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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Monday 14 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 14 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
	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. Couvreur, greffier

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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;

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

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

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

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

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

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

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Mr. Benjamin Samson,

as Junior Counsel.

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comme coagent ;

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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,

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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,

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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 aujourd'hui pour entendre le second tour de plaidoiries des Iles Marshall 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).*

M. le juge *ad hoc* Bedjaoui, pour des raisons qu'il m'a dûment fait connaître, est dans l'incapacité de siéger à l'audience de ce matin.

Je donne maintenant la parole à M. van den Biesen, coagent des Iles Marshall. Monsieur van den Biesen, vous avez la parole.

M. van den BIESEN: Merci, Monsieur le président.

GENERAL OBSERVATIONS

1. Mr. President, Members of the Court, last Monday, when we presented our first round of pleadings in the Marshall Islands' case against India, India was occupied otherwise. On the first day that India, before this Court, was publically criticized for not acting in good faith in relation to its obligation to pursue negotiations towards nuclear disarmament, India "conducted a test of its home grown intermediate range Submarine Launched Ballistic Missile — secretly from an undersea platform in the Bay of Bengal"; the report in The New Indian Express is at tab 1 of the judges' folder[1]. Mr. President, one is tempted to call this "contempt of Court" simply because naming this an "unfortunate coincidence" would be grossly understating the meaning of this event.

2. The newly developed missile is the "best in the world in its class and it's faster and stealthier" and it is "capable of delivering a two tonne [nuclear] warhead up to a distance of 3,500 kilometres"[2]. So, Mr. President, this provides some additional evidence in support of the Marshall Islands and also it provides some context for India's pleadings of last Thursday, in which it claimed, "it is ironic, indeed perverse, that India should be here at this tribunal in this manner to speak about its commitment to nuclear disarmament"[3].

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[1]The New Indian Express, "India Test Fires Nuke Capable of SLBM K-4 Secretly", 9 Mar. 2016.

[2]*Ibid.*

[3]CR 2016/4, p. 18, para. 10.

3. This ballistic missile is designed for use from India's five new nuclear submarines, the first of which became fully operational in 2015; the newspaper clipping is under tab 2 of the judges' folder[4]. The construction of these new submarines constitutes a very substantial expansion of India's nuclear capabilities. This expansion, without any doubt, will be considered as threatening by third parties and will most likely lead to the expansion of response capabilities by those third parties.

4. Mr. President, this is precisely what the Marshall Islands in its Application (para. 59) and in its oral pleadings (p. 18, para. 11) calls nuclear arms racing. Stating, at the one hand, that India is and has been all for nuclear disarmament and having, at the other hand this proliferation of its nuclear capabilities do not combine very well. In legal terms this is evidence of India's not acting in good faith concerning the obligation that is central to the current proceedings. This, Mr. President, brings me to the subject-matter of these proceedings.

5. During its oral pleadings of last Thursday, India demonstrated that there would be some confusion about what it is exactly that the Marshall Islands are claiming in this case.

6. Our colleague, Mr. Salve, spent quite some time complaining about the Marshall Islands' alleged "drawing back" from its position in its Application[5], its alleged "undermining" of its Application[6], or even the Marshall Islands' "disingenuously distancing" itself from the Application "in order to get past some of the jurisdictional challenges"[7], and so he went on — and on, and on — for a considerable amount of time. Mr. President, the Marshall Islands will not have any of this, solely because these interpretations are too far away from the realities expressed by the Marshall Islands in this case.

7. The same is true for India's unsubstantiated claim that the Marshall Islands have stated that India would be under an obligation to unilaterally disarm[8]. Mr. President, the nuclear disarmament that the Marshall Islands seeks is exactly that negotiated universal disarmament

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[4]The Economic Times, "India's First Nuclear Submarine INS Arihant Ready for Operations, Passes Deep Sea Tests", 23 Feb. 2016.

[5]CR 2016/4, p. 28, para. 46

[6]*Ibid.*, p. 27, para. 41.

[7]*Ibid.*, p. 29, para. 50.

[8]*Ibid.*, p. 30, para. 52.

contemplated in this Court's 1996 Advisory Opinion. It is true that Marshall Islands contends that India's quantitative build up and qualitative improvement of its nuclear arsenal is not compatible with its obligations under customary international law. But requesting a declaration that India is in breach of that customary law obligation in respect of nuclear weapons is not the same as asking for unilateral disarmament — nuclear or otherwise.

8. Mr. President, the Marshall Islands does claim, in its Application, that inherent to the rule of customary international law, as formulated in paragraph 105, under (2) F of this Court's Advisory Opinion, is a legal obligation in relation to cessation of the nuclear arms race and to negotiating nuclear disarmament. The Application sets out with the Court's unanimous finding with respect to the obligation, it deals with the same obligation in Section III (B) and also in Section IV (A), while the obligation is central to the remedies requested. The Memorial also begins with the obligation and at the end explicitly stipulates: "As for the merits of the case, the Applicant maintains its submissions, including the Remedies requested, as set out in the Application of 24 April 2014."[9] Obviously, the Marshall Islands was also reserving its right to modify or amend the submissions in accordance with the Rules and the Practice of the Court. Mr. President, there is no confusion whatsoever, while the consistency of the Marshall Islands claim cannot reasonably be denied.

9. To be fair, Mr. President, in a further development of its position, India distances itself from its accusatory tone and summarized the task before this Court in this case as "la détermination de l'existence d'une violation — ou non — de l'obligation de mener de bonne foi des négociations en vue de la conclusion d'un traité sur le désarmement nucléaire"[10]. This demonstrates that, in effect, India is fully aware of the precise subject-matter of this case and there is — after all — no confusion possible on India's part regarding what this case is about.

10. Mr. President, India's submits at paragraph 3 of Mr. Gill's oral pleadings that the five nuclear-weapon States that are a party to the NPT would have been "permitted" to possess nuclear weapons. This is not the case. The NPT merely acknowledges the temporary possession of

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[9]Memorial of the Marshall Islands (MMI), para 2; see also p. 22, para. 48.

[10]CR 2016/4, p. 44, para. 18.

nuclear weapons by five States pending disarmament[11]. No legitimacy, no permission is involved. Clearly there is also no State on earth that has ever "permitted" India to obtain and possess nuclear weapons. India, at the time, put forward reasons why it had decided to stay outside of the NPT. Those reasons — regardless, for now, of their validity or non-validity — could have been put forward by many other States, but the great majority of States have not done so, only Pakistan and Israel followed India's example. Most of the other States became a party to the NPT; India did not and India is now expanding its nuclear arsenal substantially. Mr. President, there seems to be quite a gap between the solemn declarations that India continues to make and the development of its factual situation.

11. In its objections to our claims — actually, going to the merits — India states that the negotiations called for should be held at regular fora. The Marshall Islands, in principle, does not have problems with that, except that those fora have proven over decades that they are just not able to deliver. The reason for them not being effective is basically that the NPT nuclear-weapon States have blocked negotiations on disarmament. The existence of the Open-ended Working Group is the living evidence of that failure. It should be noted that, at this point in time, there are nowhere any negotiations going on aimed at concluding nuclear disarmament or, in the words of my colleague and good friend, Professor Pellet: "la détermination de l'existence d'une violation — ou non — de l'obligation de mener de bonne foi des négociations en vue de la conclusion d'un traité sur le désarmement nucléaire". This has been the situation for almost 50 years now and it is precisely the aim of the Marshall Islands that this situation will drastically change as a result of the current litigation.

12. This is then where India brings forward the problem it sees with third parties not being present to this litigation. First of all, India is wrong thinking that these negotiations would exclusively be an issue for the nine States that currently possess nuclear weapons. In the first place, as India acknowledges, "les positions de celles-ci sont fort diverses"[12] or, as we said in our first round on 7 March 2016, there is no such thing as a "joint nuclear enterprise"[13]. But, apart

[11]Art. IX (3).

[12]CR 2016/4, p. 39, para. 6.

[13]CR 2016/1, p. 22, para. 11.

from that, this approach does not follow from the treaty and it is also not in conformity with the practice of negotiating multilateral disarmament treaties. As the Marshall Islands said on 7 March 2016 in our first round, it is to be expected 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." Then, also, it is for sure, Mr. President, that, as soon as the Court would indeed issue the injunctive order as requested by the Marshall Islands, this will be welcomed by the majority of States. As we know this majority voted for many consecutive years for the so-called follow-up resolution in the General Assembly of the United Nations in which it is stipulated among other things that the General Assembly:

> "1. *Underlines once again* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;"

And the General Assembly goes on to say that it:

> "2. *Calls once again upon* all States immediately *to fulfil that obligation* by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination;" (emphasis added)

which implies that these States do not need to be ordered by the Court to immediately start participating as soon as one or several nuclear-weapon States are ordered by this Court to start to, indeed, give the follow-up to the Advisory Opinion.

13. Then, Mr. President, to conclude my observations, I need to deal with some additional obstacles that India thinks would prevent the Court from moving to the merits of this case.

14. First, India states that, in effect, the Marshall Islands would ask the Court to transform itself into a legislator, no, into a world government[14]. "Far-fetched" would be the most polite way to describe this alleged obstacle. But, nowhere, does the Marshall Islands request the Court to take on the role of legislator or of the world government. The Marshall Islands request the Court to apply the law as it does in any contentious case before it. The adjudication of disputes may also, as in our case, include judging whether a State acted in good faith while disregarding certain obligations. That is, indeed, work for judges and this does not concern "un problème d'état

[14]CR 2016/4, p. 45, para. 21.

d'esprit" — as India said — and, thus, certainly not a reason for this Court to decide that it would not have jurisdiction in this case.

15. Mr. President, Members of the Court, I thank you very much for the attention you are giving to this case and I kindly request you, Mr. President, to give the floor to Professor Luigi Condorelli.

Le PRESIDENT : Merci. Je donne la parole au professeur Condorelli.

M. CONDORELLI :

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

1. Monsieur le président, jeudi dernier, lors de la clôture du premier tour de plaidoiries dans cette affaire opposant les Iles Marshall à l'Inde, vous avez rappelé que le second tour de plaidoiries doit avoir pour objet de permettre à chacune des Parties de répondre aux arguments avancés oralement par l'autre et ne doit donc pas constituer une répétition des présentations déjà faites par les Parties. J'entends, quant à moi, me conformer rigoureusement à votre recommandation. Je vais essayer de regrouper par thèmes les quelques arguments présentés jeudis par nos contradicteurs alléguant qu'aucun vrai différend n'existerait entre les Parties et qu'il faudrait, partant, exclure la compétence de la Cour dans la présente affaire.

2. Il convient de signaler d'emblée que les divers propos formulés par les orateurs de l'autre côté de la barre, tout variés qu'il puissent apparaître à première vue (ou plutôt à première ouïe), se rapportent finalement à deux pôles seulement. Le pôle n° 1 : il n'y a pas de différend parce qu'il n'y a pas de vrai désaccord entre les Parties parce qu'il n'existe entre elles aucun litige. Le pôle n° 2 : il n'y a pas de différend parce qu'il n'y a eu entre les Parties aucun genre de négociation préalable à la saisine de la Cour.

Le pôle n° 1 : pas de différend parce qu'aucun litige n'existe entre les Parties

3. Monsieur le président, j'en viens au pôle n° 1. Tous les membres de l'équipe indienne qui ont pris la parole jeudi dernier ont dit quelque mots, voire beaucoup, afin de mettre en évidence l'identité substantielle des positions des deux Parties concernant le désarmement nucléaire.

4. La Cour a pu entendre d'abord l'agent de l'Inde, Mme Chadha, affirmer que même à la conférence de Nayarit de février 2014 «the positions of the parties … regarding the need for nuclear desarmement actually coincided»[15]. A son tour l'agent de l'Inde, M. Gill est revenu sur la conférence de Nayarit pour faire valoir que tant l'Inde que les Iles Marshall s'y étaient exprimées en faveur d'une élimination complète désarmement nucléaire et ont fait état de leur engagement en faveur d'une élimination complète des armements nucléaires. M. Gill a conclu son propos en affirmant : «We agreed with the RMI in substance if not in semantics on the need to move towards «an effective and secure disarmament». The question of a dispute does not arise.»[16] Puis M[e] Salve s'est inscrit dans le même sillage en soulignant : «There is, indeed, no difference between the stand of the Marshall Islands and India on the need to bring about global elimination of nuclear weapons.»[17] Mais c'est surtout mon grand ami le professeur Pellet qui, à l'aide de devinettes bien tournées, jouant sur la similitude entre des déclarations des deux Etats, a entendu montrer combien en harmonie sont leurs conceptions supportant le désarmement nucléaire et l'élimination complète des armes nucléaires. Sa conclusion sur ce point : s'agissant «de déterminer le contenu du pseudo-différend qui serait à l'origine de la requête marshallaise, il m'apparaît que ces déclarations établissent, sans l'ombre d'un doute, qu'un tel différend n'existe pas»[18].

5. Monsieur le président, nous avons dans mon pays un proverbe dont je n'arrive malheureusement pas à trouver un bon correspondant en français ou en anglais : «Tra il dire e il fare c'è in mezzo il mare» («Entre dire et faire il y a la mer au milieu»). Entre ce que chacun raconte vouloir faire ou être en train de faire et ce qu'il fait vraiment, il peut y avoir une distance plus ou moins grande : suivant les cas, équivalant à un océan, à un lac, voire même, que sais-je, à un simple ruisseau. C'est là le différend que les Iles Marshall ont souhaité soumettre à votre Cour : le demandeur est convaincu, en effet, que la distance entre ce que l'Inde dit et ce qu'elle fait est importante, s'agissant de savoir si sa conduite correspond ou non aux standards en matière de désarmement nucléaire tels qu'ils découlent de l'article VI du traité de non-prolifération (TNP) ou

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[15] CR 2016/4, p. 10 (Chadha).

[16] CR 2016/4, p. 18-19 (Gill).

[17] CR 2016/4, p. 34 (Salve).

[18] CR 2016/4, p. 40 (Pellet).

du droit international coutumier. Les Iles Marshall demandent à la Cour de vérifier si l'Inde viole ses obligations en matière de désarmement nucléaire, non pas par ses paroles, mais par ses actes, par ses actions ou omissions.

6. Ceci dit, il est tout de même assez paradoxal d'entendre les orateurs de l'autre côté de la barre alléguer que finalement, même à la conférence de Nayarit de février 2014, «the positions of the parties … regarding the need for nuclear desarmement actually coincided». Certes, il est sans aucun doute vrai que les deux parties se sont déclarées en faveur du désarmement nucléaire et de la nécessité de négociations multilatérales pour parvenir à libérer le monde des armes nucléaires. Mais les Iles Marshall — dans leur déclaration du 13 février 2014 — ont ajouté à cela une accusation précise portée contre les Etats possédant des armes nucléaires (y compris l'Inde, bien sûr) : celle de manquer à leurs obligations internationales relatives au commencement immédiat et à la conclusion de telles négociations. Peut-on nier qu'au moyen de cette déclaration publique les Iles Marshall, avant de saisir la Cour, ont extériorisé leur grief en le portant à la connaissance des puissances nucléaires, dont l'Inde, et invoqué leur responsabilité internationale découlant du fait que ces puissances (dont l'Inde) «are failing to fulfill their legal obligations» ?

Le pôle n° 2 : il n'y a pas de différend parce qu'il n'y a eu aucun genre de négociation préalable entre les Parties avant la saisine de la Cour

7. J'en viens maintenant, Monsieur le président, au pôle n° 2. Il a été étonnant d'écouter de la part de tous les plaideurs du côté indien une sorte de panégyrique en faveur des négociations préalables : une unanimité s'est manifestée en faveur de l'idée d'après laquelle on ne pourrait pas affirmer que le différend existe lorsque, entre les Parties, il n'y a eu aucun genre de négociation préalable avant la saisine de la Cour.

8. L'agent de l'Inde, Mme Chadha, a basé son affirmation suivant laquelle «there is no dispute between the Parties» sur le constat que les Iles Marshall n'ont pas soulevé la question lors de contacts bilatéraux avec l'Inde. Or, souligne-t-elle — en citant l'arrêt *Belgique c. Sénégal* de 2012 — la Cour considère qu'il est indispensable de rechercher si, «à tout le moins, … l'une des parties [a] vraiment [tenté] d'ouvrir le débat avec l'autre partie en vue de régler le différend»[19].

[19] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 445, par. 57.

Malheureusement la citation n'est ni pertinente ni appropriée puisque dans le cas *Belgique c. Sénégal*, la compétence de la Cour était explicitement subordonnée, d'après la clause compromissoire du traité pertinent, à la vérification que le différend n'avait pas pu être réglé par voie de négociation. Dans le cas présent, il aurait été bien plus pertinent de citer, en revanche, l'arrêt de 1998 en l'affaire *Cameroun c. Nigéria* dans lequel on voit la Cour souligner avec une grande netteté que :

> «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.»[20]

Et la Cour de préciser que l'exigence des négociations préalables ne se pose pas dans les cas (tel le présent) où la Cour «a été saisie sur la base de déclarations faites en vertu du paragraphe 2 de l'article 36 du Statut, déclarations qui ne contiennent aucune condition relative à des négociations préalables à mener dans un délai raisonnable»[21].

9. Je m'excuse beaucoup, Monsieur le président, de citer une énième fois cet important précédent, si à-propos et même décisif pour ce qui est de la question de savoir quand des négociations préalables à la saisine de la Cour sont requises. J'aurais très volontiers épargné à la Cour une telle répétition si je n'avais pas eu la surprise de constater que nos aimables contradicteurs l'ignorent (voire font semblant de l'ignorer). Ainsi, par exemple, le professeur Pellet se souvient et rappelle à la Cour l'arrêt *Mavrommatis* de 1924 de la CPJI[22] (où on lit que «avant qu'un différend fasse l'objet d'un recours en justice, il importe que son objet ait été nettement défini au moyen de pourparlers diplomatiques»[23]), mais le professeur Pellet néglige ce que la Cour a dit en 1998 quand elle a clairement écarté la condition relative à des négociations préalables en se référant spécifiquement aux cas de saisine du juge sur la base des déclarations

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[20] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 275, par. 56.

[21] *Ibid.*, par. 109.

[22] CR 2016/4, p. 38 (Pellet).

[23] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 15. Voir aussi *Droit de passage sur territoire indien (Portugal c. Inde), exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 148-149.

unilatérales faites en vertu du paragraphe 2 de l'article 36 du Statut, c'est-à-dire aux cas comme le nôtre.

10. Quant à M[e] Salve, non seulement il se range lui aussi du côté des partisans farouches des négociations préalables sans accorder la moindre considération à l'enseignement de la Cour sur lequel je viens d'insister : il en arrive même à soutenir carrément le contraire de ce que la Cour a dit. On a pu ainsi l'entendre affirmer que

> «[i]mplicit in the language of Article 36 (2) is the need for there to be more negotiations — however minimal — in which some claim is raised by one State, repudiated by the other, and an attempt albeit brief is made to resolve the dispute which has arisen»[24].

11. Mais un autre passage fort significatif de son analyse mérite d'être rappelé. C'est quand M[e] Salve affirme de manière apodictique la thèse d'après laquelle il serait prématuré de considérer qu'un différend a surgi «unless an attempt is made to resolve matters through the route of negotiation». Et ceci, ajoute-t-il, «whatever may be the jurisprudence»[25].

12. On dirait, Monsieur le président, que la Cour a devant ses yeux, non pas un seul litige, celui entre les Iles Marshall et l'Inde, mais deux, le second étant celui entre l'Inde et votre Cour au sujet de la place des négociations dans le règlement judiciaire des différends internationaux, voire au sujet de la notion même de différend international. En effet, quand M[e] Salve reproche aux Iles Marshall de simplifier à l'excès cette notion «suggesting that the fact that the Marshall Islands alleges, and India denies, that it is in breach of its obligations under customary international law, gives rise to a dispute»[26], c'est en fait à la Cour qu'il reproche d'adopter une notion trop simplifiée du différend international. Chacun sait, en effet, que d'après votre jurisprudence consolidée il y a différend justement lorsque l'on constate que «la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre»[27].

13. J'abandonne à l'appréciation de la Cour le différend que je viens de signaler entre la Cour et l'Inde et je reviens pour une dernière considération au différend entre l'Inde et

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[24] CR 2016/4, p. 36, par. 84 (Salve).

[25] *Ibid.*, p. 35, par. 81 (Salve).

[26] *Ibid.*, p. 33, par. 71 (Salve).

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

les Iles Marshall. Votre Cour a certes noté que le professeur Pellet a soutenu son propos concernant la nécessité (prétendue) de pourparlers diplomatiques préalables à la saisine de la Cour en faisant référence aussi à l'article 43 des Articles de la Commission du droit international (CDI) de 2001 : «l'Etat lésé qui invoque la responsabilité d'un autre Etat notifie sa demande à cet Etat». Comme si la «notification par l'Etat lésé» pouvait être assimilée aux négociations diplomatiques.

14. Monsieur le président, une telle assimilation ne se justifie d'aucune façon. La «notification par l'Etat lésé» ne saurait être conçue comme une condition de recevabilité des instances à introduire devant le juge international ou de compétence de celui-ci. Le commentaire des Articles est explicite à ce sujet : «Les présents articles ne traitent pas des problèmes de compétence des cours et tribunaux internationaux, ni en général des conditions de recevabilité des instances introduites devant eux.»[28] Autrement dit, les Articles en question ne concernent pas l'accès au règlement judiciaire des différends internationaux en matière de responsabilité internationale, ni ne prescrivent de condition spéciale à laquelle un tel accès serait subordonné. D'ailleurs rien n'exclut que la notification par l'Etat lésé se fasse, non pas préalablement à la saisine de la Cour, mais justement au moyen d'une telle saisine.

15. Monsieur le président, Mesdames et Messieurs de la Cour, ce fut un plaisir et un honneur de pouvoir présenter à la Cour ces remarques pour le compte des Iles Marshall. Je remercie vivement la Cour de son attention et je vous prie, Monsieur le président, de bien vouloir donner la parole à M. John Burroughs.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à M. John Burroughs.

Mr. BURROUGHS:

RESERVATION REGARDING FACTS OR SITUATIONS OF HOSTILITIES

I. The interpretation of reservations

1. Mr. President and Members of the Court, I start with some general comments concerning the methodology to be applied in interpreting declarations accepting the Court's jurisdiction.

[28] *Annuaire de la Commission du droit international*, 2001, vol. II, 2e partie, p. 327.

2. India confirms, and we agree, that behind the reservations at issue in this case "lies the principle of good faith governing relations between States"[29]. This principle finds expression, for example, in the *Nuclear Tests* cases. The Court considered that:

> "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created is respected."[30]

3. The Marshall Islands contends that the principle of good faith encompasses an understanding that India could not have intended to make a totally illusory declaration under Article 36, paragraph 2, of the Court's Statute.

4. We also agree that there is much of relevance relating to the methodology of interpreting declarations — and reservations thereto — in this Court's discussion of the topic in the *Fisheries Jurisdiction* case[31], the *Anglo-Iranian Oil* case[32], and the *Aegean Sea* case[33]. The Marshall Islands contends, however, that there is nothing in these decisions that supports India's proposition that: "This Court has always given the widest possible interpretation — at times even beyond the plain language — to reservations, rather than to read them down, narrowly reduced from their apparent textual width."[34] Indeed, in the case of India's declaration, that approach would lead to the "standing offer to the other States parties to the Statute which have not yet deposited a declaration of acceptance"[35] appearing to be substantial but in reality amounting to nothing at all.

5. What we do accept is that the most logical account of the thought processes involved in interpreting a declaration is in these words from *Fisheries Jurisdiction*:

> "The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the

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[29]CR/2016/4, p. 56, para. 24 (Salve).

[30]*Nuclear Tests* cases, *I.C.J. Reports 1974*, p. 268, para. 46; p. 473, para. 49. See, to the same effect, case concerning *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 60.

[31]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, at pp. 452-456.

[32]*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p.104 ("Court cannot base itself on a *purely* grammatical interpretation of the text."); emphasis added.

[33]*Aegean Sea Continental Shelf Case (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 23, para. 55 (similar).

[34]CR 2016/4, p. 55, para. 20 (Salve). India offers no authority in support of this proposition.

[35]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 290, para. 22.

> intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served."[36]

6. This quotation constitutes the fundamental structure of our argument, including our understanding that the positive words of the acceptance and the reservations must be read as a whole. Nonetheless there is additional jurisprudence in other decisions of the Court which we shall have occasion to cite as the argument on the reservations proceeds today.

7. Our discussion of India's reservations will proceed as follows. First, I will address India's fourth reservation concerning facts or situations of hostilities. Laurie Ashton will then address India's fifth reservation, concerning the timing of the filing of the Marshall Islands' Application and the purpose of its declaration, and the eleventh reservation concerning *ratione temporis*. She will be followed by Professor Christine Chinkin, who will address India's seventh reservation concerning multilateral treaties as well as certain issues concerning customary international law.

II. Reservation regarding facts or situations of hostilities

8. Mr. President, Members of the Court, the significance of the definition of the subject-matter of the dispute in considering a reservation's applicability was underlined in the Judgment on Preliminary Objection in *Obligation to Negotiate Access to the Pacific Ocean*[37] — a Judgment not mentioned by counsel for India in their oral pleadings last week. The subject-matter of the dispute in this case is the existence, nature and application, as spelled out in all elements of the Marshall Islands' submissions, of the obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects. It is not whether possession, threat, and possible use of nuclear weapons is permitted under international law. Consequently, the Court's consideration of the dispute is not barred by India's fourth reservation concerning, and I quote:

> "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

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[36] *Fisheries Jurisdiction*, para. 49, cited in CR 2016/4, p. 50, para. 2 *(g)* (Salve).

[37] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment of 24 September 2015*, p. 19, para. 50.

> similar or related acts, measures or situations in which India is, has been or may in future be involved".

9. Nothing that India said last week undermined the Marshall Islands' analysis put forward in its Memorial and in its opening oral pleading. Reading the words of the reservation in a natural and reasonable way, the exclusion applies to disputes that concern concrete *facts or situations*, past, present, or future, involving use of force. Words take colour from their neighbours. The phrases "disputes relating to or connected with" and "other similar or related acts, measures or situations" must be read in conjunction with the central element of "facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression".

10. The immediate historical setting for adoption of the reservation, the case concerning the *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*[38], is a confirmation of this reading, not a basis to "scale down" the text as counsel for India indicated[39]. If India had wanted to exclude "any matters pertaining to national security and self-defence", to use the phrase employed in India's Counter-Memorial[40], it could have done so. But, as we said last week, that is not the reservation that India made. Rather than crafting the reservation from whole cloth, India borrowed it from El Salvador's declaration deposited nearly a year earlier[41]. The Marshall Islands notes that El Salvador deposited its declaration about four years after a specific conflict, the Football War of July 1969 between El Salvador and Honduras.

11. The *Aegean Sea Continental Shelf* case cited by India[42] exemplifies consideration of historical circumstance and context in interpretation of a reservation. In that case, under the principle of reciprocity, Turkey relied on a reservation in Greece's instrument of accession to the General Act of 1928. The Court looked to circumstances surrounding the inclusion of the reservation, including legislative history, and to contemporaneously adopted instruments, and rejected a "purely grammatical" interpretation of the reservation[43]. It rather interpreted the

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

[39] CR 2016/4, p. 54, para. 17 (Salve).

[40] CMI, p. 28, para. 59.

[41] See *International Court of Justice, Yearbook 1973-1974*, p. 57.

[42] CR 2016/4, p. 52, citing *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 30, para. 73.

[43] *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 24, para. 55.

reservation in accordance with Greece's intention. To aid in this exercise, the Court asked Greece to furnish it with any available evidence of explanations of the instrument given at the time[44]. *Aegean Sea* involved close consideration of such matters of circumstance and context. It does not in any way state, or in any way support, India's assertion that the Court "has always given the widest possible interpretation" to reservations[45]. India, moreover, has not furnished the Court with any materials that detract from the explanation of the circumstances of adoption of the reservation provided by the Marshall Islands.

12. Mr. President, Members of the Court, in its Memorial and its opening oral pleading, 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 still would not be excluded. That is because the subject-matter of the dispute concerns the obligation to pursue in good faith and conclude negotiations on nuclear disarmament in all its aspects, not the legality of possession, "deterrence", and use or threatened use of nuclear weapons.

13. Counsel for India last week objected, in substance, that in making this argument the Marshall Islands is selectively abandoning its claims relating to India's programme of quantitative expansion, diversification, and improvement of its arsenal[46]. That is not so. This programme is one component of India's conduct of which the Marshall Islands complains. In the Marshall Islands' view, the obligation to pursue negotiations on cessation of the nuclear arms race is an aspect of the obligation to pursue in good faith negotiations on nuclear disarmament in all its aspects, and the implementation of both obligations is subject to a requirement of good faith. The Marshall Islands claims that the obligation to pursue in good faith negotiations on nuclear disarmament in all its aspects accordingly entails restrictions on India's programme.

14. The, at this point theoretical, question of whether the obligation to pursue in good faith negotiations on nuclear disarmament in all its aspects may possibly entail restrictions on India's programme is strictly dependent on the interpretation to be given to the scope and content of the

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[44] *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 29, para. 69.

[45] CR 2016/4, p. 55, para. 20 (Salve).

[46] *Ibid.*, p. 22, paras. 15-16; p. 55, para. 22 (Salve).

obligation. An answer to that question can only be given at the merits stage. Doing otherwise would imply determining — at this preliminary stage — the dispute or some elements thereof[47]. Article 79 (9) of the Rules of Court provides for the consequences of such a situation and stipulates that the case is to proceed to the merits.

15. In conclusion, the language of India's fourth reservation does not exclude jurisdiction over the present dispute.

16. I now ask, Mr. President, that you give the floor to my colleague Laurie Ashton.

Le PRESIDENT : Merci. Je donne 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 again on behalf of the Marshall Islands.

2. In its oral pleadings last week India maintained that reservations (5) and (11) in its optional clause declaration preclude jurisdiction here.

3. Reservation (5) addresses acceptance of jurisdiction "exclusively for or in relation to the purposes of such dispute" or "less than 12 months prior to" filing an application[48].

4. Reservation (11) is the *ratione temporis* reservation with a critical date of September 1974[49].

5. And, for the first time, India alleged in its oral pleadings that, based on reciprocity, the Marshall Islands' own *ratione temporis* reservation applies, with a critical date of 1991.

6. I will respond briefly to each of these reservations in turn.

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[47]See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

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

[49]See CMI, paras. 83-87; MMI, Ann. 5.

India's reservation (5): the exclusivity and timing of a consent to jurisdiction

7. Mr. President, Members of the Court, in ~~its~~ oral pleadings, India argued that the RMI's Application was filed "a day too early"[50]. That is incorrect, because India is disregarding the words "less than" in its declaration. Reservation (5) excludes jurisdiction only where the acceptance of compulsory jurisdiction was "less than 12 months prior to the filing of the application . . .".

8. Under the *Right of Passage* case, the consensual bond between India and the RMI became effective on the 24***th*** ***of*** April 2013, when the RMI deposited its declaration[51]. And under a natural and reasonable interpretation, 24***th*** ***of*** April 2013 is not *less than* 12 months prior to 24***th*** ***of*** April 2014.

9. Similarly, India attempts to read out of its reservation the word "exclusively" in the phrase "exclusively for or in relation to the purposes of such dispute". When the word is included, clearly the reservation does not preclude jurisdiction.

10. India also alleges finally that "it would be unfair" for this case to proceed, ***given*** the timing of the RMI's Application[52]. But under the reasoning of the *Right of Passage* case[53] and the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*[54], there is nothing unfair about the RMI's acceptance of India's "standing offer" to settle their legal disputes before this Court.

India's reservation (11): the *ratione temporis* reservation

11. I turn now to India's *ratione temporis* reservation[55], and narrow the issues to just those that remain disputed.

12. In our oral pleadings, I recounted that neither Party here alleges that India's customary international law obligations pre-date 1974. Likewise, neither Party alleges that the RMI's legal rights pre-date 1974.

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[50]CR 2016/4, p. 56, para. 26 (Salve).

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

[52]CR 2016/4, p. 56, para. 24 (Salve).

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

[54]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 291, para. 25.

[55]See MMI, Ann. 5.

13. In the RMI's view, this is because the customary international law obligation was first recognized in 1996 in the Court's Advisory Opinion. In India's view, this is because it has no customary international law obligation.

14. But India also makes an alternative argument that, because the RMI Application states that the customary obligation to negotiate is "enshrined" in Article VI, it must also pre-date it. This is not so. Read as ***a*** whole, the Application clearly contemplates the development of the customary international law obligation *after* the NPT, not before it. For example, the Application provides that "[t]he Court's declaration is an expression of customary international law *as it stands today*"[56]. And it continues:

> "This is consistent with the view expressed by President Bedjaoui in his declaration [where he said]: 'Indeed, it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result *has now, 50 years on, acquired a customary character*'."[57]

15. In any event, if India wishes to argue that the customary legal obligation, which India denies, existed already at the time of the NPT, then it could do that. But whether that is correct is a merits question.

16. Turning now to the wording of the reservation. In its oral pleadings, India did not allege that the actual dispute here pre-dates 1974. So the Parties seem to agree that the actual dispute does not pre-date 1974.

17. India focused its oral pleadings, however, on what *it* characterizes as the causes, origins or foundations of the dispute, and alleged that those pre-date 1974. Notably, the issue of the "causes" and "origins" of a dispute has been addressed already by the *Right of Passage* case, which considered which facts or situations were ~~**the**~~ "the real *cause*" or "the source" of Portugal's dispute with India[58]. In this context "source" and "origin" are quite similar and, in this regard, India's reservation (11) is no broader than that at issue in *Right of Passage*.

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[56] Application of the Marshall Islands (AMI), p. 15, para. 44.

[57] *Ibid.*, *citing* President Bedjaoui's declaration in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 274, para. 23 (referring to the 50 years that had then elapsed since the adoption of the United Nations General Assembly's first resolution in 1946); emphasis added.

[58] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 35.

18. The remainder of India's oral argument had essentially three prongs:

(a) first, India contended, again mistakenly, that the RMI's claims are based on India's failure to join the NPT[59];

(b) second, India made the new and contradictory allegation that it demonstrated nuclear capabilities in May 1974, and that those capabilities are the cause, origin or foundation of this dispute; and

(c) third, India attempted to contort reservation (***11***) into applying to the origins *of the* causes of the dispute.

19. None of these three prongs preclude jurisdiction.

Prong 1

20. First, India alleged in its oral pleadings that "the foundation of the dispute as per the Application filed by the Marshall Islands lies in India's refusal to join the NPT"[60].

21. This is not true. The RMI's Application does not seek to compel India to join the NPT, nor does the Application claim that India's failure to join the NPT is wrongful.

22. The RMI's claims are grounded in India's breach of customary international law. This is perhaps best demonstrated by the remedies that the Marshall Islands seeks. I will not repeat those here — but note that all of them are based on customary international law[61].

Prong 2

23. Second, India alleged in its oral pleadings that its nuclear capability "was demonstrated for the first time in May 1974"[62].

24. This is very surprising. India's official statement to the United Nations Conference of the Committee on Disarmament the following year, in 1975, described that event as a "peaceful nuclear explosion experiment"; claimed that it merely wanted to keep abreast of this technology

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[59]CR 2016/4, p. 59, para. 40 (Salve).

[60]*Ibid*.

[61]AMI, pp. 25-26.

[62]CR 2016/4, p. 59, para. 40 (Salve).

for purposes like mining and earth-moving; and reiterated that India "had no intention of producing nuclear weapons"[63].

25. But even if India had begun a nuclear weapons programme prior to the critical date, and then misrepresented that to the world community, the reservation would still not apply. This is because the beginning of India's nuclear weapons programme — whenever that might have been — is not the foundation, cause or origin of this dispute. It is India's actions after the legal obligation was established that are the foundation, cause and origin of this dispute.

Prong 3

26. Third, under India's reasoning, the origin of *the cause of* the dispute is at issue. But that is not what the reservation says.

27. To see this most clearly, we focus on the dispute at issue, which is whether India is in breach of its customary legal obligation to pursue in good faith nuclear disarmament. The origins of this dispute are the 1996 Advisory Opinion *coupled with* India's conduct thereafter, when it was on notice of the universality of that obligation.

28. India blurred this distinction in its oral pleadings, arguing that the origin of the customary rule is at issue[64]. But the origin of the customary rule is the origin of the cause of the dispute. If the reservation worked that way, no dispute could ever fit within India's consent, because every cause or origin would have its own cause or origin.

29. For example, the cause or origin of this dispute is the breach of the obligation recognized in the 1996 Advisory Opinion. By India's reasoning, the origin of that cause goes back to the NPT formation. The origin of the NPT dates back to the first United Nations General Assembly resolution, which itself has an origin in the formation of the United Nations, which then has origins in the League of Nations, etc.

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

[64]CR 2016/4, pp. 59-60, paras. 44-48 (Salve).

30. But reservation (11) must not be read to render India's consent meaningless, for as India confirms, behind the reservations "lies the principle of good faith governing relations between States"[65].

31. In summary, the dispute in this case is whether India is in violation of its customary legal obligation to negotiate in good faith nuclear disarmament. The foundation, causes and origins of this dispute are the Marshall Islands' right, India's obligation and India's conduct in breach of that obligation. None of those existed prior to 1974. For these reasons, jurisdiction is not excluded by India's *ratione temporis* reservation.

The Marshall Islands' *ratione temporis* reservation

32. I turn now briefly to India's new argument that, by reciprocity, the Marshall Islands' own *ratione temporis* reservation precludes jurisdiction[66].

33. This is a surprising argument because it is somewhat contradicted by India's Counter-Memorial. There, India compared its current reservation to its prior 1940 reservation to allege that its current reservation is wider. In so doing, India described the language of its prior 1940 temporal reservation as "a much narrower temporal reservation" because it only covered disputes after the critical date "with regard to situations or facts subsequent to the same date"[67].

34. Such a narrow reservation, India reasoned, was no bar to jurisdiction in the *Right of Passage* case — nor impliedly here — because it was limited to the situations or facts that were the source of Portugal's dispute. In other words, it did not include the foundations or origins language.

35. But India's much narrower 1940 reservation contains the exact language of the Marshall Islands' temporal reservation. So by India's own reasoning, the Marshall Islands reservation does not bar this case.

36. And even setting aside India's reasoning, the RMI temporal reservation does not preclude jurisdiction. Because there cannot be a dispute until there is a right, and facts or situations prior to the date on which the right came into existence cannot be the source or real cause of that

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[65]CR 2016/4, p.56, para. 24 (Salve).

[66]*Ibid.*, p. 59, para. 42 (Salve).

[67]Counter-Memorial of India (CMI), p. 36, para. 85.

dispute[68]. Until the right exists, such prior facts or situations are unattached and unrelated to any legal dispute. This may explain why India did not mention the RMI temporal reservation in its letter to the Court disputing jurisdiction or in its 43-page Counter-Memorial, and instead raised it for the first time last Thursday.

This completes my pleading. I thank the Court for its attention and would ask you, Mr. President, to please give the floor to my colleague, Professor Christine Chinkin.

Le PRESIDENT : Merci, Madame. Je donne la parole à Mme la professeure Chinkin.

Ms CHINKIN: Thank you.

MULTILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW

1. Mr. President and Members of the Court, in this short reply I will reply to the arguments put forward by India last Thursday. I will first address India's reservation No. 7, the multilateral treaty reservation, and second, issues of customary international law, in particular the persistent objector principle.

2. India's multilateral treaty reservation excludes from jurisdiction "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". This reservation does not exclude this dispute with the Marshall Islands from the Court's jurisdiction.

3. In the *Fisheries Jurisdiction* case the Court explained that conditions or reservations in declarations "operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively."[69] Nevertheless, it also observed in *Right of Passage* with respect to the then Indian Declaration accepting the jurisdiction of the Court, that it — the declaration — "does not proceed on the principle of excluding from that acceptance any given disputes. It proceeds in a positive manner on the basis of indicating the disputes which are included within that acceptance"[70]. By its terms India is

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[68] *Right of Passage (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 34.

[69] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 44.

[70] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 34.

accepting the Court's jurisdiction except over those disputes that concern "the interpretation or application of a multilateral treaty" unless all treaty parties are also parties to the case before the Court or the Indian Government agrees to jurisdiction.

4. The last condition can be discounted; so too can the condition that the case "concerns the application" of a multilateral treaty, that is Article VI of the NPT. In its oral argument, India asserted that determining whether the NPT applies only as between the parties or is "*erga omnes* to all nations" would involve two steps: first that the Treaty must be construed so as to establish the precise scope of Article VI and its relation with the other provisions of the NPT; and second, whether it is based on pre-existing principles of customary international law or is meant to found the basis of an obligation *erga omnes*[71]. From this Mr. Salve concluded that the dispute concerns the application of the NPT.

5. However the NPT cannot be applied to India, a non-party, and those steps are irrelevant with respect to a dispute with it; Article 34 of the Vienna Convention on the Law of Treaties, 1969 is clear: "A treaty does not create either obligations or rights for a third State without its consent." The case cannot concern the application of the NPT, or its scope; it concerns the application of the principle of customary international law 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.

6. Contrary to India's assertion[72], this is supported by the Court's decision in *Nicaragua*, where the United States differently worded multilateral treaty reservation was in issue. The United States excluded disputes "arising" under a multilateral treaty "unless all parties to the treaty affected by the decision are also parties to the case". The Court held that since Nicaragua's claim was not based solely on multilateral treaties but also on customary international law, "the claim . . . would not . . . be barred by the multilateral treaty reservation"[73]. The Court could not dismiss Nicaragua's claims under customary and general international law, "simply because such principles

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[71]CR 2016/4, p. 57 (Salve).

[72]*Ibid.*

[73]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 425, para. 73.

have been enshrined in the texts of the conventions relied upon by Nicaragua"[74]. After excluding claims based upon the multilateral treaties applicable in that case, the reservation could have "no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply"[75]. The case now before the Court is simpler in that there is no parallel treaty cause of action.

7. Inspired by Sir Elihu Lauterpacht here I have to say that "[t]here is really nothing more that needs to be said on this point"[76].

8. But, says India, its reservation also precludes jurisdiction where the dispute involves interpretation of a multilateral treaty[77], which is the case here because the Marshall Islands relies on the interpretation of the Treaty given in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* and therefore, by the process of precedent, this case too relies on the interpretation of Article VI. India claims support for this argument from the Marshall Islands' own assertion that the customary international law obligation is "rooted" in Article VI[78].

9. India seems to assume that describing a rule of customary international law as being rooted or enshrined in Article VI is equivalent to saying that Article VI alone is responsible for that customary rule. This is incorrect. A treaty provision which did not codify a customary rule when the treaty was concluded, because at that time there was no such customary rule, can later, as the rule emerges and crystallizes, come to embody or enshrine that customary rule, which can then be said to be rooted in the treaty. As this Court observed in the *Libya/Malta Continental Shelf* case: "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing [from] them"[79].

10. The Marshall Islands has never claimed that Article VI of the NPT codified a pre-existing customary rule. Rather, its position is that a parallel rule of customary international law has developed through a dynamic process, which, in the *North Sea Continental Shelf* cases, the

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[74]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 425, para. 73.

[75]*Ibid.*, p. 38, para. 56.

[76]*Aerial Incident of 10 August 1999 (Pakistan* v. *India)*, CR 2000/1, 3 April 2000, para. 55 (Lauterpacht).

[77]CR 2016/4, pp. 57-58.

[78]CR 2016/4, p. 58, para. 36.

[79]*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985*, pp. 29-30, para. 27.

Court recognized as "perfectly possible"[80], with the result that Article VI now embodies or enshrines that customary rule. Article VI as a fundamentally norm-creating provision has played a part in that process, but so too have other institutions and actions over the years, both before and after the adoption of the NPT, such as the acts and statements of States, United Nations General Assembly and Security Council resolutions ***and*** the NPT Review Conferences. The Court referred similarly to such practices and instruments in determining the applicable rule of customary international law in *Nicaragua*[81].

11. This Court, of course, also played a significant part in this process through its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where it opined that Article VI *formally* concerns the then 182 States parties to the NPT[82]; if the Court had meant that the obligation binds only States parties to the NPT, it need not have added "formally", a word implying a distinction between the treaty rules formally applying to States parties and a rule of customary international law binding non-party States. This view is reinforced by the Court's further statement that "virtually the whole of the international community" has been involved in these processes and that "it remains without any doubt an objective of vital importance to the whole of the international community today"[83]. Nor is the unanimous point (2) F in the *dispositif* limited to States parties, thereby recognizing the parallel rule of customary international law. The Marshall Islands' claim is that India is in breach of its obligations under this rule of customary international law. Thus this case does not concern the "application" or "interpretation" of the NPT, Article VI. Accordingly, the multilateral reservation does not exclude jurisdiction.

12. India argues, however, that if there is such a rule it is not bound by it because it has declined to become a party to the NPT and that this constitutes persistent objection[84].

13. The Marshall Islands does not claim customary international law status for the NPT as a whole. It claims only that there is a norm of customary international law requiring the pursuit of

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[80]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 41, para. 71.

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

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

[83]*Ibid.*, p. 265, para. 103.

[84]CR 2016/4, p. 11, p. 16.

negotiations in good faith and their conclusion. India points in particular to Annex 20 of India's Counter-Memorial which describes what India considers to be the deficiencies of Article VI[85]. But this was in 1968 and set against this is the repeated emphasis by India of its support for negotiations towards disarmament, which, as I have just reiterated, is the essence of the customary international obligation in question. For instance, counsel recalled last Thursday that on 2 April 1954, the then [Indian] Prime Minister "was the first leader" to call "for negotiations for the prohibition and elimination of nuclear weapons"[86]. This stance continues through India's claims to be "the only nuclear-weapon State committed to the negotiation of a Nuclear Weapons Convention"[87]. With regard to its public stance on the issues, it has consistently voted in favour of the United Nations General Assembly resolutions on the follow-up to the Advisory Opinion, which call upon States immediately to commence multilateral negotiations. It is inconsistent for India to argue simultaneously that it is a persistent objector and to point to its record of support for the very obligation at question in the Marshall Islands' claim.

14. Accordingly, even if the principle of a persistent objector to the emergence of a rule of customary international law is accepted in contemporary international law and can apply where a communitarian norm is involved, it does not prevent India being bound by this rule.

15. Finally I note that, as a sort of codicil to his comments, Professor Pellet accepted the conclusion of the Court in the Advisory Opinion that all States are under this obligation to pursue negotiations in good faith and their conclusion, thus also implicitly accepting its status as customary international law[88].

16. The RMI is not "hopelessly vague" as to the steps required of States under this rule of customary international law as alleged by counsel for India[89]; the existence of the rule, its scope and substance are not matters of an exclusively preliminary matter and must be considered at the merits stage of the case.

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[85]CR 2016/4, p. 15, para. 6.

[86]*Ibid.*, p. 15, para. 5.

[87]*Ibid.*, p. 17, para. 9.

[88]*Ibid.*, p. 42, para. 12.

[89]*Ibid.*, p. 33, para. 70.

17. This completes my submissions. I thank the Court for its kind attention and ask you, Mr. President, to invite my colleague Professor Paolo Palchetti to the podium.

Le PRESIDENT : Merci, Madame. Je donne la parole au professeur Palchetti.

Mr. PALCHETTI:

ABSENT THIRD PARTIES

1. Mr. President, Members of the Court, I will be developing four points in response to India's submissions of Thursday. All relate to the question of whether this Court can exercise its jurisdiction in the present case in the absence of the other States possessing nuclear weapons.

2. I start my first point, which concerns the test to be used to determine whether the *Monetary Gold* principle applies to the present case?

I. The test for the applicability of *Monetary Gold*

3. India did not substantially develop this issue. However, at a certain point Professor Pellet appears to suggest that the test is different from the one indicated by the Marshall Islands. He suggested that, when a judgment may have implications for the legal position of a third State, that State must be regarded as an indispensable party. Professor Pellet relied on the opinions of Judge Ago and Judge Jennings in *Nauru*, he said that these judges had already responded to the argument presented by Marshall Islands on Monday[90].

4. It is already a challenging task to rebut Professor Pellet. But now Professor Pellet wants me to rebut also Judge Ago and Judge Jennings. Fortunately, I do not have to respond to Judge Ago and Judge Jennings. The Court has already done it. The test developed by the Court in *Nauru* is different from that suggested by these two eminent judges. Their opinions are dissenting opinions.

5. As for my friend Professor Pellet, I would say that at the end he appears to join the majority in *Nauru*. He recognizes that the key question for considering a third State an indispensable party is whether the determination of the responsibility of the third State is a

[90]CR 2016/4, p. 44 (Pellet).

precondition, "un préalable", in order to determine the responsibility of a respondent State[91]. If this is the case, it can be concluded that both Parties agree about the test to be applied in the present case in order to determine the applicability of the *Monetary Gold* principle.

II. The *erga omnes* character of the obligation allegedly breached and the *Monetary Gold* principle

6. On the question of the *erga omnes* character of the obligation to negotiate, my second point, the Agent of India reiterated an argument which is also contained in India's Counter-Memorial[92]. Ms Chadha contended that the Marshall Islands cannot rely on the *erga omnes* character of this obligation in order to establish the jurisdiction of the Court on States who are not parties to the dispute[93]. But the Marshall Islands has never claimed that the Court should exercise its jurisdiction over States who are not parties before the Court. The Marshall Islands' position is that the Court has jurisdiction over the dispute between the Marshall Islands and India and that it should exercise its jurisdiction irrespective of whether the Court's judgment may have some implications for the interests of third States.

7. India's Agent also insisted that the dispute is not a bilateral one because of the *erga omnes* character of the obligation allegedly breached[94]. Once again we agree, but this is irrelevant. The *omnes* are not indispensable parties. The *Monetary Gold* principle cannot be applied simply because of the *erga omnes* character of the obligation at issue between the Parties.

III. The determination of the responsibility of the other States possessing nuclear weapons is not a precondition for the determination of the responsibility of India

8. I move now to what appears to be India's main argument. India argues that this Court cannot determine whether India has complied with its obligation to engage in good faith negotiation without having first, as a preliminary matter, determined whether the other States possessing nuclear weapons have complied with this obligation[95].

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[91]CR 2016/4, p. 44 (Pellet).

[92]Counter-Memorial of India (CMI), p. 21, para. 40.

[93]CR 2016/4, p. 11 (Chadha).

[94]*Ibid.*

[95]*Ibid.*, pp. 44-45 (Pellet).

9. To support its argument, India attempts to divert the focus from India's conduct to the conduct of all the States possibly involved in a negotiation on nuclear disarmament. It substantially describes the present dispute as one in which the Court is called upon to determine who is responsible for the absence of a multilateral convention on nuclear disarmament, whether it is India, any other State possessing nuclear weapons or whether India and all the nuclear-armed States jointly[96].

10. Mr. President, this is not the subject-matter of the present dispute. The subject-matter is exclusively India's responsibility for its unlawful conduct in respect to nuclear disarmament. A State may breach its obligation to negotiate in different ways. It may reject any invitation to start a negotiation on nuclear disarmament. It may vote against any proposal aimed at setting up a process within the context of an international organization. It may undertake conduct which hinders, rather than supports, the objective to achieve a negotiation. In all these cases, the conduct of the State concerned may be assessed on its own, without any need of a prior determination of the legal position of any third State.

11. In the present case, the greatest part of the factual allegations underlying the Marshall Islands' claims concerns acts and omissions which are attributable exclusively to India. An assessment of these acts is sufficient to show that India has breached its obligation to engage in good faith negotiation. There is no need to assess, as a preliminary matter, the conduct of third States.

IV. The relief sought by the Marshall Islands

12. This brings me to my last point which concerns the relief sought by the Marshall Islands in the present case. India insists in arguing that any judgment that this Court might render against India could not be enforced because of the absence of indispensable third parties[97]. According to India, this impossibility to enforce the judgment would justify the application of the *Monetary Gold* principle.

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[96] CR 2016/4, p. 45 (Pellet).

[97] *Ibid.*, p. 11 (Chadha); p. 46 (Pellet).

13. Here again, there is no need to believe that the relief sought by the Marshall Islands cannot be enforced without the same order being directed to all the other States possessing nuclear weapons. Professor Pellet is right when he says "[o]n ne négocie pas tout seul"[98]. But the Marshall Islands does not ask the Court to order India to conclude a multilateral convention on nuclear disarmament. It asks to order India to take all steps necessary to comply with its obligations, including, if necessary, by taking the initiative of pursuing negotiations aimed at the conclusion of a convention on nuclear disarmament. There is a sea of difference. The obligation to take the initiative to negotiate and to pursue in good faith negotiation can be enforced against a single State, regardless of the positions and actions of the other States possessing nuclear arsenals.

14. Mr. President, Members of the Court, I thank you for your attention and ask you to give the floor to the Co-Agent, Mr. Tony deBrum, for his closing remarks.

Le PRESIDENT : Merci. Je donne la parole à S. Exc. M. Tony deBrum, coagent des Iles Marshall.

Mr. deBRUM:

CONCLUDING REMARKS

1. Mr. President, Members of the Court, as I stated last week, the Marshall Islands has come before this Court because of its belief in, and reliance upon, the rule of law.

2. I wish to briefly reply to some of the comments that India made in its oral pleadings.

3. First, with regard to the Marshall Islands' purpose in accepting compulsory jurisdiction, India has asked the Court to infer wrongful intent on the part of my country. Such an inference would be untrue. And I personally am the signatory on that declaration. India's unmoored accusations that this dispute is "perverse", "artificial", "disingenuous", "contrived" or an "abuse of process", are both wrong and unsupported.

4. Second, the dispute in this case is over whether India is in breach of a customary international legal obligation to pursue in good faith negotiations leading to nuclear disarmament and, by implication, an end to the nuclear arms race. The RMI has not alleged that India's United

[98]CR 2016/4, p. 45, para. 20 (Pellet).

Nations voting record is a violation of its obligations. The RMI has alleged that India is failing to pursue in good faith the required negotiations, including by taking significant steps contrary to its obligations. And actions speak louder than words.

5. Even on voting, however, India must agree that the RMI has been voting in the United Nations General Assembly since 2013 in favour of resolutions calling for immediate commencement of negotiations for a nuclear weapons convention[99] and those calling for "follow-up to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*"[100]. But India criticized us for abstaining or not being present to vote in some prior years. I will not get into the details of my country's modest resources and staffing for the United Nations General Assembly, or the evolution from our early emergence from United Nations Trusteeship to our present voting. Suffice it to say, Mr. President, that the RMI is fully committed to using whatever limited voice it has in that forum to achieve nuclear disarmament. And it must also be said that the forum at issue — the United Nations General Assembly — has not to date been successful in achieving significant progress on nuclear disarmament. Instead, it has been hampered by the failure of States possessing nuclear weapons to pursue in good faith their legal obligations to negotiate.

6. Third, India agreed in oral pleadings that the "horrific" suffering of my country caused by nuclear weapons was a "catastrophe"[101]. But India then emphasized that it had no role in that catastrophe. That statement misses the point entirely. The RMI's horrific suffering motivates it to bring these proceedings against the nuclear giant that India has become, because the RMI knows first-hand the devastation that India's nuclear arsenal can cause. And it is a nuclear arsenal that India is proudly and rapidly enhancing and diversifying. Such conduct is the opposite of satisfying a legal obligation to negotiate in good faith nuclear disarmament.

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[99]E.g., UNGA resolution A/RES/68/32, 5 Dec. 2013 (137-28-20).

[100]E.g., UNGA resolution A/RES/70/56, 7 Dec. 2015 (137-24-25).

[101]CR 2016/4, p. 9, para. 5 (Chadha).

7. Fourth, one must pause when a nuclear giant, such as India, tells this Court that this case brought by the Marshall Islands, with its exceedingly obvious vulnerabilities, is for political rather than legal purposes. One must pause because the allegation is implausible. Outside of the law, conduct dependent only on political purposes often results in "might makes right". And we should not have to compare India, with a GDP of 2 trillion dollars and ranked 9th in the world, with the RMI, ranked 192nd out of 194 States, joined at the bottom by Kiribati and Tuvalu, two of our Pacific Island neighbours with whom India suggests we negotiate worldwide nuclear disarmament. In this Court, vulnerable States stand as equals with the mighty, under the law.

8. Fifth, and finally, India's argument that the RMI should take the lead in negotiations rather than seeking to hold India, which is engaged in an all-out nuclear arms race, accountable for its legal obligations, rings hollow. And because nuclear weapons undeniably respect no national borders, India's arsenal endangers the very existence of humankind.

9. Mr. President, Members of the Court, resolution of this dispute is of the highest importance to the Marshallese. The time is approaching when those who bear witness to the nuclear explosions will no longer be alive. Given what we know, our commitment to seek judicial settlement of this very real dispute is unqualified.

10. Before reading the final submissions of the Marshall Islands, I would like to express my sincere appreciation for the Court's time, attention and expertise on these critically important matters of international law.

11. Mr. President, Members of the Court, I will now present the Marshall Islands' final submissions.

"The Marshall Islands respectfully requests the Court:

(a) to reject the objections to its jurisdiction of the Marshall Islands' claims, as submitted by the Republic of India in its Counter-Memorial of 16 September 2015; ***and***

(b) to adjudge and declare that the Court has jurisdiction over the claims of the Marshall Islands submitted in its Application of 24 April 2014."

I thank you, Mr. President, Members of the Court.

Le PRESIDENT : Excellence, je vous remercie. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République des Iles Marshall.

La Cour se réunira de nouveau en cette affaire le mercredi 16, à 10 heures, pour entendre le second tour de plaidoiries de l'Inde.

Je vous remercie. L'audience est levée.

L'audience est levée à 11 h 40.

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