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, para. 55.

[24]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 267, para. 105, read in the light of paras. 98-103.

[25]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 41-42, paras. 70-73.

4 November 1954. The Marshall Islands notes, in particular, the Final Document of the Tenth Special Session of the General Assembly, adopted without a vote on 30 June 1978[26] and referred to in paragraphs 48 and 53 of the Application. Of course, the Marshall Islands accepts that, in general, United Nations General Assembly resolutions have no legally binding force. But, as the Court recognized in paragraph 70 of the Advisory Opinion, they "may sometimes have normative value" and "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".

8. Similarly, Mr. President, the Security Council has recognized the obligation on States to negotiate in good faith for nuclear disarmament and recognized that this obligation is incumbent on all States, not merely on States parties to the NPT. For example, Security Council resolution 1887 of 2009, in operative paragraph 5, calls upon "the *Parties to the NPT*, pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament"; and it then calls upon "*all other States* to join in this endeavour"[27].

9. Mr. President, Members of the Court, at paragraph 93 (iii) of its Counter-Memorial, India argues that since there has been no compliance with Article VI by States parties to the NPT for 45 years (i.e., since the Treaty's entry into force), Article VI cannot have acquired customary character. But that lack of compliance does not prevent the emergence or existence of an equivalent customary rule. The majority of non-nuclear weapon States parties to the Treaty maintain that the nuclear-weapon States parties are failing to make progress in implementation of Article VI: the Non-Aligned Movement made this perfectly clear during the 2015 NPT Review Conference[28]. For their part, the nuclear-weapon States parties to the Treaty claim that they are complying with their obligations under Article VI[29]. Mr. President, Members of the Court, even

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[26]A/RES/S-10/2, 30 June 1978.

[27]Resolution S/RES/1887 (2009); emphasis added.

[28]Statement by H.E. Dr. Javad Zarif, Minister for Foreign Affairs of the Islamic Republic of Iran before the 2015 NPT Review Conference on behalf of the Non-Aligned Movement States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 27 April 2015, p. 2, http://www.un.org/en/conf/npt/2015/statements/pdf/NAM_en.pdf.

[29]Statement by the People's Republic of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the 2015 Treaty on the Non-Proliferation of Nuclear Weapons Review Conference, delivered by a representative of the United Kingdom, 30 April 2015, pp. 1-2, http://www.un.org/en/conf/npt/2015/statements/pdf/P5_en.pdf.

India, whose entire argument rests upon its being a third State, regularly asserts that its conduct is consistent with Article VI. For instance, on 9 May 2000, in a statement on the NPT Review Conference, which is reproduced at tab 4 of the judges' folders, India's External Affairs Minister confirmed to Parliament, at paragraph 7:

> "Article VI commits the parties to pursue negotiations to bring about eventual global nuclear disarmament. It needs to be emphasised that India today is the only nuclear-weapon state that remains committed to commencing negotiations for a Nuclear Weapons Convention in order to bring about a nuclear-weapons-free world, the very objective envisaged in Article VI of the NPT."[30]

Mr. President, Members of the Court, as this Court observed in the *Nicaragua* case, the significance of these attitudes is to *confirm* rather than to weaken the customary rule[31].

India is not a persistent objector to the customary rule

10. At paragraph 93 (iii) of its Counter-Memorial, India also argues that the obligation in Article VI "cannot acquire customary law character imposing an obligation on a non-State party who has persistently objected to the treaty itself and the obligations contained thereunder".

11. But, the Marshall Islands recalls that while India has so far refused to join the NPT, it has not persistently objected to the customary obligation to negotiate in good faith towards nuclear disarmament and to reach agreement. So even if we were to admit, without conceding, that the persistent objector principle is part of international law and that it can apply in situations like this where a communitarian norm is involved, it would not benefit India. On the contrary, besides the statement of the External Affairs' Minister cited a few moments ago[32], in paragraph 91 of its Counter-Memorial India "strongly endorses negotiations between all States possessing nuclear weapons to build trust and confidence to promote nuclear disarmament". And in paragraph 16 of a statement made on 27 May 1998, reproduced in Annex 5 to the Counter-Memorial, India's then Prime Minister cited with obvious approval this Court's unanimous conclusion in point 2 F of the Advisory Opinion's *dispositif*.

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[30]Statement by External Affairs Minister Jaswant Singh, 9 May 2000, available at http://www.acronym.org.uk/dd/dd46/46india.htm.

[31]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 186.

[32]*Supra*, para. 9.

12. Indeed, Mr. President, India has long held this position regarding the pursuit of nuclear disarmament. The official records of the Conference of the Eighteen-Nation Committee on Disarmament show that even before the NPT entered into force, and quite independently of the Treaty and of Article VI in particular, India recognized the urgency of pursuing nuclear disarmament. Mr. President, Members of the Court, in your folders at tab 5 you will find an excerpt from the final verbatim record of the 404th meeting of this Committee on 17 April 1969. On page 18, at paragraph 50, after emphasizing the unprecedented destructive power of existing nuclear arsenals, Mr. Husain, one of India's representatives, continued:

> "That being so, there is justification enough for us to make serious efforts towards achieving nuclear disarmament, and for that purpose, I submit, it is not necessary to invoke article VI of the non-proliferation Treaty . . . as if that was the only reason for pursuing nuclear disarmament. The need for nuclear disarmament existed before that Treaty, exists now, and will exist in the future so long as nuclear weapons remain in the arsenals of nations, regardless of when the non-proliferation Treaty comes into force. Supposing there was some delay in the coming into force of the non-proliferation Treaty. Should that mean that we should suspend our efforts towards nuclear disarmament?"[33]

13. In order to be a persistent objector to the customary rule requiring States to negotiate in good faith towards nuclear disarmament and to reach agreement, India would have to show that it had consistently and unequivocally manifested a refusal to accept that rule during and since the period of the norm's formation[34]. Even if the persistent objector principle applies, therefore, as India has not fulfilled those conditions, it cannot be a persistent objector to the customary rule in question and its non-participation in the NPT is completely irrelevant in this respect.

14. Mr. President, Members of the Court, those are my submissions. I thank the Court for its attention and would ask you to invite Professor Condorelli to the podium.

Le PRESIDENT : Je vous remercie. Je donne la parole au professeur Luigi Condorelli.

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[33] ENDC/PV.404.

[34] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 131. See also *Brownlie's Principles of Public International Law*, 8th ed., James Crawford, OUP, 2012, p. 28.

M. CONDORELLI :

L'EXISTENCE DU DIFFÉREND ENTRE LA RÉPUBLIQUE DES ILES MARSHALL ET L'INDE

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un grand honneur pour moi de prendre la parole encore une fois devant votre Cour et je suis très reconnaissant au Gouvernement des Iles Marshall de m'avoir confié cette tâche.

Introduction

2. Je vous cite : «La Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire…»[35]

3. Je suis en train d'évoquer les mots percutants et célèbres par lesquels votre Cour exprime le concept fondamental sur lequel il faut prendre appui si l'on est appelé à discuter de la question de savoir si, au moyen de sa requête du 24 avril 2014, la République des Iles Marshall a entendu soumettre à la Cour un différend «véritable» entre elle-même et l'Inde, ou bien une «contrived dispute»[36] (un différend inventé ou artificiel), comme le prétend la Partie adverse. Ce concept fondamental la Cour s'est d'ailleurs souciée de l'exprimer par des mots plus détendus lorsqu'elle a souligné qu'elle n'a pas

> «la faculté de choisir parmi les affaires qui lui sont soumises celles qui lui paraissent se prêter à une décision et de refuser de statuer sur les autres. L'article 38 du Statut dispose que la mission de la Cour est «de régler conformément au droit international les différends qui lui sont soumis» ; en dehors de l'article 38 lui-même, d'autres dispositions du Statut et du Règlement indiquent aussi que la Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties.»[37]

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[35] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 55 et *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58.

[36] Contre-mémoire de l'Inde (CMI), p. 10, par. 15.

[37] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 57 et *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 60.

4. Dans le cas présent, il faut donc reconnaître que la Cour ne pourra exercer sa compétence qu'à condition d'avoir vérifié elle-même l'existence réelle d'un différend, étant entendu, on le sait bien, qu'une telle existence doit être établie «objectivement»[38] ; votre jurisprudence souligne :

> «il ne suffit pas que l'une des parties à une affaire contentieuse affirme l'existence d'un différend avec l'autre partie. La simple affirmation ne suffit pas pour prouver l'existence d'un différend, tout comme le simple fait que l'existence d'un différend est contestée ne prouve pas que ce différend n'existe pas. Il n'est pas suffisant non plus de démontrer que les intérêts des deux parties à une telle affaire sont en conflit. Il faut démontrer que la réclamation de l'une des parties se heurte à l'opposition de l'autre.»[39]

La démonstration de cette opposition est donc essentielle, étant donné que le différend, selon une définition jurisprudentielle ultraclassique, vénérable et jamais contestée (que l'on trouve répétée à mille occasions), «est un désaccord sur un point de droit ou de fait, une opposition de thèses juridiques ou d'intérêt entre deux personnes».

5. Venons-en donc spécifiquement à notre cas. Afin de vérifier si ce que les Iles Marshall ont entendu soumettre à la Cour est ou non un «véritable» différend, pouvant être qualifié de «réellement» existant, il faut donc étudier d'abord s'il y a bien une réclamation présentée par les Iles Marshall alléguant la violation par le défendeur d'obligations juridiques lui incombant, puis vérifier si — oui ou non — une telle réclamation se heurte à l'opposition manifeste de l'Inde.

La réclamation des Iles Marshall

6. Il va de soi que pour identifier la réclamation, il est indispensable de se tourner vers la requête des Iles Marshall du 24 avril 2014, puisque — comme la Cour n'a pas manqué de le relever — «[i]l ne fait pas de doute qu'il revient au demandeur, dans sa requête, de présenter à la Cour le différend dont il entend la saisir et d'exposer les demandes qu'il lui soumet».[40] Le rôle ainsi reconnu à la requête concernant l'identification du différend apparait parfaitement logique, puisque — la Cour le rappelle — «[l]e paragraphe 1 de l'article 40 du Statut de la Cour exige que l'«objet du différend» soit indiqué dans la requête ; et le paragraphe 2 de l'article 38 de son

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[38] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 74.

[39] *Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328.

[40] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, par. 29, p. 447. Voir aussi *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 266-267, par. 69.

Règlement requiert pour sa part que la «nature précise de la demande» y figure»[41]. Il se pourrait, il est vrai, que le seul examen de la requête s'avère insuffisant dans certains cas, nous signale la Cour : ceci lorsque des incertitudes ou des contestations devaient surgir quant à l'«objet» du différend dont la Cour est saisie ou à la nature exacte des demandes qui lui sont soumises. Et la Cour de suggérer que dans de pareils cas l'on ne saurait alors s'en tenir aux seuls termes de la requête ni, plus généralement, s'estimer liés par les affirmations du demandeur[42].

7. De toute façon il n'y a pas d'incertitudes ou d'ambigüités sérieuses quant à la définition de l'«objet réel» du différend et à la «nature précise de la demande» figurant dans la requête des Iles Marshall. Il suffit de lire, ce que je ferai avec votre permission, deux ou trois passages de celle-ci :

> Paragraphe 2 : «La présente requête ne vise pas à rouvrir la question de la licéité des armes nucléaires…»
>
> . . . . . .
>
> Paragraphe 6 : «… l'Inde : i) manque de manière continue aux obligations qui lui incombent en vertu du droit international coutumier, en particulier à celle de mener de bonne foi des négociations devant, d'une part, mettre fin à une date rapprochée à la course aux armements nucléaires et, d'autre, part, déboucher sur un désarmement nucléaire dans tous ses aspects effectué sous un contrôle international strict et efficace ; et ii) manque de manière continue à son obligation de s'acquitter de bonne foi de ses obligations internationales».
>
> . . . . . .
>
> Paragraphe 64 : «en adoptant un comportement contrevenant directement aux obligations de désarmement nucléaire et de cessation de la course aux armements nucléaires à une date rapprochée, le défendeur a manqué de s'acquitter et continue de ne pas s'acquitter de son obligation juridique consistant à exécuter de bonne foi les prescriptions du droit international coutumier».

8. Voilà quelle est la réclamation présentée par les Iles Marshall dans leur requête, voilà leur demande faisant valoir ce que le professeur Brownlie aimait appeler un «an alleged breach of one or more legal duties»[43]. Et voilà, pour mémoire, comment cette réclamation est exprimée, de façon

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[41] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 448, par. 29.

[42] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 448, par. 29.

[43] Brownlie, *The Peaceful Settlement of International Disputes*, in *Chinese Journal of International Law*, 2009, p. 268

beaucoup plus ramassée mais sans en modifier nullement le sens (contrairement à ce que prétend le défendeur dans son contre-mémoire[44] au paragraphe 2 du mémoire du demandeur :

> «Le présent différend porté devant la Cour par la République des Iles Marshall … a pour objet le manquement de la République de l'Inde … à l'obligation qui lui incombe à l'égard du demandeur (ainsi qu'à l'égard d'autres Etats) de poursuivre de bonne foi et de mener à terme des négociations devant conduire au désarmement nucléaire dans tous ses aspects, sous un contrôle international strict et efficace. Cette obligation de négocier le désarmement nucléaire inclut, au premier chef, l'obligation, pour chaque Etat possédant des armes nucléaires, de négocier de bonne foi pour mettre fin à la course aux armements nucléaires.»[45]

9. La demande marshallaise, on le voit bien, identifie avec précision tous les éléments nécessaires pour la définition du différend : *primo*, elle nomme l'Etat dont la responsabilité internationale pour fait illicite est alléguée par le demandeur, l'Inde ; *secundo*, elle évoque la norme internationale pertinente de droit coutumier, qui, d'après le demandeur, est en vigueur et lie l'Inde, et dont le contenu correspond à celui de l'article VI du traité de non-prolifération nucléaire (TNP) ; *tertio*, elle met en évidence les obligations internationales *erga omnes* que cette norme fait peser sur l'Inde (en même temps que sur tous les autres Etats) : celle notamment de «poursuivre de bonne foi des négociations sur des mesures efficaces relatives à la cessation de la course aux armements nucléaires à une date rapprochée et au désarmement nucléaire et sur un traité de désarmement général et complet sous un contrôle international strict et efficace» ; *quarto*, elle fait valoir que l'Etat en question, l'Inde, a violé et viole ces obligations internationales ; *quinto*, elle prie la Cour de dire et juger tout cela en accordant aux Iles Marshall des «remèdes» appropriés.

L'opposition de l'Inde

10. Y a-t-il, Monsieur le président, «opposition manifeste» de la part de l'Inde à cette réclamation, si exhaustivement articulée par les Iles Marshall pour ce qui est de tous les éléments essentiels ? Difficile, sinon impossible de le nier ! Une telle opposition est d'ailleurs affichée on ne peut plus clairement sous les yeux même de la Cour, et cela déjà à ce stade préliminaire de la procédure, centrée pour l'heure sur les seules questions attenant à la compétence. Je rappelle au passage, à ce propos, le *dictum* de votre Cour, souvent cité, d'après lequel «[p]our déterminer

[44] CMI, p. 13, par. 20.

[45] Mémoire des Iles Marshall (MIM), p. 4, par. 2.

l'existence d'un différend il est possible, comme dans d'autre domaines, d'établir par inférence quelle est en réalité la position ou l'attitude d'une partie»[46];

Le PRESIDENT : Monsieur le professeur Condorreli, je vous arrête un instant. Je ne suis pas sûr qu'on entende bien la traduction anglaise. Ça y est ? Oui ? Alors, pardon, vous pouvez reprendre, Monsieur le professeur.

M. CONDORELLI : Donc j'étais en train de dire, il est difficile de nier qu'une telle opposition existe. Elle est affichée. Et je citais le point, le principe établi par la Cour suivant lequel l'existence d'un différend doit s'établir par inférence quelle que soit la position, l'attitude d'une partie. Et je voudrais rappeler aussi que dans plusieurs affaires, la Cour a attribué une valeur probante à cet effet aux déclarations faites devant elle par les parties au cours du procès[47].

11. Dans leur mémoire, les Iles Marshall ont attiré l'attention sur la lettre du 6 juin 2014 de l'Inde à la Cour, dans laquelle le défendeur a explicitement contesté le bien-fondé des griefs du demandeur, mettant en exergue en particulier son extranéité au TNP, dont les normes (y compris l'article VI) ne sauraient en aucun cas (même pas à titre coutumier) s'appliquer à un Etat — tel l'Inde — qui a toujours refusé *mordicus* d'adhérer au traité en question.

12. Quant au contre-mémoire indien, tout centré qu'il est sur les questions relatives à la juridiction de la Cour, l'«opposition manifeste» à la réclamation marshallaise y est proclamée d'emblée ouvertement *:* «RMI position lacks any merit whatsoever»[48]. Une telle opposition prend notamment la forme de propos alléguant, par exemple, ceci :

> «Au vu de la requête, et notamment de la décision sollicitée, il ne fait aucun doute que ce que la République des Iles Marshall cherche en réalité à mettre à la charge de l'Inde est l'obligation de se conformer à l'article VI du TNP. Autrement dit, la demande des Iles Marshall équivaut à prier la Cour de dire que l'Inde est soumise à l'obligation énoncée dans cette disposition.»

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[46] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 315, par. 89.

[47] Références au MIM, p. 13, note 27. Au paragraphe 24 de son opinion individuelle en l'affaire *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 231, le juge Abraham s'exprime ainsi : «Il y a un différend si, au moment où elles viennent devant la Cour, les parties soutiennent des points de vue opposés sur les questions que le demandeur (qu'il ait raison ou non) prétend soumettre à la décision judiciaire. Cela suffit. Peu importe que les deux parties en aient débattu avant ou non.»

[48] CMI, p. 4, par. 6.

Cependant — souligne-t-on — la disposition figurant à l'article VI du TNP «ne saurait être considérée isolément ; elle constitue une partie d'un traité que plusieurs pays, dont l'Inde, ont jugé inacceptable. Or il est incontestable que la Cour n'a pas compétence pour contraindre un Etat à accepter des obligations conventionnelles auxquelles il n'a pas souverainement consenti et auxquelles il s'est constamment opposé.» Et encore : «L'Inde soutient que la République des Iles Marshall cherche, dans sa requête, à lui imposer des obligations découlant du TNP et, dans son mémoire, à masquer son intention réelle en s'appuyant sur un vague principe de droit international qu'elle n'énonce pas expressément et qui lui permettrait d'atteindre indirectement le même objectif.»

13. Monsieur le président, il va de soi qu'à ce stade de la procédure, il n'y a pas lieu de débattre quant au bien-fondé des thèses juridiques présentées de part et d'autre, et en particulier de celle évoquée par le défendeur au moyen des propos que je viens de citer. Il n'y a pas lieu non plus de débattre de la question de savoir s'il est vrai — ainsi que le défendeur le prétend avec insistance — qu'en réalité l'Inde s'est toujours conduite de manière parfaitement en harmonie avec les impératifs résultant de l'article VI du TNP, tout en n'étant pas liée par ledit traité. Ce qui importe maintenant est de relever l'opposition manifeste exprimée par l'Inde face à la réclamation du demandeur, le désaccord fondamental entre les deux Parties sur les points centraux de droit et de fait. Comment nier l'existence du différend, lorsqu'il apparaît clairement que le demandeur invoque une règle de droit s'imposant aux deux Etats et établissant des obligations que le défendeur aurait violées et continuerait de violer, alors que le défendeur proclame : «India does not accept that there is any accepted principle of international law as it is sought to be asserted by RMI»[49], se déclarant ainsi convaincu qu'une telle règle ne le lie d'aucune façon et qu'elle ne lui est pas applicable et que les obligations qu'elle établit ne sont nullement pertinentes pour lui ?

Monsieur le président, je me mets à votre disposition si vous souhaitez que ce soit un moment congru pour une interruption ou si vous souhaitez que je continue ?

Le PRESIDENT : Le plaisir de vous écouter me conduit à vous demander de poursuivre, Monsieur le professeur.

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[49] CMI, p. 10, par. 15.

M. CONDORELLI :

Les arguments avancés par l'Inde pour nier l'existence du différend

14. Monsieur le président, c'est l'évidence même que le différend existe bel et bien, puisque, comme je viens de le montrer, la réclamation des Iles Marshall se heurte de front à l'opposition manifeste de l'Inde. Et pourtant, cette évidence est contestée par la Partie adverse. Celle-ci voudrait convaincre la Cour que non, qu'il n'existe pas de vrai différend entre les Parties, que ce que la requête marshallaise essaie de soulever n'est qu'une «contrived dispute», un différend inventé, manifestement «créé de toutes pièces». L'argument invoqué est basé sur l'axiome suivant : «for a dispute to arise, there has to be an attempt to rise an issue the failure to resolve which gives rise to a dispute»[50]. De là, la remarque que voici : «if RMI was serious in relation to the matter raised in its application, it should have in the first instance raised the matter with India»[51]. Or, «le demandeur n'a jamais porté son grief à l'attention de l'Inde ni invoqué la responsabilité de cette dernière et a encore moins cherché à entamer des négociations avec les Etats contre lesquels il a introduit des instances devant la Cour».[52]

15. Toutefois, l'axiome sur lequel l'Inde base son propos n'a aucun fondement en droit. Il suffit de laisser la parole à ce sujet à votre Cour dont l'enseignement — que le défendeur préfère ignorer — est net et précis :

> «Il n'existe ni dans la Charte, ni ailleurs en droit international, de règle générale selon laquelle l'épuisement des négociations diplomatiques serait un préalable à la saisine de la Cour. Un tel préalable n'avait pas été incorporé dans le Statut de la Cour permanente de Justice internationale… Il ne figure pas davantage à l'article 36 du Statut de la présente Cour.»[53]

Pas de «règle générale», précise la Cour, tout en admettant qu'une règle spéciale en la matière pourrait fort bien être établie dans tel ou tel domaine. Mais (souligne la Cour) tel n'est pas le cas lorsque la Cour «a été saisie sur la base de déclarations faites en vertu du paragraphe 2 de

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[50] CMI, p. 10, par. 15.

[51] *Ibid.*, par. 16.

[52] *Ibid.*, par. 19.

[53] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 302-303, par. 56.

l'article 36 du Statut, déclarations qui ne contiennent aucune condition relative à des négociations préalables à mener dans un délai raisonnable»[54].

16. Monsieur le président, j'ai à peine besoin de signaler que ceci est spécialement pertinent dans la présente affaire, puisque votre Cour a été saisie justement sur la base des déclarations unilatérales faites par l'Inde et les Iles Marshall en vertu du paragraphe 2 de l'article 36 du Statut, et qu'aucune de ces deux déclarations ne contient la moindre condition relative à des négociations préalables. Ni des négociations préalables à épuiser, ni même des négociations préalables à entamer !

17. Le professeur Rosenne a donc indiscutablement raison lorsqu'il formule avec une clarté exemplaire le point : «There is no principle or rule of international law that requires diplomatic negotiations to precede the institution of proceedings, so that the failure of negotiations is a condition for the Court's jurisdiction.» Et il est sans doute intéressant de constater que Rosenne fait précéder une autre remarque à celle que je viens de citer :

> «Neither general international law nor the Statute requires a potential applicant to inform the potential respondent of its intention to institute proceedings. In the absence of any such obligation and of any infringement of the correspondent rights, the respondent cannot in good faith challenge the jurisdiction of the Court on the ground that it had not received prior notice of the intention to bring the proceedings before the Court.»[55]

18. Monsieur le président, il me semble qu'il n'y a pas besoin d'en dire davantage pour montrer que l'argument présenté par l'Inde ne tient pas la route et ne saurait être retenu par la Cour : j'entends l'argument d'après lequel «pour qu'un différend se fasse jour, il faut qu'une partie tente de soulever un problème et que celui-ci ne puisse être résolu, donnant ainsi lieu à un différend». Mais, en fait, il y a bien davantage à dire à ce sujet : peut-on sérieusement prétendre, comme le fait le défendeur avec une étonnante désinvolture, qu'avant la saisine de la Cour au moyen de sa requête du 24 avril 2014 «le demandeur n'a jamais porté son «grief» à l'attention de l'Inde ni invoqué la responsabilité de cette dernière»[56]?

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[54] *Ibid*, par.109.

[55] Rosenne, *The Law and Practice of the International Court*, 2006, p. 1153.

[56] Voir ci-dessus note 52.

La déclaration de Nayarit

19. Mais non, Mesdames et Messieurs les juges, on ne peut absolument pas le prétendre ! La Partie indienne oublie de prendre en compte des prises de position publiques très significatives que les Iles Marshall ont adoptées avant la saisine de la Cour, et ce malgré le fait que le mémoire des Iles Marshall en ait souligné l'importance et la pertinence. L'Inde oublie en particulier la déclaration de Nayarit[57] de février 2014, que vous trouverez à l'onglet n° 2 dans le dossier des juges, par laquelle les Iles Marshall ont fait valoir :

> «the 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.»

20. En février 2014, les Iles Marshall s'étaient donc spécifiquement et publiquement adressées à tous les Etats possédant des arsenaux nucléaires (y compris l'Inde évidemment, qui était d'ailleurs présente à la conférence de Nayarit) en les accusant de manquement à leurs obligations relatives aux négociations devant aboutir à la cessation de la course aux armements nucléaires et au désarmement nucléaire ; de surcroît, la source des obligations en question était identifiée : l'article VI du TNP et le droit international coutumier. On ne peut alors pas soutenir de manière crédible — comme le fait le défendeur — qu'avant la saisine de la Cour le demandeur «n'a jamais porté son grief à l'attention de l'Inde ni invoqué la responsabilité de cette dernière», puisque c'est exactement le contraire qui s'est passé ! Or, l'Inde n'a aucunement réagi face à une telle réclamation, pourtant grave : ni elle ne l'a contestée, ni elle n'a montré ou déclaré qu'elle infléchissait (ou qu'elle entendait infléchir) le comportement qui lui était reproché.

Conclusion

21. Dans son arrêt de 2011 en l'affaire *Géorgie c. Fédération de Russie*, dans lequel le thème de l'existence du différend a été soumis à l'attention soutenue des juges, la Cour[58] a d'abord rappelé que «[l]a question de savoir s'il existe un différend dans une affaire donnée demande à être

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[57] Second Conference on the Humanitarian Impact of Nuclear Weapons, *Nayarit, Mexico, 13-14 February 2014* (http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf).

[58] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84. Tous les passages cités figurent au paragraphe 30 de l'arrêt.

«établie objectivement» par la Cour» ; puis elle a répété que, «pour se prononcer elle doit s'attacher aux faits»» étant donné qu'«il s'agit d'une question de fond, et non de forme». Enfin elle a souligné en toutes lettres: «l'existence d'un différend peut être déduite de l'absence de réaction d'un Etat à une accusation dans des circonstances où une telle réaction s'imposait». Le différend avec l'Inde que les Iles Marshall ont soumis à la Cour par leur requête du 24 avril 2014 existait donc dès avant la saisine de votre Cour !

22. Il convient de souligner, de surcroît, qu'au moyen de la déclaration de Nayarit les Iles Marshall ont ouvertement protesté contre la conduite des puissances nucléaires (dont l'Inde), faisant valoir qu'une telle conduite se prolongeant dans le temps constitue la violation des obligations internationales qui leur incombent en vertu de l'article VI du TNP et du droit international coutumier. Un différend peut alors être défini comme déjà existant dans une situation où l'on est confronté, en premier lieu, à une conduite attribuable à une partie dont, ensuite, une autre partie conteste la légalité. C'est le point de vue qu'avait exprimé le juge Morelli dans son opinion dissidente jointe à l'arrêt de la Cour de 1962 en les affaires du *Sud-Ouest africain*[59] ; point de vue que le juge Fitzmaurice avait par la suite partagé en déclarant que, pour qu'un différend mettant en jeu la fonction judiciaire de la Cour existe, «peu importe, comme l'a dit M. Morelli, que la demande vienne d'abord et le rejet (exprès ou résultant d'un certain comportement) ensuite, ou que le comportement soit le premier à apparaître et soit suivi d'une plainte, d'une protestation ou d'une prétention à laquelle il n'est pas fait droit»[60].

23. Qu'il me soit permis d'insister sur cette conclusion, Monsieur le président : le différend avec l'Inde que les Iles Marshall ont soumis à la Cour, assurément existant au moment de la requête du 24 avril 2014, existait dès avant la saisine de votre Cour !

24. Merci, Monsieur le président, Mesdames et Messieurs les juges, de votre attention. Puis-je vous demander, Monsieur le président, après la pause de bien vouloir donner la parole à M[e] Laurie Ashton.

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[59] Affaires du *Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 319, opinion dissidente du juge Morelli, p. 567.

[60] Affaire du *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, opinion dissidente du Juge Fitzmaurice, p. 110.

Le PRESIDENT : Merci, Monsieur le professeur. La Cour entendra Mme Ashton après une pause de 15 minutes.

La séance est suspendue.

L'audience est suspendue de 11 h 35 à 11 h 55.

Le PRESIDENT : Veuillez vous asseoir. Je donne à présent la parole à Mme Ashton.

Ms ASHTON:

OPTIONAL CLAUSE DECLARATION RESERVATIONS (5) AND (11)

Introduction

1. Thank you. Mr. President, Members of the Court, it is an honour to appear before you today on behalf of the Marshall Islands.

2. Mr. President, Members of the Court, India alleges that four reservations in its optional clause declaration preclude this Court's jurisdiction in this case. I will be addressing two of them, both of which were raised by India for the first time in its Counter-Memorial, and neither of which were addressed by the Marshall Islands in its Memorial. The two reservations are:

— Reservation (5), regarding disputes where an applicant's consent to compulsory jurisdiction was "exclusively for or in relation to the purposes of the ~~***such***~~ dispute" or where the applicant's declaration was "deposited or ratified less than 12 months prior to the filing of the application" before this Court[61]; and

— Reservation (11), which is the *ratione temporis* reservation concerning disputes pre-dating India's 1974 declaration[62].

3. Neither of these reservations preclude jurisdiction in this case.

4. As a preliminary matter, the Court confirmed in the *Fisheries Jurisdiction Case* that a declaration must be interpreted "as it stands" with regard to the words "actually used"[63].

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[61]See Counter-Memorial of India (CMI), paras. 63-72; Memorial of the Marshall Islands (MMI), Ann. 5.

[62]See *ibid.* at paras. 83-87.

[63]*Fisheries Jurisdiction Case (Spain* v. *Canada), I.C.J. Reports 1998*, p. 454, para. 47, citing *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105.

Additionally, under the reasoning of the *Aerial Incident of 1999* decision, any intention of India with regard to its reservations must be reflected in the text of the declaration[64].

India's Reservation (5): The Exclusivity and Timing of a Consent to Jurisdiction

5. Mr. President, Members of the Court, turning specifically to India's reservation (5), the Marshall Islands' consent was not *exclusively* for the purpose of this dispute with India; nor was it filed *less than* 12 months prior to the Application.

6. Fundamentally, the word "exclusively" in the reservation is decisive in this matter. That the Marshall Islands declaration was not deposited "exclusively for or in relation to the purposes of" this dispute with India is evidenced by the following three points.

7. First, nothing in the wording of the Marshall Islands' declaration restricts its acceptance of compulsory jurisdiction to *exclusively* this dispute.

8. Second, the Marshall Islands' consent to compulsory jurisdiction has been on file for nearly three years, and the Marshall Islands has not denounced, modified or limited its declaration since it was deposited on 24 April 2013. If the Marshall Islands had intended that its declaration apply exclusively to this case, it could easily have withdrawn the declaration after commencing these proceedings. But it has not done so. Clearly the Marshall Islands is not "shy[ing] away" from the jurisdiction of this Court for other matters[65].

9. Third, importantly, if the Court were to look beyond the Marshall Islands' declaration, ample evidence exists that the Marshall Islands publically anticipated climate change litigation before this Court for many years. This is reflected in press articles quoting the Marshall Islands Co-Agent, Tony deBrum. As the Court heard earlier, among the statements made by Mr. deBrum on behalf of the Marshall Islands, and reported by the press, is the following statement made on 5 April 2013 concerning actions with regard to climate change:

> "We will leave no stone unturned in our search for justice in this manner. If that means approaching the ICJ — the International Court of Justice — that will be an option that's left on the table".

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[64]See *Aerial Incident of 10 August 1999 (Pakistan* v. *India), I.C.J. Reports 2000*, p. 31, para. 44.

[65]See CMI, para. 67.

This statement was reported by ClimateWire, and is readily available on the Internet. It is included at tab 1 of the judges' folders[66].

10. This statement followed the Marshall Islands' earlier inclusion of the International Court of Justice among its legal options for combating the threat that climate change poses to its existence. As early as 2010, the United Nations Non-Governmental Liaison Service reported on a conference in New York entitled "Threatened Island Nations: *Legal Implications of Rising Seas and a Changing Climate"*, which was scheduled in May 2011. That report, which is also readily available on the Internet, states that the Marshall Islands was collaborating with Columbia University: "to explore creative approaches to the legal issues facing low-lying island nations as climate change causes sea levels to rise" including, whether actions might be brought in "existing international tribunals"[67]. That report is at tab 6 of the judges' folders.

11. Clearly, the Marshall Islands' acceptance of the Court's compulsory jurisdiction had a history independent of these proceedings.

12. For the foregoing reasons, the Marshall Islands' consent is, unequivocally, not within India's reservation excluding jurisdiction where consent was made "exclusively for or in relation to the purposes of such dispute".

13. Mr. President, Members of the Court, as to the timing of the Application, India's reservation (5) excludes from jurisdiction a "dispute . . . where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application"[68]. The words "less than" are important.

14. According to India, the purpose of reservation (5) was to prevent a suit like that in *Right of Passage*, where Portugal filed a consent to jurisdiction followed — just three days later — with an application against India. Thus, according to India, its reservation (5) protects it against suits

[66]Pacific RISA — Managing Climate Risk in the Pacific, Hawaii Conference on Pacific Islands Climate Change Featured in ClimateWire, 9 April 2013, available at http://www.pacificrisa.org/2013/04/09/hawaii-conference-on-pacific-islands-climate-change-featured-in-climatewire/.

[67]http://www.un-ngls.org/index.php/un-ngls_news_archives/2010/730-threatened-island-nations-legal-implications-of-rising-seas-and-a-changing-climate.

[68]See CMI, para. 63.

where India might be sued "at any moment" by States that otherwise "shy away" from cases India might bring[69]. Neither issue is present here.

15. The Marshall Islands' acceptance of this Court's jurisdiction as compulsory was filed on 24 April 2013, and pursuant to the *Right of Passage* case, "on that very day" that consent became effective and the "consensual bond" was established[70]. So the only question is whether 24 April 2013 was *less than* 12 months prior to 24 April 2014. Under any "natural and reasonable"[71] interpretation, it was not.

India's Reservation (11): The *Ratione Temporis* Reservation

16. Mr. President, Members of the Court, turning specifically to India's reservation (11), jurisdiction is only precluded for "disputes prior to" 15 September 1974,

> "including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter"[72].

17. The essence of India's submission at issue here is that "India's alleged failure to negotiate is a cause which had clearly existed prior to the date of the [1974] Declaration"[73] and that the Court accordingly lacks jurisdiction *ratione temporis* in this dispute. India is incorrect. Neither the disputed customary international law obligation at issue, nor the disputed Marshall Islands legal rights thereunder, ***is*** alleged — either by the RMI or by India — are alleged to have existed prior to 1974. And the foundations, reasons, facts, causes, origins, definitions, allegations and bases of India's disputed wrongful conduct — as alleged by the RMI — do not pre-date 15 September 1974.

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[69]See CMI, para. 67.

[70]*Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, pp. 146-147.

[71]*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 104.

[72]See MMI, Ann. 5.

[73]See CMI, para. 87.

The disputed customary international obligation at issue

18. Importantly, as the Permanent Court explained in the *Electricity Company of Sofia and Bulgaria* case: "It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact."[74]

19. The existence of a customary international law obligation to negotiate nuclear disarmament was authoritatively recognized for the first time on 8 July 1996 by this Court when it delivered its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which it concluded, unanimously, as follows: "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."[75] The date of that recognition is thus the date from which a State could be expected to be aware of the universality and scope of that obligation. The Marshall Islands alleges no requisite obligations of India under customary international law prior to 1996, much less prior to 1974.

The disputed rights of the Marshall Islands under the customary international law at issue

20. Regarding the Marshall Islands' rights, the Marshall Islands was not admitted as a member of the United Nations until 17 September 1991. This is evidenced in Security Council resolution 704, whereby the Security Council recommended to the General Assembly that the Marshall Islands be admitted to membership in the United Nations, and after which the President of the Security Council stated that the action "marks the final steps in the process leading to the full integration of the Republic of the Marshall Islands into the international community . . .".[76] The Marshall Islands does not allege any rights with respect to India prior to 1991, much less prior to 1974. Put differently, the Marshall Islands' rights under the disputed customary international law at issue in this case do not pre-date the Marshall Islands' recognition as a member of the international community, much less predate 1974.

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[74] *Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 82.

[75] *I.C.J. Reports 1996 (I)*, p. 267, para. 105 (2) F.

[76] Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/704(1991) ; judges' folders, tab 7.

The disputed wrongful conduct of India at issue

21. Turning now to India's disputed wrongful conduct at issue in this case, such conduct post-dates 1974. It involves India's failure to pursue in good faith negotiations leading to nuclear disarmament, as well as its affirmative actions in quantitative build-up and qualitative improvement of its nuclear weapons arsenal. The Marshall Islands has not raised a dispute in this case over foundations, reasons, facts, causes, origins, definitions, allegations or bases of India's conduct that pre-date 1974.

22. India argues, however, that because it announced its decision to not sign the NPT in 1968, this dispute over India's failure to negotiate disarmament under customary international law must pre-date 1974. India further relies on the Marshall Islands' recitation in its Application that it has been 68 years since the first UNGA resolution, 45 years since the NPT entered into force, and 20 years since this Court's 1996 Advisory Opinion[77]. That recitation of history, however, as well as India's 1968 decision to not sign the NPT, does not indicate that the foundations, reasons, facts, causes, origins, definitions, allegations or bases of the present dispute pre-date 1974. The Marshall Islands' claims alleging wrongful conduct on the part of India are not based on India's failure to join the NPT, at its inception or subsequently. Nor does the Marshall Islands claim that India is in breach of the NPT, to which it is not a party, or that early UNGA resolutions preclude India's subsequent conduct.

23. Thus, when it comes to India's disputed wrongful conduct, the Marshall Islands proffers no pre-1974 conduct by India as evidence of India's breach of its customary international law. Even according to India's official statements in the United Nations Conference of the Committee on Disarmament, India did not possess or intend to possess nuclear weapons prior to 15 September 1974[78].

24. In sum, I have made three main points regarding India's *ratione temporis* reservation:

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[77] See CMI, para. 86.

[78] Report of the Conference of the Committee on Disarmament, twenty-ninth session (A/9627), New York, 1975, p. 8, https://disarmamentlibrary.un.org/UNODA/Library.nsf/6dc03c1297fa943485257775005b138c/6d913cb85a9acfdd85257833006db095/$FILE/A-9627.pdf, cited in AMI, para. 21; judges' folders, tab 8.

(i) First, the customary legal obligation under which the Marshall Islands alleges India is in breach was first recognized by this Court in 1996, and the Marshall Islands alleges no requisite legal obligation by India pre-dating that recognition;

(ii) Second, the Marshall Islands was not admitted as a member of the United Nations until 1991, and the Marshall Islands alleges no international legal rights with respect to India's conduct prior to that time; and

(iii) Third, India's disputed wrongful conduct at issue in this case post-dates 1974, and the Marshall Islands has raised no dispute with respect to pre-1974 foundations, reasons, facts, causes, origins, definitions, allegations or bases for India's disputed conduct.

25. For these reasons, India's *ratione temporis* reservation does not preclude jurisdiction in this case.

I thank the Court for its attention and would ask you, Mr. President, to give the floor to my colleague, Dr. John Burroughs.

Le PRESIDENT : Je vous remercie. Je donne la parole à Monsieur Burroughs. Vous avez la parole.

Mr. BURROUGHS:

THE NON-APPLICABILITY OF INDIA'S RESERVATION REGARDING FACTS AND SITUATIONS OF HOSTILITIES AND OF ITS RESERVATION REGARDING MULTILATERAL TREATIES

1. Mr. President and Members of the Court, I am honoured to appear before the Court for the first time. I will address India's arguments regarding two of its reservations to its declaration recognizing the jurisdiction of the Court as compulsory. I will begin with India's fourth reservation regarding facts and situations of hostilities, and then take up India's seventh reservation regarding multilateral treaties.

Reservation regarding facts and situations of hostilities

2. India's fourth reservation excludes from the Court's jurisdiction

> "disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to

> aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved"[79].

3. The exclusion is not applicable. This is a case about the existence, nature, and application of a customary international law obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament. It is not about the use or threatened use of nuclear weapons. It is not about, in the words of India's reservation, "facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression".

4. In paragraphs 54 and 59 of its Counter-Memorial, however, India seeks to vastly expand the reservation to mean "any circumstances or state or affairs, at any point in time, which threaten the security of the country" and "any matters pertaining to national security and self-defence"[80]. But that is not the reservation that India made. As the Court said in *Fisheries Jurisdiction*, a declaration "must be interpreted as it stands, having regard to the words actually used"[81].

5. In particular, noting that it lives in a proliferated region, India contends that measures of self-defence which it perceives to be necessary to deal with future nuclear threats are covered by the reservation[82]. However, the reservation has to be "read as a unity", as the Court stated in *Whaling in the Antarctic*[83]. The phrase "other similar or related acts . . . or situations in which India is, has been, or may in future be involved" relied upon by India[84] must relate to concrete *facts or situations* involving use of force including actions *taken* in self-defence and *resistance* to aggression[85]. As to the future, the reservation applies if and when such concrete facts or situations occur.

6. The reservation is contained in a declaration deposited by India on 18 September 1974. In that declaration the reservation in question replaced a reservation in the previous declaration made in 1959. El Salvador had deposited a declaration containing a virtually identical reservation

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[79]India's declaration is in Ann. 5 to the Memorial of the Marshall Islands (MMI).

[80]India's Counter-Memorial (CMI), pp. 27, 28, paras. 54, 59.

[81]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 47, quoting *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105.

[82]CMI, p. 27, para. 54.

[83]*Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, para. 37, cited in MMI, pp. 17-18.

[84]CMI, p. 27, para. 54.

[85]See MMI, pp. 17-18, paras. 38-40.

in 1973[86]. India's new declaration was deposited a few months after the filing by Pakistan of the case concerning the *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*[87]. One basis asserted by Pakistan for the Court's jurisdiction over that case was provided by the declarations of the Parties under Article 36, paragraph 2, of the Statute[88]. The Marshall Islands observed in its Memorial at paragraph 42 that this circumstance suggests that the new reservation excludes jurisdiction over disputes concerning particular situations of the use of force involving India or over related acts and measures such as the treatment of prisoners of war. This explanation is consistent with the ordinary meaning of the words used in the exception[89].

7. India offers no evidence to rebut the explanation, although obviously any pertinent materials such as ministerial statements are in its possession. Instead, India states opaquely in paragraph 57 of its Counter-Memorial: "In view of the above, the RMI's reliance upon the earlier Declaration of 1959, and the reasons for its modification are misconceived."[90] The phrase "the above" apparently refers to India's general argument regarding its security situation over many years and its linguistic analysis.

8. India's vague assertion does not suffice to render irrelevant the explanation offered by the Marshall Islands. In *Fisheries Jurisdiction*, the Court stated that in interpreting a reservation it will have "due regard to the intention of the State concerned *at the time when it accepted* the compulsory jurisdiction of the Court"[91]. It further stated that the intention of a reserving State is determined, among other factors, by "*an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served*"[92]. In that case, the Court was furnished

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[86]Exception (iv) in El Salvador's declaration deposited 26 November 1973. It excludes: "disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which El Salvador is, has been or may at some time be involved". See *International Court of Justice, Yearbook 1973-1974*, p. 57 (judges' folder, tab 9).

[87]*I.C.J. Pleadings 1973, Trial of Pakistani Prisoners of War (Pakistan* v. *India), Application (11 May 1973).*

[88]*Trial of Pakistani Prisoners of War (Pakistan* v. *India), Oral Arguments (public sittings held at the I.C.J. 4-26 June 1973): Request for the indication of interim measures of protection)*, Argument by Mr. Bakhtiar; CR 1973, p. 54.

[89]See MMI, pp. 17-18, paras. 38-40.

[90]CMI, p. 28, para. 57 (footnote omitted).

[91]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49; emphasis added.

[92]*Ibid.*; emphasis added.

with ministerial statements, parliamentary proposals, legislative proposals and press communiqués[93]. In the present case, absent any other evidence, the explanation put forward by the Marshall Islands concerning the circumstances of adoption of the reservation stands.

9. Regarding India's overall argument, the Court's recent Judgment in *Obligation to Negotiate Access to the Pacific Ocean*[94] suggests that it is misframed and must be rejected. In that case, Chile argued that the Court lacked jurisdiction under an exclusion clause in the Pact of Bogotá because the dispute involves matters of territorial sovereignty and the character of Bolivia's access to the Pacific Ocean that were settled and governed by the 1904 Peace Treaty[95]. The Court held that jurisdiction exists because, properly framed, the subject-matter of the dispute is whether an obligation to negotiate access exists, and, if so, whether Chile has breached it[96]. Here, India claims that the Court lacks jurisdiction under an exclusion of disputes relating to facts or situations of hostilities. In fact, properly framed, the subject-matter of this dispute is whether India has an obligation to pursue in good faith negotiations on nuclear disarmament, and, if so, whether India has breached it.

10. Finally, in its Memorial, at paragraph 44, the Marshall Islands observed that if, *arguendo*, a dispute over India's possession of a nuclear arsenal might be considered to fall within the ambit of the reservation, the jurisdiction of the Court over the present dispute would not be excluded. That is because the Marshall Islands' claims are not about the legality or illegality of possessing certain weapons of mass destruction, for whatever reason they are possessed, including self-defence. The Marshall Islands' claims focus on an obligation upon all States to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament. If this obligation is honoured, there will be no diminishing of the right of any State to defend itself.

11. In its Counter-Memorial, India did not respond directly to the Marshall Islands' argument in this regard, apparently content with its extremely broad interpretation of the reservation. That

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[93] *Ibid*.

[94] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment of 24 September 2015*.

[95] *Ibid*., para. 42.

[96] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment of 24 September 2015*, para. 50.

interpretation does not withstand scrutiny, and the reservation does not bar the Court's jurisdiction in this case for the reasons set forth in the Marshall Islands' Memorial and today.

Multilateral treaty reservation

12. I turn to India's argument that jurisdiction is barred by the seventh reservation which excludes "disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction"[97].

13. India's invocation of this reservation in the present case depends upon the premise that the exclusion applies even when India is not a party to the treaty in question. That premise is not tenable. In its Memorial, at paragraph 33, the Marshall Islands made this basic point, and India did not attempt to rebut the point in its Counter-Memorial.

14. I add now two supplemental considerations. First, the reservation provides that jurisdiction would exist if "all the parties to the treaty are also parties to the case". It would be a strange situation indeed if all treaty parties were to be parties to a case concerning a treaty to which India was not a party. Second, the legislative history of the first multilateral treaty reservation, the Vandenberg reservation to the United States' declaration, on which subsequent reservations were modelled, contains no indication that a situation was envisaged in which the declarant State was not a party to the treaty at issue[98]. That legislative history is at tabs 10 and 11 of the judges' folders.

15. Consider now the terms of the reservation. They do not exclude jurisdiction over the present case. This case does not involve a dispute about the *application* of the Non-Proliferation Treaty. India is not a party to the NPT, so the NPT cannot be applied to it. This case involves a dispute about the application to India of what the Marshall Islands maintains is a customary international law obligation to — in the words of this Court — "pursue in good faith and bring to a

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[97]CMI, Part IV C.

[98]See "Memorandum of John Foster Dulles Concerning Acceptance by the United States of the Compulsory Jurisdiction of the International Court of Justice", 10 July 1946, in *Compulsory Jurisdiction, International Court of Justice*, Hearings Before A Subcommittee of the Committee on Foreign Relations, United States Senate, 79th Congress, 2nd Session, on S. Res. 196, 11, 12 and 15 July, 1946, pp. 43-45, esp. p. 44 (judges' folder, tab 10); *Congressional Record*, 79th Congress, 2nd Session, Vol. 92, p. 10618 (dialogue between Senator Vandenberg and Senator Thomas) (judges' folder, tab 11). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392; separate opinion of Judge Ruda, pp. 455-456, paras. 18-21.

conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

16. In *Military and Paramilitary Activities in and against Nicaragua*, the United States invoked its multilateral treaty reservation. The Court stated that "[t]he fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, *even as regards countries that are parties to such conventions*"[99]. In the present case, India is not a party to the NPT. A typical circumstance in which principles of customary international law come into play is precisely when a State is not a party to a treaty containing the same or similar principles.

17. Nor is the Marshall Islands asking the Court in this case to *interpret* the NPT. It is true that the NPT plays a significant role in the argument for the existence, nature and implications of the customary international law obligation to pursue and conclude negotiations on nuclear disarmament. But the customary international law obligation is not only based on the NPT, as will be apparent from our presentation earlier this morning. Resolutions of the General Assembly and the Security Council also contributed to development of the customary international law obligation, whose existence was recognized by the Court in its 1996 Advisory Opinion. In that opinion, the Court begins by construing[100] the obligation "expressed"[101] in Article VI. It then refers to General Assembly resolutions, instruments outside the United Nations context, instruments setting forth the principle of good faith, a Security Council resolution, and the Final Document of the 1995 NPT Review and Extension Conference[102]. Furthermore, the interpretation and application of the obligation will require reference to post-1996 instruments and practice. Interpreting a customary international law obligation growing out of this dynamic process in the context of resolving a dispute with a non-NPT party is not equivalent to interpreting the NPT in the course of applying it to an NPT party.

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[99]*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, *supra* n. ***98***, p. 424, para. 73: emphasis added; quoted in Memorial of the Marshall Islands (MMI), pp. 16-17, para. 35.

[100]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 263-264, para. 99.

[101]*Ibid*., pp. 264, 265, paras. 102, 103.

[102]*Ibid*, pp. 264-265, paras. 100-103.

18. At paragraph 79 of its Counter-Memorial, India attempts to distinguish *Military and Paramilitary Activities* on the ground that claimed violations in that case were of principles of customary international law "codified" in multilateral conventions, whereas the Marshall Islands invokes an alleged customary international law obligation "rooted" in the NPT[103]. This is a selective rendition of what the Marshall Islands said. Paragraph 59 of the Application states:

> "The customary international law obligation of cessation of the nuclear arms race at an early date is rooted in Article VI of the NPT *and resolutions of the General Assembly and the Security Council* and is inherent in the obligation of nuclear disarmament enunciated by the Court."[104]

Moreover, the process of reasoning in both cases is comparable. In *Military and Paramilitary Activities*, the Court's examination ranged over sources and practice pre-dating and post-dating the adoption of the multilateral conventions[105]. In the present case, analysis will involve a range of sources and practice pre-dating and post-dating the adoption of the NPT and the issuance of the Advisory Opinion.

19. India also notes that its exclusion refers to "disputes concerning the interpretation or application of a multilateral treaty" rather than "disputes arising under a multilateral treaty" as in the United States' exclusion at issue in *Military and Paramilitary Activities*, and contends that its exclusion is wider in scope[106]. Whether or not the scope is indeed wider is immaterial in the present case. Once again, this dispute concerns the existence, nature and application of an obligation of customary international law. It is not about an obligation under a treaty to which India is not a party.

20. In conclusion, for the reasons stated in the Marshall Islands' Memorial and today, jurisdiction of the Court is not barred by India's multilateral treaty reservation.

21. May I request, Mr. President, that you now give the floor to my colleague, Professor Paolo Palchetti.

Le PRESIDENT : Merci. Je donne la parole à M. le professeur Palchetti.

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[103]CMI, pp. 34-35, para. 79, citing AMI, para. 59.

[104]Emphasis added.

[105]See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, especially at pp. 97-104, 107-108.

[106]CMI, p. 35, paras. 80-81.

Mr. PALCHETTI:

ABSENT THIRD PARTIES

1. Mr. President, Members of the Court, it is an honour for me to address this Court on behalf of the Republic of the Marshall Islands. My task before you is to address the question of whether this Court can exercise its jurisdiction in the present case in the absence of the other States possessing nuclear weapons.

I. The invocation of the *Monetary Gold* principle by India

2. With regard to third States, India puts forward two alternative arguments. First, India relies on the so-called *Monetary Gold* principle. It argues that the real subject-matter of the present dispute is the alleged common or joint responsibility of the nine States possessing nuclear weapons[107]. According to India all States would be affected by the judgment of the Court sought by the Marshall Islands[108]. Therefore this Court should decline to exercise its jurisdiction.

3. India also argues that it is precisely because the judgment would have no binding effect on any nuclear armed State other than India that the Court should decline to exercise its jurisdiction[109]. This would be so, it says, since a judgment directing India alone to undertake negotiations would be incapable of effective application[110].

4. This last argument will be later addressed by Professor Roger Clark. I will address the *Monetary Gold* argument. I will show, *first*, that the object of the Marshall Islands' Application is exclusively India's conduct, and not the conduct of all States possessing nuclear weapons; *second,* that according to the well-established case law of this Court the *Monetary Gold* principle applies only when the assessment of the responsibility of a third State is a prerequisite for the determination of the responsibility of the respondent State; *third and finally*, that under the circumstances of the present case, the assessment of the responsibility of the other States

[107]CMI, para. 35; see also para. 38 (alleged dispute cannot be decided in the absence of the other States possessing nuclear weapons).

[108]CMI, para. 42.

[109]CMI, para. 89.

[110]*Ibid.*

possessing nuclear weapons is not a prerequisite for the determination of India's responsibility. Therefore the *Monetary Gold* principle does not apply to the present dispute.

II. The Subject-Matter of the Present Dispute

5. Mr. President, as the Application of the Marshall Islands makes clear, the subject-matter of the present dispute is India's international responsibility for its wrongful conduct in respect to nuclear disarmament. The conduct giving rise to such responsibility consists of acts and omissions attributable to India. The responsibility arises from the breach of a customary international law obligation which binds India. In the present case the Marshall Islands does not ask the Court to determine whether other States possessing nuclear weapons, by their own conduct, are in breach of their own, respective, obligations, and there is no need for the Court to do it in order to determine India's responsibility.

6. The Respondent does not deny that the focus of the claim presented in the Application is on acts and omissions of India. In fact, India does not even bother to refer to the conduct complained of in the Application. Its argument relies on the assertion that India's position cannot be adjudged separately from that of the other States possessing nuclear weapons. This would be so, it says, for a number of reasons, none of which, however, justifies the application of the *Monetary Gold* principle. I will examine these reasons in turn.

7. First, India refers to the fact that the obligation allegedly breached by it is the same obligation that the Marshall Islands invoked against all the other States possessing nuclear weapons[111]. The Marshall Islands has no difficulty in conceding this point. But this circumstance is irrelevant for the triggering of the *Monetary Gold* principle. The fact that several States, by their own separate conduct, breached the same obligation does not mean that the responsibility of each State cannot be assessed independently. This finds clear support in this Court's Judgment in the *Nauru* case. As Judge Simma noted in his separate opinion in the *Oil Platforms* case, "where two States contributed to a single, indivisible damage without having acted in concert (unlike the three

[111]CMI, para. 34.

States in the *Nauru* case), the holding of the Court in the *Nauru* case applies with even greater strength"[112].

8. Secondly, India referred to the relief sought by the Marshall Islands. It asserted that in the present case effective relief would require that all States possessing nuclear weapons were parties to these proceedings[113]. Again, this argument is mistaken. The *Monetary Gold* principle has nothing to do with the effectiveness of the remedies sought by a party. Nor can India attempt to broaden the subject-matter of the present dispute by simply referring to what, in its view, would be the only effective relief. In the present case the only relief sought by the Marshall Islands is against India.

9. India advanced in its Counter-Memorial a third argument. According to India, negotiations leading to nuclear disarmament, by definition, would require the participation of all States possessing nuclear weapons. These, in turn, would justify the conclusion that the very subject-matter of the present case is the alleged common or joint responsibility of all these States[114]. Mr. President, it is one thing to say that negotiation needs the participation of more than one State. This is rather obvious. It is an altogether different matter, however, to suggest, as India does, that the obligation to negotiate in good faith is of such a nature that it cannot be invoked against a single State. This latter view is patently wrong. There is no reason to believe that compliance by each and every State with the obligation to negotiate cannot be assessed separately. In the *Pulp Mills* case, this Court had no difficulty in assessing whether Uruguay, by its own conduct, had breached its obligation to engage in good faith negotiation[115]. The Marshall Islands asks the Court to do the same in the present case: to determine whether India, by its own conduct, has breached its obligation to engage in good faith negotiation.

10. Finally, India argued that the *erga omnes* character of the obligation to negotiate nuclear disarmament supports its view that the present dispute is not a bilateral one and involves the

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[112]*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*; separate opinion of Judge Simma, p. 361.

[113]CMI, para. 34.

[114]CMI, para. 35.

[115]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* pp. 67-68, para. 149. See also *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),* pp. 132-134, paras. 156-162.

establishment of rights and obligations of third States[116]. Here again the Respondent appears to mix up different issues. True, this dispute is not strictly bilateral as it concerns the alleged breach of an obligation *erga omnes*. However, it would be absurd to pretend to apply the *Monetary Gold* principle because of the *erga omnes* character of the obligation breached. As a judge of this Court has written, "[t]he fact that an obligation *erga omnes* is owed by a State to a large number of other States does not make any of these States a necessary party to judicial proceedings concerning compliance with the obligation by the former State"[117].

III. The scope of the *Monetary Gold* principle in the case law of the International Court of Justice

11. Mr. President, it may be appropriate at this stage to address briefly the question of the scope of the *Monetary Gold* principle. In its Counter-Memorial India asserted that in the present case "all States are 'indispensable Parties', since all would be affected by the Judgment of the Court sought by the RMI"[118]. This statement is based on a wrong assessment of the scope of the *Monetary Gold* principle. The principle does not apply when the interests of third States are simply "affected" by the Court's Judgment. A higher threshold is required. In its Judgment in the *Monetary Gold* case, this Court recognized that the principle applies when the legal interests of the third party "would not only be affected by a decision, but would form the very subject-matter of the decision"[119]. This Court has also observed that "[t]he circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction"[120].

12. India has visibly failed to take account of relevant case law that is essential for understanding the scope of the *Monetary Gold* principle. In particular, no reference is made in its Counter-Memorial to the Court's Judgment in the *Nauru* case. Yet *Nauru* is of decisive importance for the purposes of the present case. *Nauru* clarifies that the Court is prevented from exercising

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[116]CMI, para. 41.

[117]G. Gaja, "The Protection of the General Interests in the International Community. General Course on Public International Law", *Recueil des cours*, Vol. 364 (2014), pp. 117-118.

[118]CMI, para. 42.

[119]*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32.

[120]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88.

jurisdiction only when the assessment of the responsibility of a third State is a prerequisite for the determination of the responsibility of the respondent State. In *Nauru* the Court distinguished *Monetary Gold* by observing that "[i]n the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim"[121]. The Court also observed that

> "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia"[122].

13. The Court's Judgment in *Nauru* provides clear authority for the proposition that the *Monetary Gold* principle does not apply when the conduct complained of can be attributed simultaneously to the respondent State and to third States. The holding in *Nauru* applies "with even greater strength" — to borrow Judge Simma's words — when two or more States, by taking distinct conduct, contributed to the same wrongful act or when they committed distinct wrongful acts by breaching the same obligation. In all these cases, the determination of the responsibility of the respondent State "may well have implications" for the other States; however, there is no need for the Court to determine, as a preliminary matter, the responsibility of these States.

IV. The *Monetary Gold* principle does not apply to the present dispute

14. It is against this legal background that the question of the absent third States must be assessed. The present case is quite different from *Monetary Gold*, it is quite different from *East Timor*. The responsibility of States other than India does not form the very subject-matter of the present dispute. The focus of the Marshall Islands' claims in this case is on the conduct of India, including the quantitative build-up, diversification, and qualitative improvement of its nuclear arsenal[123]. In order to establish its claim the Marshall Islands does not need to prove any act which is attributable to a State other than India. More importantly, none of the conduct referred to in the

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[121] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55.

[122] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55.

[123] Application of the Marshall Islands (AMI), para. 62.

Application requires a prior determination of the responsibility of a third State, whether it is a State possessing nuclear weapons or any other State.

15. Mr. President, the conclusion is clear. The *Monetary Gold* principle does not apply to the dispute brought by the Marshall Islands against India. Any objection to the jurisdiction of the Court or the admissibility of the claim which is based on that principle must be rejected.

16. This concludes my presentation. I thank the Members of the Court for their kind attention and I would ask the Court to give the floor to Professor Roger Clark.

Le PRESIDENT : Merci. Je donne maintenant la parole au professeur Clark.

Mr. CLARK:

JUDGMENT WOULD SERVE NO LEGITIMATE PURPOSE

1. Thank you, Mr. President. Mr. President, Members of the Court, I am honoured to appear before this Court for the second time, having argued on behalf of Samoa in the Advisory Proceedings on Nuclear Weapons in 1995.

2. I shall deal with India's — most thinly argued — contention[124] that: "The Judgment would serve no legitimate purpose." We have interpreted "legitimate" in the light of the cases relied upon by India as meaning "having some practical consequence". I shall consider first the cases relied upon by India and then address the remedies sought by the Marshall Islands to demonstrate why these proceedings do in fact have a "legitimate", and very practical, purpose.

3. First, the case law. India relies heavily on two decisions of this Court, *Northern Cameroons*[125] and the *Nuclear Tests* cases[126]. The situations there were very different from the present case.

4. The Marshall Islands accepts that in *Northern Cameroons* the Court insisted that its judgment "must have some practical consequence". The context of this statement, however, needs examination. Cameroon was seeking a declaration that the United Kingdom had breached the Trusteeship Agreement with respect to the Northern Cameroons. But the United Nations General Assembly had validly terminated the Trusteeship two days before application was made to the Court. There was thus no existing Agreement on which Cameroon could base its case. Cameroon had not sought damages for any past breach of the Agreement and any judgment would be, as the Court put it, "devoid of purpose"[127]. It would not be possible to recreate the *status quo ante*.

5. This is far from the situation here. The Marshall Islands bases its case on a rule of customary international law which it contends is in place and applicable to India. There has been

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[124]CMI, Part V.

[125]*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33, 34 and 38.

[126]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 58; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 61.

[127]*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38.

no intervention by a United Nations organ to terminate any obligation in this respect, even imagining that one would have been able to do so, which is patently not the case. On the contrary, the General Assembly has regularly reiterated in annual resolutions this Court's articulation in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* of the principle upon which Marshall Islands founds its case. And the Assembly looks forward to further action in the international community to give effect to that principle. The Marshall Islands seeks to enforce that existing and continuing obligation.

6. Then there are the *Nuclear Tests* cases[128]. A majority of this Court, over a powerful dissent, held that since France had promised, outside the Court, to cease its atmospheric testing, and could be expected to comply with its promise, the cases were moot. The French statements, in the Court's words, had "caused the dispute to disappear"[129]. Mr. President, there is no disappearing act here. India has not promised to change the conduct that is the basis for the Marshall Islands' claims[130]. Further, while India states that it "actively supports the commencement of negotiations on nuclear disarmament", India says that it does so "regardless of whether it is bound by any rule of international law to pursue such negotiations"[131]. It insists that it "does not accept that there is any accepted principle of international law as is sought to be asserted by RMI"[132].

7. Both aspects of this position are important to the Marshall Islands. On the one hand, it is important to reinforce the existence and content of the rule of international law on which it relies. On the other hand, it is important for the Marshall Islands to establish that India is bound by the obligations in question and that it is in breach of those obligations. India evidently contests the Marshall Islands' contentions both as to the facts and as to the law. But those are matters for the merits stage of the proceedings, not the jurisdiction stage. Regarding India's support for the commencement of negotiations on complete disarmament, even if it were accepted, as the Marshall Islands does not, that this alone would demonstrate compliance with the obligation to pursue

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[128] *Nuclear Tests (Australia* v. *France); Nuclear Tests (New Zealand* v. *France).*

[129] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55, *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.

[130] See AMI, paras. 57-64.

[131] Counter-Memorial of the Republic of India (CMI), pp. 39-40.

[132] CMI, p. 10.

negotiations on nuclear disarmament, India does not regard its stance as required by the obligation. It is merely a policy choice; it can be changed.

8. Apparently India does not dispute the competence of the Court in the abstract to afford the type of relief — declarations and an order — requested by the Marshall Islands. India's argument is rather that in this instance the relief would be ineffective and thus that the Court should abstain from deciding the case. Even if the Marshall Islands were asking only for declaratory relief, the words of the joint dissenting opinion in the *Nuclear Tests* cases[133] are apposite. As the dissenters noted: "to decide and declare that certain conduct of a State is or is not consistent with international law is of the [very] essence of international adjudication, the heart of the Court's judicial function"[134]. Findings are, indeed, a common form of relief and, in and of themselves, are often considered a sufficient remedy[135].

9. I turn to the remedies, a set of declarations and an order, requested by the Marshall Islands in its Application[136] to demonstrate the intensely practical nature of what it seeks. The Marshall Islands asks first for four declarations. Each involves an assertion as to applicable law which the Marshall Islands will develop at the merits stage. Each involves assertions of fact, also subject to further development, that the RMI believes that it can prove. The Marshall Islands may find that it needs to refine or even amend its submissions in this regard at the merits stage, but there can be no objections in principle at this stage to what is being requested. In connection with its second claim regarding the cessation of the nuclear arms race[137], the Marshall Islands notes that, other than its support for a fissile materials cut-off treaty, India is not proposing negotiations on global or regional measures to end or limit nuclear arms racing. India, in the view of the Marshall Islands, is

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[133]CMI, p. 10.

[134]*Nuclear Tests Case (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, p. 314, para. 7; *Nuclear Tests Case (New Zealand* v. *France), Judgment, I.C. J. Reports 1974*, p. 457; joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, p. 496, para. 7 (in slightly different words).

[135]See e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp. 232-37 and operative paras. 5-8.

[136]AMI, pp. 25-26, Remedies.

[137]See AMI, para. 13 and Remedies *(b)*, at p. 25; MMI, para. 2.

therefore failing to "pursue" negotiations in the sense of seeking to bring them about[138]. A declaration to that effect would have a very practical import.

10. Finally, the Marshall Islands asks for an order based on the previous declarations insisting, by some concrete steps, that India remedy the situation created by its failures. This again is a "legitimate" and practical request by the Marshall Islands. It would require actions beyond taking positions in the General Assembly and the Conference on Disarmament, including, if necessary, initiating negotiations on complete nuclear disarmament.

11. India argues that "the relief sought by the RMI would, in the absence of other States serv[e] absolutely no purpose"[139]. On the contrary, Mr. President, the relief would set out legal parameters for *India's conduct*, regardless of the positions and actions of other States possessing nuclear arsenals. Moreover, it is not the case that participation in negotiations of all States possessing nuclear weapons or even all the NPT nuclear-weapon States is required. Negotiations could commence with the participation of some nuclear-armed States, even just one, and others could join at a later stage. Also, among other possibilities, a nuclear disarmament treaty could provide that it would enter into force only when certain States had ratified it, or make some obligations of initial participants contingent on others joining in due course. Ultimately, success in achieving a world free of nuclear weapons will require, as the Court noted in its Advisory Opinion, "the co-operation of all States"[140]. But that condition does not necessarily apply to initial stages of a disarmament process. Moreover, that condition does not preclude the relief that the Marshall Islands claims against India, which is premised, I repeat, on India's own conduct.

12. For these reasons, India's "legitimate purpose" argument lacks substance.

13. Mr. President, Members of the Court, I appreciate your attention. This concludes the Marshall Islands' oral pleadings for today.

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[138] The ordinary meaning of "pursue", according to the Oxford English Dictionary, includes: "To seek to reach or attain"; "To try to obtain or accomplish, to work to bring about, to strive for (a circumstance, event, condition, etc.); to seek after, aim at."

[139] CMI, p. 40, para. 91.

[140] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264.

Le PRESIDENT : Merci Monsieur le professeur. Voilà qui met un terme au premier tour de plaidoiries des Iles Marshall. La Cour se réunira de nouveau en cette affaire le jeudi 10 mars 2016 à 10 heures pour entendre l'Inde en son premier tour de plaidoiries.

Je vous remercie. L'audience est levée.

L'audience est levée à 13 heures.

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