Corrigé
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*CR 2016/2*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2016**

***Public sitting***

***held on Tuesday 8 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.* Pakistan)**

***Jurisdiction and Admissibility***

**VERBATIM RECORD**

**ANNÉE 2016**

***Audience publique***

***tenue le mardi 8 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. Pakistan)**

***Compétence et recevabilité***

**COMPTE RENDU**

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|---|---|---|
| *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,

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*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,

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*as Technical Adviser.*

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

S. Exc. M. Tony deBrum,

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

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

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Mme Amanda Richter, membre du barreau d'Angleterre,

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

*comme conseiller technique*.

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

La Cour se réunit aujourd'hui pour entendre les plaidoiries des Iles Marshall sur les questions de la compétence de la Cour et de la recevabilité de la requête 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. Pakistan)*. Il me revient de relever d'emblée que, par lettre datée du 2 mars 2016 et reçue au Greffe le même jour, S. Exc. M. Moazzam Ahmad Khan, coagent de la République islamique du Pakistan, a notamment indiqué que son gouvernement «a eu l'honneur de déposer à la Cour un contre-mémoire détaillé à l'appui de sa position, à savoir que la Cour n'a pas compétence pour connaître de la présente demande des Iles Marshall et que la requête introduite par celles-ci est irrecevable» ; et a également fait savoir à la Cour que son gouvernement «n'ayant rien à ajouter aux déclarations et conclusions qu'il a formulées dans son contre-mémoire, il estime que sa participation à la procédure orale n'apporterait aucun nouvel élément utile».

Dans ces conditions, la procédure orale se limitera dans cette affaire à une séance de trois heures, ce matin, à l'issue de laquelle les Iles Marshall présenteront leurs conclusions finales sur les questions de la compétence de la Cour et de la recevabilité de la requête.

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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 3 de l'article 31 du Statut et elles ont désigné M. Mohammed Bedjaoui comme juge *ad hoc*.

Le Pakistan ne s'est pas prévalu du même droit.

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 été désigné juge *ad hoc* en d'autres affaires dans lesquelles il a fait des déclarations solennelles, il lui faut, conformément au paragraphe 3 de l'article 8 du Règlement de la Cour, en faire une nouvelle en la présente espèce.

J'ai rappelé hier, en ouvrant les audiences dans l'affaire entre les Iles Marshall et l'Inde, la carrière marquante et les qualifications éminentes de M. Bedjaoui.

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.

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.

* *

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 islamique du Pakistan, 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 le Pakistan le 12 septembre 1960 (déclaration déposée auprès du Secrétaire général le 13 septembre 1960) et par elles-mêmes le 15 mars 2013 (déclaration déposée auprès du Secrétaire général le 24 avril 2013).

Par une note verbale en date du 9 juillet 2014, le Gouvernement pakistanais a notamment indiqué que «le Pakistan [était] d'avis que la Cour internationale de Justice n'a[vait] pas compétence …, et consid[érait] la requête … comme irrecevable», et a prié la Cour de «rejeter *in limine* ladite requête».

Par ordonnance du 10 juillet 2014, le président de la Cour a estimé, en application du paragraphe 2 de l'article 79 du Règlement, que, dans les circonstances de l'espèce, il était nécessaire de régler en premier lieu les questions de la compétence de la Cour et de la recevabilité

de la requête, et qu'en conséquence la Cour devrait statuer séparément, avant toute procédure sur le fond, sur ces questions ; à cette fin, il a décidé que les pièces de la procédure écrite porteraient d'abord sur lesdites questions et a fixé au 12 janvier 2015 et au 17 juillet 2015, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire des Iles Marshall et d'un contre-mémoire du Pakistan. Le mémoire des Iles Marshall a été déposé dans le délai ainsi prescrit.

Par note verbale en date du 2 juillet 2015, le Pakistan a sollicité une prorogation de six mois du délai fixé pour le dépôt de son contre-mémoire. Par lettre en date du 8 juillet 2015, les Iles Marshall ont indiqué qu'elles pouvaient consentir à une extension du délai de trois mois. Par ordonnance du 9 juillet 2015, le président de la Cour a reporté au 1er décembre 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 coagents, conseils et avocats de la République des Iles Marshall.

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

Mr. deBRUM:

**OPENING STATEMENT**

1. Mr. President, Members of the Court, it is again a privilege and honour to appear before you as Co-Agent for the Republic of the Marshall Islands, this time in the case of the Marshall Islands v. Pakistan.

2. Yesterday was a beautiful morning here in The Hague that featured a picture-perfect snowfall. As a tropical State, the Marshall Islands has experienced "snow" on one memorable and devastating occasion, the 1954 Bravo test of a thermonuclear bomb that was one thousand times the strength of the Hiroshima bomb. When that explosion occurred, there were many people, including children, who were a far distance from the bomb, on our atolls which, according to leading scientists and assurances, were predicted to be entirely safe. In reality, within five hours of the explosion, it began to rain radioactive fallout on Rongelap. Within hours, the atoll was covered with a fine, white, powdered-like substance. No one knew it was radioactive fallout. The children thought it was snow. *And the children played in the snow. And the children ate the snow*. So one can understand that snow, while beautiful, has a tragic and dark history in the Marshall Islands. I will speak more of the Bravo explosion in a few minutes. But I ***note***, here, that the Marshall Islands seeks no monetary compensation in this case.

3. ~~***But first,***~~ Mr. President, Members of the Court, I wish to confirm that this dispute with Pakistan had been submitted to this Court 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 Pakistan and I will address my country's decision to bring this case, including specifically the risks that Pakistan's conduct creates for the Marshall Islands.

4. Article 33 of the United Nations Charter provides States a list of options to take when seeking a peaceful solution to their disputes[1]. While the provision lists "negotiation" between the parties as an option, it also lists "judicial settlement" and makes clear that the selection of the preferred option is a matter of a State's "own choice"[2]. The Marshall Islands' choice here is reflected in its filing of the Application against Pakistan, and the Marshall Islands seeks "judicial settlement". Our goal is to resolve this dispute with Pakistan peacefully and obtain the required negotiations in good faith for nuclear disarmament.

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

[2]*Ibid.*

5. Mr. President, Members of the Court, the Marshall Islands is a very small State, with a population of under 70,000 people; Pakistan, by comparison, is very large, with an approximate population of 200 million people. Before this Court, however, and as a Member State of the United Nations, the Marshall Islands stands as an equal with Pakistan. 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 the Marshall Islands, 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.

6. I have spoken publicly for many years about the unique and devastating history that the Marshall Islands has 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 so-called testing 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.

7. 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 bloody red. This distance from which I witnessed this explosion was, in rough terms, approximately equivalent to the distance between The Hague and Paris — so it is a significant distance.

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[3]UN Charter, Preamble.

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

8. Scientists have estimated that the nuclear and thermonuclear explosions in the Marshall Islands are estimated to be the equivalent of 1.6 Hiroshima-sized bombs every day for twelve years. And 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]

9. Mr. President, Members of the Court, to be quite clear, while these experiences give us a unique perspective that we never requested, they are *not* the basis of this dispute. But they do help explain why a country of our size and limited resources would risk bringing a case such as this regarding a nuclear-armed State such as Pakistan, and its breach of customary international law with respect to negotiations for nuclear disarmament and an end to the nuclear arms race.

10. 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.

11. 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

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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.

[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.

occurred, as the States most susceptible to rising sea levels focused their efforts on the Paris Conference of last year.

12. 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 even 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 a projected loss of not one, but two billion people, and disruption not only to the global food supply but also to the global economy, political structure and the 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].

13. The report also provided grounds, amongst 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 Pakistan, including by its nuclear arms racing, is in breach of its international legal obligation to negotiate in good faith disarmament and an end to nuclear arms ***racing***. In other words, the report is an additional basis for why a nuclear-armed nation such as Pakistan is of great significance to the small nation of the Marshall Islands. Even a limited nuclear war involving Pakistan's nuclear arsenal would threaten the already diminished safety of the Marshallese.

14. Mr. President, Members of this Court, a key issue in the dispute in this case concerns Pakistan's current nuclear arms racing — including the production of new nuclear weapons[10].

15. 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[11]. That

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[8]See Memorial of the Marshall Islands (MMI), paras. 8-10.

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

[10]Application of the Marshall Islands (AMI), paras. 27-29, 55-59.

[11]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***.

official statement is at tab 2 of the judges' folders. Pakistan attended this Conference, and indisputably Pakistan is a State possessing a nuclear arsenal.

16. Prior to that Conference, in 2005, Pakistan alleged to the United Nations that, while "not a state party to the NPT, it is strongly committed to the objectives of Non-Proliferation" and, with respect to weapons of mass destruction, including nuclear weapons, it has a "[s]trong long-standing commitment to the objectives of disarmament and non-proliferation"[12].

17. Mr. President, Members of the Court, the Marshall Islands' claims in this dispute are based on Pakistan's own breach of customary international law based on its own conduct, not the conduct or 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, Pakistan's conduct includes the quantitative build-up and qualitative improvement of its nuclear arsenal.

18. Pakistan alleges, on the contrary, that the Marshall Islands' claims are without legal merit or substance[13]. The dispute is clear. 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.

19. 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 à présent la parole à Monsieur van den Biesen, coagent des Iles Marshall.

Mr. van den BIESEN:

**GENERAL OBSERVATIONS**

1. Mr. President, Members of the Court, the last time I had the privilege of appearing before this esteemed Court was yesterday; and it is a great honour for me to be back here today, again, to

[12]Pakistan Annex to the Note Verbale dated 19 September 2005 from the Permanent Mission of Pakistan to the United Nations addressed to the Chairman of the Committee, readily available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/542/40/IMG/N0554240.pdf?OpenElement.

[13]See Counter-Memorial of Pakistan (CMP), paras. 1.3 (4), 1.8.

represent the Republic of the Marshall Islands, this time, in a case against Pakistan in another effort to have a far greater Power than itself live up to one of its most important obligations under international law. An obligation of which the very concept was present in the 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"[14].

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. Pakistan is not following a similar course: it appeared by its Co-Agents and it fully participated in the written proceedings.

3. Mr. President, as you noted at the beginning of this session, in his letter to the Court dated 2 March 2016, the Co-Agent of Pakistan made it known to the Court that it would not participate in these oral proceedings. Since you have read part of this letter this morning, I feel at liberty to repeat the crucial sentence:

> "The Government of Pakistan does not wish to add anything further to its statements and submissions made in its Counter-Memorial and therefore does not feel that its participation in the oral proceedings will add anything to what has already been submitted through its Counter-Memorial."

4. We take note of the fact that Pakistan has, explicitly, chosen not to make use of its right to further its arguments during these oral proceedings, which implies that the arguments in support of its position are only to be found in its Counter-Memorial. Obviously, today, the Marshall Islands will respond to this Counter-Memorial, and will do so on the assumption that, apart from the objections raised by Pakistan in its Counter-Memorial, the Parties are in agreement as to the existence of the jurisdiction of the Court and the admissibility of the Marshall Islands' claims.

5. Mr. President, the use of armed force is rapidly spreading, it is escalating, and this is additionally dangerous given the involvement of States that possess nuclear arsenals. Moreover, all nuclear powers seem to be substantially modernizing their nuclear forces. The Respondent in this case certainly belongs to that category.

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

6. This Court considered, in paragraph 98 of its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 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". Precisely for that reason the Court pointed to the way out and recognized the existence of an obligation for all States, which obligation is central to the present case.

7. Mr. President, contrary to what Pakistan suggests (Counter-Memorial of Pakistan (CMP), Part 8, Chap. 3), this case is not about rearguing the Advisory Opinion, let alone to — somehow — appeal the Opinion (CMP, para. 8.69) or to — again, somehow — construe a request for another advisory opinion (CMP, para. 8.72). This is perfectly clear from both the Application (p. 3, para. 2) and our Memorial (pp. 20-21, paras. 45-47). But, the Advisory Opinion is, indeed, critical to this case and leads us directly to the Marshall Islands' submissions. The 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"[15].

8. Although, Mr. President, 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"[16].

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

10. This hearing is only about jurisdiction. The Marshall Islands' Memorial of 12 January 2015 is drafted in accordance with the President's Order of 10 July 2014 in which the President decided "that the written pleadings shall first be addressed to the questions of the jurisdiction of the Court and the admissibility of the Application". The Marshall Islands duly followed this clear instruction and in its Memorial stated the facts and the law in support of its

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

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

position on jurisdiction and admissibility. For that reason alone, Pakistan's repeated allegation that, with this Memorial, the Marshall Islands somehow violated the Rules (CMP, Part 5) lacks any basis whatsoever. At the same time the Marshall Islands notes that Pakistan repeatedly ignored the President's Order and began discussing the merits of this case. We will not do that; we will only deal with those parts of Pakistan's Counter-Memorial to the extent necessary for this stage of the proceedings.

11. This morning, the Marshall Islands will deal with issues such as standing, the *erga omnes* character of the obligation, the existence of a dispute, the question of third parties being indispensable or not, the limitations set by the Parties' declarations under Article 36, paragraph 2, of the Statute and the value of the judgment sought by the Marshall Islands. At this point, I will make a few observations on some of these issues.

12. As I said, Mr. President, 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; each one in its own case. Not because we cannot do without them from a legal perspective, but because the behaviour of the others also deserves being adjudged by this Court. Pakistan takes a similar position (for example, CMP, Part 7, Sections 6 and 7), albeit for entirely different reasons: 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, Pakistan's approach cannot be accepted, since there is no necessity for the Court to establish first the legal position of any third party before it may begin to adjudge the Marshall Islands' submissions in the present case. Each and every State is — in the light of the obligation spelled out in your Advisory Opinion — to be judged on its own particular behaviour.

13. During these oral pleadings there are three separate cases being heard, and not just one. 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 thing between them. Each State draws up its own plans and policies and, in any event, each of them is at liberty to determine its own choices regarding nuclear weapons. Each also has its own responsibilities in that respect, including its own legal responsibilities.

14. This case against Pakistan, therefore, needs to be adjudged on its own, particular, merits, which will lead to a judgment that is only binding between the Marshall Islands and Pakistan (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, certainly, never a reason for the Court not to deliver a judgment.

15. Pakistan's repeated references to the Marshall Islands' case against the United States of America before U.S. Federal Courts does not make all of this any different. That case is based on the Non-Proliferation Treaty, this one on customary international law. The decision of the U.S. Federal Court — which is currently reviewed in appeal — was exclusively based on the U.S. Constitution and on U.S. Federal Law; the current case will be decided on the basis of international law.

16. Mr. President, Pakistan, 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: Pakistan is not a party to the NPT. The Marshall Islands' approach is demonstrated in its submissions and also in the text of the Application, for example paragraph 6, and the Memorial, for example paragraph 19: this case is founded on an obligation that flows from customary international law.

17. 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 and whether the Marshall Islands' submissions are admissible. We will deal this morning with these questions at length.

18. As just explained by the Co-Agent, the Marshall Islands contemplated coming to this Court with an eye on climate-change litigation. This was long before it decided to file the nuclear disarmament cases. So, there is no question that the Marshall Islands would have deposited its declaration "for the sole purpose of bringing [these] proceedings against India, Pakistan and the United Kingdom" as Pakistan states in its Counter-Memorial (para. 7.37).

19. Mr. President, one final observation. Pakistan repeatedly states that the relief sought by the Marshall Islands, including the injunctive relief, cannot have any effect if the other nuclear

weapons States are not part of the current proceedings (CMP, Part 8, Ch. 5, e.g., para. 8.108). Again, for this position, there is no basis in law or in recent practice. 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 at all times include conditions governing the particular treaty's entry into force. Conditions that entail such matters as a stipulated number of ratifications, for example that is done in the Certain Conventional Weapons Convention 1981 (Art. 5, para. 1), and also in the Chemical Weapons Convention 1993 (Art. XX, para. 1) and sometimes such a provision not only contains a quantitative threshold, but also — and this may, indeed, be relevant for a Nuclear Weapons Convention — a qualitative one; see, for example, the Biological Weapons Convention 1972 (Art. XIV, para. 3) which names "Depositaries" as a specific category, and see also the Comprehensive Nuclear-Test-Ban Treaty 1996 (Art. XIV, para. 1, and Ann. 2), that specifically lists 44 States with nuclear power or research reactors. There is no reason, Mr. President, to expect that this model will not be followed in the case of a Nuclear Weapons Convention.

20. Mr. President, may I kindly request that you give the floor to my colleague and friend, Professor Nicholas Grief.

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

Mr. GRIEF:

**THE CUSTOMARY STATUS AND *ERGA OMNES* CHARACTER OF THE OBLIGATION: SOME INITIAL OBSERVATIONS**

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

2. Pakistan's Counter-Memorial includes several elements that clearly belong to 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*[17]. Rather, in

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

the words of this Court in *Barcelona Traction*, they are "inextricably interwoven" with the merits[18] and thus are not of an exclusively preliminary character within the meaning of Article 79, paragraph 9, of the Rules of Court. I will make some brief submissions on two of these issues, the customary status of the obligation and its *erga omnes* character, in order to show that the Marshall Islands' claims are not, as Pakistan insists, "manifestly without legal merit or substance".

3. First, Pakistan contends that by claiming that it is in breach of its obligations under customary international law, the Marshall Islands is merely restating its treaty-based claims, in effect holding Pakistan to a treaty to which it is not a party. As we have heard, Members of the Court, this is clearly not the case. The fact that Pakistan is not a party to the Non-Proliferation Treaty (NPT) does not prevent it from being bound by a parallel rule of customary international law which is both separate from and equivalent to Article VI.

4. Mr. President, Members of the Court, the existence of a general, customary rule equivalent to Article VI of the NPT was unanimously recognized by this Court 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*.

5. In reaching that momentous conclusion, besides relying on and construing Article VI, the Court acknowledged the United Nations General Assembly's contribution to the development of this customary obligation. In paragraph 101 of the Advisory Opinion it referred to the very first General Assembly resolution, unanimously adopted on 24 January 1946, and ~~***the Court***~~ noted, "[i]n a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament". The Court then cited unanimously adopted resolution 808 A (IX) of 4 November 1954[19]. Among these other resolutions, the Marshall Islands would highlight, in particular, the Final Document of the Tenth Special Session, adopted without a vote on 30 June 1978[20] and referred to in paragraph 43 of the Application. Of course, the Marshall Islands accepts that, in general, United Nations General Assembly resolutions are not legally binding. But as the Court recognized in paragraph 70 of the Advisory Opinion, they "may sometimes have

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[18] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Preliminary Objections, Judgment, I. C. J. Reports 1964*, p. 46.

[19] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 101.

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

normative value" and "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".

6. For its part, the Security Council has recognized the obligation to negotiate in good faith for nuclear disarmament and has underlined the point that this obligation is incumbent on all States, not just on States parties to the NPT. For example, in resolution 1887 of 2009, operative paragraph 5, the Security Council 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"; it then calls upon "*all other States* to join in this endeavour"[21].

7. Furthermore, the existence of a customary obligation equivalent to Article VI is confirmed by the application of the criteria set out by this Court in the *North Sea Continental Shelf* cases, whereby a fundamentally norm-creating treaty provision can generate a rule of custom[22].

8. Mr. President, Members of the Court, I turn now to Pakistan's argument that "there exists no obligation *erga omnes* and thus no standing of the RMI in respect of the claims"[23].

9. In the *Barcelona Traction* case, the Court recognized the "essential distinction . . . between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection". The Court continued: "By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[24]

10. Mr. President, Members of the Court, the 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 is just such an obligation owed *erga omnes*. This is demonstrated not only by the way in which the Court formulated point 2 F of the *dispositif* of the Advisory Opinion, but also by its emphatic assertion in paragraph 103 that fulfilling this obligation is of vital importance for the whole of the international community. Earlier, in paragraph 36, the Court had gravely noted

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

[22]*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.

[23]Counter-Memorial of Pakistan (CMP), para. 7.33, and especially paras. 8.52-8.63.

[24]*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para 33.

the "destructive capacity" of nuclear weapons, "their capacity to cause untold human suffering, and their ability to cause damage to generations to come". Members of the Court, Judge Weeramantry put it even more bluntly: "[T]he nuclear weapon stands alone, unmatched for its potential to damage all that humanity has built over the centuries and all that humanity relies upon for its continued existence."[25]

11. In terms of its importance for the international community, therefore, the obligation we are concerned with here is surely equivalent to rules like those outlawing aggression, genocide, slavery and racial discrimination, all of which the Court referred to in *Barcelona Traction*[26]; and to the rules of international humanitarian law which, according to the Court in the *Wall* case, "incorporate obligations which are essentially of an *erga omnes* character"[27].

12. Mr. President, Members of the Court, the Marshall Islands also refutes Pakistan's argument that the *erga omnes* nature of this obligation does not give rise to standing. It accepts that following *Barcelona Traction*, there was uncertainty as to whether the breach of an obligation *erga omnes* could give standing before this Court to a State not claiming any direct injury. But the answer to that question is now abundantly clear. In *Belgium* v. *Senegal*, after recognizing that "[a]ll the other States parties [to the Torture Convention] have a common interest in compliance with these obligations", the Court concluded: "any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . . and to bring that failure to an end"[28].

13. In the *Whaling* case[29], Australia made no claim to be an injured State but sought to uphold its collective interest, an interest it shared with all other parties to the Whaling Convention[30]. As a party to that Convention it invoked the Court's ruling on *erga omnes partes*

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[25]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*; dissenting opinion of Judge Weeramantry, p. 470.

[26]*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para 34.

[27]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136, para. 157.

[28]*Questions relating to the Obligation to Prosecute or Extradite(Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449-450, paras. 68-69.

[29]*Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[30]*Ibid.*; CR 2013/18, 9 July 2013, p. 28, para. 19.

obligations in *Belgium* v. *Senegal*. The Court's silence on this denotes its acceptance that the status of the obligations conferred standing.

14. Similarly, in its *Advisory Opinion on the Deep Seabed*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea concluded that where there is damage to the environment from mining the deep sea-bed beyond national jurisdiction, "each . . . Party [to the UN Convention on the Law of the Sea] may . . . be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area"[31].

15. Mr. President, Members of the Court, the importance of the *erga omnes* obligation in the present case is highlighted by those last two cases. The *Whaling* case concerned the conservation of a living species. In the *Deep Seabed Mining* case, the interest was damage to the surrounding environment. In this case, we are concerned with nothing less than the survival of the planet itself.

16. Of course, those three cases — *Belgium* v. *Senegal*, the *Whaling* case and the *Deep Seabed Advisory Opinion* — all concerned obligations *erga omnes partes*. Here, since the obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament is an obligation under customary international law as well as under Article VI of the NPT, it is an obligation *erga omnes* and not solely an obligation *erga omnes partes*.

17. *Barcelona Traction* drew no such distinction. There, the Court recognized that rights of protection corresponding to obligations *erga omnes* can arise both in general international law and through universal or quasi-universal multilateral treaties[32].

18. Most significantly, and contrary to Pakistan's contention at paragraph 8.63 of its Counter-Memorial, Article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts[33] clearly supports the Marshall Islands' position on standing. Article 48, paragraph 1, provides*:* "~~*(1)*~~ Any State other than an injured State is entitled to invoke the responsibility of another State" if "(*b*) The obligation breached is owed to the international

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[31]Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area***,** Advisory Opinion, 1 Feb. 2011, para. 180.

[32]*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Judgment, I.C.J. Reports 1970,* p. 32, para. 34.

[33]*Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 126.

community as a whole." The commentary to Article 2 of the Articles makes it clear that "breach of an international obligation is used to cover both treaty and non-treaty obligations."[34]

19. In the *Wall* case, the Court opined***: "T***he "obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law"[35]**. *T***he Court was thereby implicitly endorsing the International Law Commission's provisions on communitarian norms set out in Article 48[36].

20. Similarly, Mr. President, Members of the Court, in your folders, at tab 3, is a resolution adopted in 2005 by the *Institut de Droit International*, Article 1 *(a)* of which defines an obligation *erga omnes* as: "an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of ***that*** obligation enables all States to take action"[37].

21. And for its part, in the *Deep Seabed Advisory Opinion* the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea drew no distinction between a treaty-based and a customary international law-based *erga omnes* obligation in deriving support for its position from Article 48.

22. So, in conclusion, the Marshall Islands clearly does have standing to bring before this Court its claim that Pakistan is in breach of an obligation owed to the international community as a whole.

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

LE PRESIDENT : Merci, Monsieur le professeur. J'invite maintenant M. le professeur Condorelli à prendre la parole.

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[34]*Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 35, para. 7.

[35]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 155.

[36]James Crawford, "Responsibilities for Breaches of Communitarian Norms", in Ulrich Fastenrath et al. (eds.) *From Bilateralism to Community Interest Essays in Honour of Bruno Simma*, 2011, pp. 224, 234.

[37]Institut de Droit International, Krakow Session, 2005, Resolution, Obligations *erga omnes* in International Law, Article 1 *(a)*.

M. CONDORELLI :

## L'EXISTENCE DU DIFFÉREND ENTRE LA RÉPUBLIQUE DES ILES MARSHALL ET LE PAKISTAN

Monsieur le président, Mesdames et Messieurs les juges, je suis très honoré de pouvoir prendre la parole encore une fois devant votre Cour, et je suis très reconnaissant à la République des Iles Marshall pour la confiance qu'elle me témoigne.

### Introduction

1. Monsieur le président, chacun sait que la mission de votre Cour est de régler conformément au droit international les différends entre Etats qui lui sont soumis, comme le proclame l'article 38 du Statut, et que par conséquent «la Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties»[38]. Chacun sait également que la tâche d'établir «objectivement»[39] l'existence du différend incombe à la Cour : il est incontestable, en effet, que c'est à la Cour de vérifier qu'il y a bien «un désaccord sur un point de droit ou de fait, une opposition de thèses juridiques ou d'intérêt entre deux parties (suivant la célèbre définition)[40]. Votre jurisprudence enseigne à ce sujet qu'«il ne suffit pas que l'une des parties à une affaire contentieuse affirme 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 faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre.»[41] Autrement dit, la Cour pourra et devra décider qu'entre les parties à une affaire, le différend existe dès qu'elle aura constaté que la réclamation d'une des parties se heurte manifestement à l'opposition de l'autre, étant donné que le différend consiste justement dans l'«opposition des thèses juridiques» entre deux Etats.

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

[39] *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.

[40] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 11 et, plus récemment, *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, par. 30.

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

2. Monsieur le président, il n'y a aucun désaccord entre les Parties à la présente affaire quant aux principes présidant à la définition du différend et à l'identification de son existence que je viens de rappeler : leurs écritures présentées à la Cour en témoignent amplement. Il y a en revanche un désaccord radical concernant l'application de ces principes afin d'établir si, dans la présente affaire, c'est bien un réel différend que les Iles Marshall ont soumis à la Cour — ce dont le demandeur est certain — ou bien si (comme le Pakistan le soutient) l'existence dudit différend lors de la saisine de la Cour par le demandeur ne serait en l'espèce nullement démontrée. Votre Cour se trouve en somme confrontée — pourrait-on dire — à un différend sur le différend, qu'elle a indiscutablement la pleine compétence à régler.

**La réclamation présentée par les Iles Marshall**

3. Qu'il me soit permis de présenter à la Cour la position des Iles Marshall. Puisqu'il y a différend lorsqu'il est vérifié qu'une partie avance contre l'autre une réclamation à laquelle cette deuxième partie s'oppose manifestement, il est alors indispensable d'analyser avant tout s'il y a bien une réclamation présentée par les Iles Marshall alléguant la violation par le Pakistan d'obligations juridiques lui incombant à l'égard du demandeur, puis vérifier si une telle réclamation se heurte ou non à l'opposition manifeste du Pakistan.

4. La réclamation des Iles Marshall est clairement formulée dans la requête marshallaise, plus d'une fois d'ailleurs : il est surprenant de lire dans le contre-mémoire du Pakistan que «The RMI has failed to set out any claims with sufficient clarity for Pakistan to properly understand the alleged dispute.» Je cite — par souci de brièveté — deux seuls passages, parmi de nombreux autres. Le premier :

> «le Pakistan … 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»[42].

Le deuxième passage :

> «le Pakistan a manqué de s'acquitter de l'obligation que lui impose le droit international coutumier de poursuivre de bonne foi des négociations conduisant à un désarmement nucléaire dans tous ses aspects effectué sous un contrôle international

[42] Requête, par. 6.

> strict et efficace, et ce, en particulier, en adoptant une ligne de conduite qui, en visant à accroître et à améliorer ses forces nucléaires, est contraire à l'objectif du désarmement nucléaire»[43].

5. Venons-en à la formulation du grief qui figure dans le mémoire du demandeur :

> «Le présent différend porté devant la Cour par la République des Iles Marshall … a pour objet le manquement de la République islamique du Pakistan … 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.»[44]

6. Il est indéniable que la requête des Iles Marshall détaille avec beaucoup de précision tous les éléments indispensables pour définir le différend l'opposant à l'Etat dont la responsabilité internationale est alléguée : le Pakistan.

7. Le demandeur identifie les obligations internationales *erga omnes* qui pèsent à son avis sur le Pakistan, ainsi que sur d'autres Etats, en tant que prescrites par le droit international coutumier, plus précisément par une norme coutumière générale en vigueur dont le contenu prescriptif — d'après le demandeur — est identique à celui de l'article VI du traité sur la non-prolifération des armes nucléaires (TNP) : norme coutumière qui lie notamment toutes les puissances nucléaires, y compris le Pakistan (alors que l'article VI du TNP, en tant que norme conventionnelle, ne concerne pas le Pakistan, qui n'est pas partie audit traité). Cette norme coutumière engage tous les Etats à

> «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».

Puis le demandeur fait valoir que le Pakistan manque de manière continue auxdites obligations qui lui incombent en vertu du droit international coutumier, en indiquant diverses conduites constitutives, à son avis, des manquements en question. Enfin, les Iles Marshall demandent à la Cour d'en juger et de leur accorder en conséquence le «remède» adéquat, représenté par l'ordre à impartir au Pakistan de prendre toutes les mesures nécessaires pour se conformer, dans un délai approprié, aux obligations que lui impose le droit international coutumier.

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[43] Requête, par. 14.

[44] Mémoire des Iles Marshall (MIM), par. 2.

**L'opposition manifeste du Pakistan**

8. Voici pour ce qui est de la réclamation envers le Pakistan que les Iles Marshall formulent au moyen de leur requête. Or, nous le savons bien, on ne saurait prétendre qu'un différend existe qu'à condition de vérifier l'opposition manifeste à la réclamation de la part de celui contre qui elle est adressée. Mais, Monsieur le président, peut-on émettre sérieusement des doutes quant à l'existence et au caractère manifeste de l'opposition dans un cas comme celui-ci, dans lequel l'opposition du Pakistan aux griefs qu'on lui adresse est clairement affichée et même illustrée à mots ouverts devant la Cour ? Un cas dans lequel c'est le défendeur lui-même qui s'empresse d'informer tambour battant la Cour de sa réaction face à la réclamation du demandeur, en proclamant haut et fort : «The RMI's claims against Pakistan are manifestly without legal merit and substance»[45] !

9. Déjà dans leur mémoire, les Iles Marshall ont souligné ce que le Pakistan avait pris l'occasion de déclarer dans sa note verbale adressée à la Cour, datant du 9 juillet 2014. Le Pakistan y soulève la question du manque prétendu de compétence de la Cour et énumère diverses raisons pour lesquelles la Cour devrait se déclarer dépourvue de juridiction pour se saisir de l'affaire. Toutefois, il n'oublie pas de dévoiler en passant son opposition nette à la réclamation marshallaise quant au fond, celle-ci étant basée d'après lui sur une interprétation «exagérée et infondée» de l'article VI du TNP, qui ne s'appliquerait pas aux Etats non parties à ce traité et ne serait pas *erga omnes* (par. 2, point III). Voilà qui suffit pour rendre évident qu'il existe bien un différend d'ordre juridique entre les Parties quant à la teneur et aux conséquences de l'obligation énoncée dans la requête, quant à la question de savoir s'il s'agit d'une obligation de nature coutumière qui, dès lors, s'applique au Pakistan, ainsi qu'à la question s'il s'agit ou non d'une obligation dont le respect est dû par le Pakistan à la communauté internationale dans son ensemble *(erga omnes)*.

10. L'opposition pakistanaise à la réclamation des Iles Marshall peut être inférée de manière encore plus patente du contre-mémoire : ce document, dont la préface assure qu'il serait dédié exclusivement au traitement des questions concernant la juridiction de la Cour et l'admissibilité de la requête, conformément aux prescriptions établies dans l'ordonnance de la Cour du 10 juillet 2014, en réalité ne rate pas une seule occasion pour dénoncer de façon répétitive combien

[45] Contre-mémoire du Pakistan (CMP), partie 4, p. 14.

les griefs du demandeur sont infondés en droit. Quelques citations entre mille : «the RMI's case against Pakistan is manifestly without legal merit or substance», puisque

> «even if the scant facts advanced by the RMI were accepted by the Court, they involve no concrete or imminent harm on the part of the RMI and they do not give rise to any violation of rights or obligations deriving from contemporary international law in relation to the RMI»[46] ;

et encore : «although the RMI seeks to present its claims as founded in customary international law, the obligations which it identifies are said to be «rooted» and «enshrined» in Article VI of the NPT, a treaty provision … Pakistan is not a party to the NPT.»[47] Par ailleurs, les demandes marshallaises seraient basées en substance, nous dit-on, non pas sur un prétendu droit coutumier, mais sur des résolutions non obligatoires de l'Assemblée générale et sur un avis consultatif de la Cour, alors que «none of the above-referenced sources invoked by the RMI is opposable to Pakistan»[48]. De surcroît,

> «by invoking the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court in a situation where the RMI's claims against Pakistan are manifestly without legal merit and substance and there is no trace of a dispute between the RMI and Pakistan, the RMI is abusing the Court's processes»[49].

11. Monsieur le président, il est une phrase que l'on trouve répétée de nombreuses fois dans votre jurisprudence, y compris la plus récente qui dit : «En principe, le différend doit exister au moment où la requête est soumise à la Cour.»[50] Il a été souvent remarqué que les mots d'ouverture, «en principe» donnent à cet enseignement une flexibilité évidente : on dirait que votre Cour n'ait pas voulu exclure la possibilité éventuelle que l'existence du différend puisse se manifester après la saisine de la Cour. Ce qui est sûr en revanche est que votre Cour ne semble pas exiger que le différend doit nécessairement avoir existé avant la requête. Il paraît donc justifié de dire, comme le

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[46] CMP, partie 1, p. 6, par. 1.8.

[47] CMP, partie 4, p. 14, par. 4.5.

[48] *Ibid.*

[49] CMP, p. 13, par. 3.4, al. 7).

[50] *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. 85, par. 30. Auparavant, par exemple, *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 25-26, par. 42-44 ; *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 130-131, par. 42-44.

fait le juge Abraham dans son opinion individuelle à l'arrêt de 2011 en l'affaire *Géorgie c. Fédération de Russie*[51], que

> «en règle générale, il importe peu que le différend soit apparu pour la première fois entre les parties peu de temps ou longtemps avant l'introduction de l'instance. Il faut et il suffit que le différend existe lorsque le juge est saisi (ce qui peut être aussi révélé par des faits postérieurs) et qu'il subsiste à la date à laquelle la Cour vérifie que les conditions sont remplies pour qu'elle exerce sa compétence.»

12. De toute façon, si on laisse de côté pour l'heure la question de la date de naissance, il est évident, à la lumière de tout ce que j'ai remarqué jusqu'ici, que dans le cas présent, au moment de la requête, le différend, un différend d'ordre juridique, existe bel et bien. Ceci du fait même de la présence (au moment de la requête, justement) de la réclamation du demandeur se heurtant à l'opposition manifeste du défendeur.

Monsieur le président, puis-je poursuivre ? Ou préférez-vous…

Le PRESIDENT : Poursuivez, Monsieur le professeur.

**Les arguments avancés par le Pakistan pour nier l'existence du différend et leur inconsistance**

13. Cette évidence, à savoir l'existence indéniable du différend, est pourtant radicalement niée par le Pakistan. Le contre-mémoire pakistanais regorge de phrases du genre de celles-ci :

> «The RMI's conduct in instituting proceedings against Pakistan in the absence of a dispute (legal or otherwise) between the RMI and Pakistan, demonstrates that the RMI is acting unreasonably, without a sense of responsibility and capriciously. Its conduct constitutes an abus de droit.»[52]

Autre phrase : «the RMI's Application is inadmissible upon multiple grounds. Of primary import is the absence of a dispute (legal or otherwise) between the RMI and Pakistan, existing at the time of the filing of the Application.»[53] Dernier exemple :

> «The RMI's Application and Memorial do not contain evidence of the existence of any dispute (legal or otherwise) between the RMI and Pakistan at the time the Application was submitted to the Court. For this reason, the RMI's Application must be dismissed is inadmissible.»[54]

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[51] *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. 229, par. 16.

[52] CMP, p. 6, par 1.7.

[53] *Ibid.*, par. 1.12.

[54] CMP, p. 44, par. 8.6.

14. Ce sont là de simples affirmations, que l'inlassable répétition ne rend pas plus crédibles. Y a-t-il un quelconque argument qui les justifie ? Si l'on étudie en profondeur les écritures de la Partie pakistanaise, on s'aperçoit que beaucoup de mots sont utilisés pour faire valoir finalement un seul et même argument :

> «There is no dispute between the RMI and Pakistan because in reality no positively opposed claims exist. This is evident from the lack of prior communications and consultations between the RMI and Pakistan and from the lack of relevant evidence accompanying the RMI's Application and Memorial.»[55]

Le défendeur revient sans cesse et revient continuellement sur ce point. Ici, il souligne par exemple : «The RMI had never resorted to any of the means set forth in Article 33 of the United Nations Charter in order to settle any alleged dispute with Pakistan, including through diplomatic negotiations conducted in good faith, before instituting the present proceedings.»[56] Ailleurs, il revient à la charge : «The RMI is not acting with a sense of responsibility; otherwise, it would have, as a minimum, pursued some form of negotiation or consultation with Pakistan in respect of the alleged dispute before instituting these Proceedings.»[57] Et voilà enfin la conclusion : «Pakistan submits that it cannot be the case that a dispute can have arisen (let alone crystallised) where there has been a complete absence of any communications, negotiations, discussions or interactions as between the relevant parties.»[58]

15. Mais sur quelle base, Monsieur le président, devrait-on considérer qu'un différend ne peut pas être considéré existant si la saisine de la Cour n'a pas été précédée par des négociations, discussions, communications, interactions entre les parties ? L'enseignement de votre Cour va clairement dans un tout autre sens, et il est étonnant que le défendeur ait oublié de le prendre en considération, alors que curieusement il s'empresse de mentionner le célèbre, mais désormais dépassé propos de 1924 de votre devancière, la Cour permanente de Justice internationale, en l'affaire *Mavrommatis*, arguant dans le sens de la nécessité de négociations diplomatiques préalables. Trois quarts de siècle après 1924, en 1998, votre Cour s'est exprimée ainsi :

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[55] CMP, p. 46, par. 8.19.

[56] CMP, p. 11, par. 2.20.

[57] CMP, p. 12, par. 3.4, al. 3).

[58] CMP, p. 48, par. 8.32.

> «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.»[59]

La Cour ne manque pas d'ailleurs d'apporter d'importantes précisions, lorsqu'elle rappelle que des règles spéciales exigeant des négociations préalables peuvent fort bien être prescrites dans des domaines spécifiques. Cependant, souligne-t-elle, il n'en va pas ainsi lorsque 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»[60]. Monsieur le président, tel est exactement le cas présent : votre Cour a été saisie sur la base des déclarations unilatérales faites par le Pakistan et les Iles Marshall en vertu du paragraphe 2 de l'article 36 du Statut, et ni l'une ni l'autre des deux déclarations ne prévoit la moindre condition relative à la tenue (encore moins à l'épuisement) de négociations préalables d'aucun genre !

16. Il est donc certain que ni le droit international général ni le Statut de la Cour n'imposent des négociations préalables à la saisine de la Cour, ni n'exigent d'ailleurs que le demandeur ait informé d'avance le défendeur de son intention de l'attaquer en justice[61]. Mais s'il est vrai qu'il est essentiel que le différend existe au moment où le juge est saisi, il n'est évidemment pas exclu (et il est même courant) qu'avant la saisine de la Cour aient vu le jour des événements, pour ainsi dire, annonciateurs du différend, voire des événements témoignant que le différend était *in statu nascendi* sinon déjà éclos. Or justement, d'après le Pakistan, en l'absence d'événements antérieurs de ce genre le différend ne saurait exister. Le défendeur fonde cette thèse sur l'opinion d'un auteur, le professeur Christoph Schreuer, qu'il fait sienne en la citant expressément et en demandant à votre Cour de la retenir. Voilà la citation : «the existence of a dispute presupposes a certain degree of communication between the parties. The matter must have been taken up with the

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

[60] *Ibid*., p. 322, par. 109.

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

other party, which must have opposed the claimant's position if only indirectly.»[62] Comme rien de tel ne s'est passé entre les Parties avant la requête, prétend le défendeur, il s'ensuit qu'aucun différend ne saurait exister entre elles.

17. A vrai dire, la citation du texte du professeur Schreuer a été tronquée de façon quelque peu maladroite. La Cour pourrait être intéressée à savoir quels sont ses mots immédiatement suivants, qu'on a choisi de mettre entre parenthèses. Les voici :

> «practice demonstrates that the threshold required in terms of communication between the parties for the existence of a dispute is fairly low. In certain situations a dispute may exist even in the absence of active opposition by one party to the claim of the other party.»[63]

18. Monsieur le président, admettons maintenant, pour les besoins de notre débat, que l'opinion du professeur Schreuer soit correcte et qu'elle puisse être retenue par votre Cour. Admettons donc pour un instant, sous toute réserve, qu'une communication entre les parties au sujet du différend, fût-elle minimale, devrait avoir eu lieu avant la saisine de votre Cour. Mais, Monsieur le président, peut-on sérieusement nier que ce fut justement le cas dans la présente affaire ? Ne doit-on pas juger peu crédible — sinon carrément incroyable — l'affirmation du défendeur d'après quoi «the Application constitutes the first document directed at Pakistan in which the Republic of Marshall Islands (RMI) claims that Pakistan has violated certain international obligations alleged to be owed to RMI»[64] ? Comment le Pakistan peut-il prétendre de se débarrasser des prises de position officielles très significatives et tout à fait pertinentes que les Iles Marshall ont publiquement adoptées avant la saisine de la Cour, et ce malgré le fait que le mémoire des Iles Marshall les ait mises pleinement en lumière ?

**La déclaration de Nayarit du 10 février 2014**

19. C'est surtout sur la déclaration de Nayarit[65] de février 2014 qu'il convient de centrer l'attention. La Cour la connaît bien. Je me limite à citer le passage qui dit :

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[62] Christoph Schreuer, «What is a Legal Dispute?» *in* I. Buffard *et al.* (eds.), *International Law Between Universalism and Fragmentation*, Festschrift in Honour of Gerhard Hafner (Leiden/Boston : Martinus Nijhoff Publishers, 2008), p. 961. Cette étude figure en tant qu'annexe 15 au contre-mémoire du Pakistan.

[63] *Ibid.*

[64] CMP, p. 11, par. 2.19.

[65] 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).

> «we believe that states possessing nuclear arsenals are failing to fulfill 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, bien avant la saisine de la Cour, les Iles Marshall se sont donc spécifiquement adressées à tous les Etats possédant des arsenaux nucléaires, y compris le Pakistan évidemment, qui était présent à la conférence de Nayarit et qui — que je sache — ne nie pas d'être au nombre des puissances nucléaires. Ce que les Iles Marshall ont reproché à ces Etats (et partant au Pakistan) est bien précis : elles les ont accusés de manquer 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. Il faut alors convenir que le Pakistan dit à la Cour quelque chose qui est bien loin de la vérité lorsqu'il affirme sans sourciller : «the Application constitutes the first document directed at Pakistan in which the RMI claims that Pakistan has violated certain international obligations alleged to be owed to RMI [66]» ! Ce qui est vrai en revanche est que le Pakistan n'a aucunement réagi face aux griefs pourtant graves qui lui étaient adressés ni il ne les a contestés, ni il n'a indiqué qu'il modifierait sa ligne de conduite qui lui était reprochée. Il les a bel et bien ignorés, peut-être en considérant qu'il ne valait pas la peine de se soucier outre mesure d'accusations venant d'un des plus petits Etats de notre planète…

## Conclusion

21. Monsieur le président, il faut l'admettre : le professeur Schreuer a sans doute raison quand il affirme «in certain conditions a dispute may exist even in the absence of active opposition by one party to the claim of the other party»[67]. Votre Cour ne peut qu'en convenir, étant donné que, dans l'arrêt de 2011 en l'affaire *Géorgie c. Fédération de Russie*, vous avez affirmé ceci : «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[68]. A la lumière de tous ces éléments, il est

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[66] CMP, p. 11, par. 2.19.

[67] Voir ci-dessus, note 23.

[68] *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, par. 30.

alors loisible de soutenir que le différend entre le Pakistan et les Iles Marshall, assurément existant au moment de la requête marshallaise, existait en fait dès avant la saisine de votre Cour !

22. Je vous remercie beaucoup, Monsieur le président, Mesdames et Messieurs les juges, de votre attention prolongée. Puis-je vous demander, Monsieur le président, après la pause sans doute, de bien vouloir donner la parole à M[e] Laurie Ashton.

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 50.*

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

Ms ASHTON:

## PAKISTAN'S VOLUNTARY ACCEPTANCE: "ONLY FOR THE PURPOSE" RESERVATION

### Introduction

1. Thank you. Mr. President, Members of the Court, it is an honour to appear before you again today on behalf of the Marshall Islands. In this case Pakistan argues that the Marshall Islands has failed to demonstrate Pakistan's voluntary intention to accept this Court's compulsory jurisdiction over this dispute. It also raises a jurisdictional challenge based on reciprocity and the Marshall Islands' own reservation, which precludes jurisdiction in cases brought by a party that has accepted the compulsory jurisdiction of this Court "only in relation to or for the purpose of" that dispute[69].

2. I will first briefly address the allegation that the Marshall Islands has not demonstrated Pakistan's acceptance of compulsory jurisdiction, as well as the general rules for interpreting the declarations of the parties. Then I will address the allegation that the Marshall Islands' own reservation requires this Court to decline jurisdiction.

3. Both allegations are mistaken.

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[69]See Counter-Memorial of Pakistan (CMP), paras. 7.35-7.39.

**The consensual jurisdictional bond and general rules for interpreting the declarations**

4. First, the consensual bond: Pakistan argues that the Marshall Islands has not shown Pakistan's "unequivocal indication" to accept this Court's jurisdiction, or that its acceptance was "voluntary and indisputable"[70]. But as Pakistan's own declaration, as well as the well-settled law governing that declaration, demonstrate ***otherwise***, that is incorrect, for the following reasons.

5. When Pakistan filed its declaration under Article 36 (2) of the Statute of the Court, it expressed its advance consent to this Court's jurisdiction over all the categories of disputes described therein. Pakistan specifically voluntarily included disputes over "any question of International law" and "the existence of any fact which, if established, would constitute a breach of an international obligation"[71]. And as this Court has held, by filing a declaration, a State: "must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance"[72].

6. Pakistan's arguments on this issue are quite similar to those made by Nigeria and rejected by this Court in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*[73]. There, Nigeria accused Cameroon of acting "surreptitiously" and in an "inappropriate haste" by filing its case a mere 26 days after filing its declaration of consent[74]. But as the Court held, any State that files a declaration of consent makes

> "a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be fulfilled."[75]

I repeat, "no further condition needs to be fulfilled".

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[70]CMP, paras. 6.6-6.8.

[71]Memorial of the Marshall Islands (MMI), Ann. 5.

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

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

[74]*Ibid.*, Preliminary Objections of the Federal Republic of Nigeria, Dec. 1995, Vol. 1, Chap. 1, paras. 1.8-1.9, available at: http://www.icj-cij.org/docket/files/94/8598.pdf.

[75]*Ibid*., p. 291, para. 25.

7. Accordingly, when the Marshall Islands filed its declaration, it accepted Pakistan's standing offer to adjudicate their disputes before this Court[76]. On that very day the consensual bond was created between Pakistan and the Marshall Islands regarding the compulsory jurisdiction of this Court over "any question of International law" and "the existence of any fact which, if established, would constitute a breach of an international obligation"[77]. No further condition was required.

8. As to additional rules for interpreting the parties' declarations, this Court has confirmed that each declaration must be interpreted "as it stands" with regard to the words "actually used"[78]. In addition, the Court will ascribe a "natural and reasonable" interpretation to the words[79].

**The Marshall Islands' reservation precluding jurisdiction in a dispute where the consent to compulsory jurisdiction is "only" for the purpose of that dispute**

9. I turn now to Pakistan's claim that the jurisdictional reservation in the Marshall Islands' declaration of consent, by virtue of reciprocity, bars this case. That reservation precludes cases brought by a party that has accepted the compulsory jurisdiction of this Court "only in relation to or for the purpose of" that dispute[80]. Pakistan first raised this reservation in opposition to jurisdiction in its Counter-Memorial, and our oral pleadings today are the Marshall Islands' first response to it.

10. Pakistan is mistaken in its assertion that this reservation precludes jurisdiction. While the Marshall Islands does not dispute the application of reciprocity with respect to this reservation, the reservation simply does not preclude jurisdiction here.

11. In this case, the word "only" in the Marshall Islands' reservation — precluding jurisdiction where an acceptance of jurisdiction is "only" for the present case — is the key word. The evidence demonstrating that the Marshall Islands declaration was not deposited "only in relation to or for the purpose of" this case includes the following three points.

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[76]Application of the Marshall Islands (AMI), para. 60.

[77]MMI, Ann. 5.

[78]See *Aerial Incident of 10 August 1999 (Pakistan/India), I.C.J. Reports 2000*, pp. 30-31, para. 42, citing *Anglo Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105 and *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 27.

[79]See *ibid.*, p. 31, citing *Fisheries Jurisdiction (Spain* v. *Canada), I.C.J. Reports 1998*, p. 454, para. 49.

[80]See CMP, paras. 7.35-7.39; MMI, Ann. 5.

12. First, nothing in the wording of the Marshall Islands declaration — as it stands and with respect to the words actually used — limits the acceptance of compulsory jurisdiction to *only* this dispute. Nothing. Pakistan may wish to dispense with the word "only" in the reservation, but it cannot do so[81].

13. Second, the Marshall Islands filed its consent to the compulsory jurisdiction of this Court nearly three years ago, on 24 April 2013, and since that time the Marshall Islands has never changed its declaration. If it wished to limit its consent to only this dispute with Pakistan, it could have withdrawn or modified its consent. But it did not do so.

14. Third, and importantly, if this 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, including as reflected in press articles quoting the Marshall Islands' Co-Agent, Tony de Brum. Specifically, as the Court heard earlier today, among the statements made by Mr. de Brum 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." This statement was reported by ClimateWire, and is readily available on the Internet. It is included at tab 1 of the judges' folders[82]. This statement was made before the Marshall Islands declaration was deposited[83].

15. The statement followed the Marshall Islands' earlier consideration 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 titled "Threatened Island Nations: *Legal Implications of Rising Seas and a Changing Climate*", which was scheduled in May 2011. That report states that the Marshall Islands was collaborating with Columbia University: "to explore creative approaches to the legal

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[81]See CMP, para. 7.39.

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

[83]See MMI, Ann. 4, declaration of the Marshall Islands.

issues facing low-lying island nations as climate change causes sea levels to rise" including, whether actions might be brought in "existing international tribunals"[84].

16. It is clear that the Marshall Islands' acceptance of the Court's compulsory jurisdiction had a history independent of this dispute with Pakistan.

17. For the foregoing reasons, the Marshall Islands reservation excluding jurisdiction in a dispute where the consent was "only for the purpose of or with respect to" that dispute does not limit jurisdiction in this case.

I thank the Court for its attention and would ask you, Mr. President, to give the floor to my colleague, Professor Roger Clark.

Le PRESIDENT : Merci. Je donne la parole à Monsieur le professeur Clark.

Mr. CLARK: Thank you, Mr. President.

**DOMESTIC JURISDICTION, MULTILATERAL TREATY RESERVATION**

1. Mr. President, Members of the Court, I am honoured to speak again on behalf of the Marshall Islands.

2. I shall deal, first, with Pakistan's argument[85] that jurisdiction is excluded by virtue of its reservation of "disputes relating to questions which by international law fall exclusively within the domestic jurisdiction of Pakistan"[86]; second, with its reservation of "disputes arising under a multilateral treaty, unless (i) all parties to the treaty affected by the decision are also parties to the case before the Court, or (ii) the Government of Pakistan specially agree to jurisdiction"[87].

## A. Domestic jurisdiction

3. Having quoted the language of its domestic jurisdiction reservation[88], Pakistan immediately veers off and discusses a reservation not made, namely matters connected with

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[84]Https://unngls.org/index.php/un-ngls_news_archives/2010/730-threatened-island-nations-legal-implications-of-rising-seas-and-a-changing-climate.

[85]Counter-Memorial of Pakistan (CMP), Part 7, Chapter 3.

[86]Proviso *(b)* of Pakistan's 1960 Declaration Recognizing as Compulsory the Jurisdiction of the Court.

[87]Proviso *(c)* of its declaration; CMP, Part 7, Chap. 4.

[88]CMP, Para. 7.40.

national defence. What Pakistan does not discuss is the relevant jurisprudence on domestic jurisdiction reservations like the one that it actually made, or the related scholarly commentary[89]. Instead, Pakistan[90] refers to the dissenting or separate opinions in the *Nuclear Tests* cases[91] of Judges de Castro[92], Forster[93] and Gros[94] dealing with a national defence exception in France's then-existing declaration under Article 36 (2) of the Court's Statute. Perhaps Pakistan's assumption is that "domestic jurisdiction" and "national defence" constitute a single category, or that one is a subcategory of the other, but the argument is not spelled out by Pakistan. We know of no reasoned authority for conflating the two.

4. Be that as it may, the national defence version of the domestic jurisdiction argument misses the mark. What Pakistan fails to accept is that the Marshall Islands is not objecting to Pakistan's national defence policy *simpliciter*, including its decision to acquire nuclear weapons. *This* case, to reiterate, is about Pakistan's policy in the face of its customary law obligation to negotiate in good faith. Pakistan's argument, at best, goes to the merits, to the question of the existence and application of such an obligation, not to jurisdiction[95].

5. Pakistan offers a variation on the national defence theme when it contends that "[d]isputes relating to national defence and security are non-justiciable by their very nature"[96]. Whether Pakistan is in breach of its international obligations under customary law is eminently capable of judicial determination. Pakistan similarly asserts that a judgment for the RMI would deny

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[89]For relevant cases, see, e.g., Christian Tomuschat, "Article 36", in Andreas Zimmerman, Christian Tomuschat, Karin Oellers-Frahm and Christian J. Tams, *The Statute of the International Court of Justice*, 633, 688, 2nd ed., 2012; Gaetano Arangio-Ruiz, "The plea of domestic jurisdiction before the International Court of Justice: substance or procedure?" in Vaughn Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, 440, 2007; C.H.M Waldock, "The Plea of Domestic Jurisdiction Before International Legal Tribunals", 1954, 31 *BYBIL*, 1996.

[90]CMP, para. 7.43.

[91]*Nuclear Tests* case *(Australia* v. *France) I.C.J. Reports 1974* p. 253; *Nuclear Tests* case *(New Zealand* v. *France) I.C.J. Reports 1974*, p. 457. (Pakistan's references appear to be only to the Australian case.)

[92]Dissenting opinion of Judge de Castro, *ibid*., p. 376.

[93]Separate opinion of Judge Forster, *ibid*., p. 275.

[94]Separate opinion of Judge Gros, *ibid*., p. 283. To the same effect if Judge Ignacio Pinto's separate opinion, *ibid*., p. 311 which is not cited by Pakistan.

[95]In this respect, compare the discussion in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock in the *Nuclear Tests* case, *supra* note 7, p. 364, para. 106, with that of the Judges quoted by Pakistan. See also *Case Concerning Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, pp. 30-31.

[96]CMP, Part 8, Chap. 5, Sec. 3.

Pakistan's "ability to protect its long-asserted sovereign rights"[97]. No denial of sovereignty is entailed in a finding that Pakistan is in breach of customary international law.

6. Pakistan thus relies on a reservation not made in its declaration; for that reason alone its objection to jurisdiction should be rejected. I shall not enter into a tedious recitation of each of the cases relating to Pakistan's *actual* domestic jurisdiction exception, but I shall refer briefly to the main ones.

7. The starting-point is, of course, the Permanent Court's advisory opinion in *Nationality Decrees Issued in Tunis and Morocco*[98]. As those proceedings emanated from a request by the League Council, the discussion turned on Article 15 (8) of the Covenant rather than on a declaration under Article 36 (2) of the Statute. Nonetheless, subsequent discussions in contentious proceedings frame the issue the same way. The Court commented, famously:

> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain."[99]

The Court concluded that the arguments made by the United Kingdom[100] in the particular context overcame the principle that nationality was generally within the reserved domain, which was thus — as they put it — "limited by rules of international law"[101]. The argument turned on the applicability of a set of treaties, on diplomatic correspondence, on general international law about the applicability of some of the treaties to third parties, and on the application of the principle of *clausula rebus sic stantibus* to others. The Court concluded that "In the opinion of the Court, these facts suffice, even when considered separately, to prove that the dispute arises out of a matter which, by international law, is not solely within the domestic jurisdiction of France as such jurisdiction is defined in this opinion."[102] The Marshall Islands' dispute with Pakistan similarly arises out of an *international law* obligation, an obligation to pursue negotiations in good faith.

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[97]Pakistan asserts this in Part 8, Chap. 5, Sec. 4, paras. 8.117 and 8.118 of its Counter-Memorial.

[98]*Advisory Opinion 1923, P.C.I.J., Series B, No. 4.*

[99]*Ibid.*, p. 24.

[100]See discussion *ibid*., pp. 24-32.

[101]*Ibid.*

[102]*Ibid*., pp. 31-32.

8. The most extended discussion of the exception in *this* Court was in the *Interhandel* case[103]. Since it was clear in *Interhandel* that the legal issues concerned treaty interpretation and customary international law governing relations between belligerents and neutrals, the domestic jurisdiction exception was inapplicable.

9. A distinguished academic commentator, Professor Tomuschat, summarizes this Court's decisions on domestic jurisdiction exceptions thus: "Whenever recourse can be had to a rule of international law for the settlement of a dispute, it ceases to be one under domestic law."[104]

10. Mr. President, at the very end of its domestic jurisdiction discussion[105], Pakistan makes an entirely undeveloped reference to Article 2, paragraph 7, of the United Nations Charter. Article 2, paragraph 7, is not an issue that has received extensive treatment in this Court. It was, however, given short shrift as a barrier to jurisdiction in the only case in which it was considered in depth, the Court's 1950 Advisory Opinion, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*[106]. There the Court commented[107] that "[t]he interpretation of the terms of a treaty . . . could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court."[108]

11. The obligation which Pakistan is alleged to have breached in the present proceedings is based on customary international law rather than a treaty, but the same principle applies.

12. In sum, on domestic jurisdiction, the Marshall Islands contends that Pakistan is under a customary international law obligation to negotiate in good faith and bring to a conclusion nuclear disarmament. If the Marshall Islands is wrong about the existence of such an obligation, judgment should be given for Pakistan. But that is for determination at the merits stage. It is one of the

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[103]*Switzerland* v. *United States, I.C.J. Reports 1959*, p. 6.

[104]*Supra* n. 89, at p. 688; internal footnote omitted.

[105]CMP, para. 7.46.

[106]*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65.

[107]*Ibid.*, pp. 70-71.

[108]Discussions of the applicability of Article 2.7 in political organs of the UN demonstrate how limited its scope is as a threshold barrier to discussion and action. See, e.g., Georg Nolte, 'Article 2 (7)' in Bruno Simma, Daniel Erasmus Khan, Georg Nolte and Andreas Paulus, *The Charter of the United Nations*, 280, 3rd ed., 2012; A. A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations", 1976, 25 *ICLQ* 715.

ultimate questions of international law in this case, not a preliminary issue of "jurisdiction" to be dismissed pursuant to Pakistan's reservation *(b)* or Article 2, paragraph 7, of the Charter.

### B. The multilateral treaty exception

13. This case, to repeat, arises under international customary law. Pakistan is hard pressed to contend that the RMI's case "arises under" a treaty to which Pakistan is not a party. The most sensible ordinary meaning of "arising under a multilateral treaty" is that the dispute arises under a multilateral treaty to which each disputant is a party. Moreover, it seems extreme to argue, as Pakistan does, that the case "affects all the parties to that treaty"[109]. Practice, such as that in *Nicaragua* about to be discussed, suggests a much narrower range of application of "affects" and confines it to a State specifically affected.

14. Aside from a reference to a cryptic comment in a dissenting opinion by Judge Oda[110], Pakistan's discussion fails completely to deal with the arguments made by the Marshall Islands in its Memorial[111] based on this Court's decisions at the Jurisdiction and Admissibility[112] stage, and again at the Merits phase[113], of the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In that case, Nicaragua had made parallel arguments against the United States based on both treaty law and on customary law. The United States then-applicable declaration contained a multilateral treaty exception identical to Pakistan's.

15. At the first stage in *Nicaragua*, the Court held that the exception did not require dismissing the customary law claim:

> "[It] cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, 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."[114]

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[109]CMP, para. 7.58.

[110]CMP, para. 7.61, referencing Judge Oda's dissenting opinion in *Military and Paramilitary activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 218 para. 13.

[111]Memorial of the Marshall Islands (MMI), paras. 56, 61.

[112]*Military and Paramilitary activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392.

[113]*Military and Paramilitary activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 14.

[114]*Military and Paramilitary activities in and against Nicaragua, Jurisdiction and Admissibility*, *supra* n. 112, p. 424, para. 73.

The Court went further and characterized the exception as going to the merits, not jurisdiction:

> "As for the Court, it is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified. . . .
>
> At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem."[115]

16. The United States had suggested at the jurisdictional stage that El Salvador, Honduras and Costa Rica would be "affected" by the Court's judgment. At the merits stage, the Court noted that "even if only one of these States is found to be 'affected', the United States reservation takes full effect"[116]. It proceeded to "first take the case of El Salvador, as there are certain special features in the position of this State"[117]. The Court concluded, after a careful consideration of the facts, that El Salvador, a party to both relevant treaties, the United Nations Charter and the Charter of the Organization of American States, would be "affected" by a decision from the Court that the United States had violated those treaties[118]. The Court therefore could not proceed with the claims based on treaty law, but it could proceed with the customary law claims. The Court said:

> "It should however be recalled that, as will be explained further below, the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply."[119]

There is no suggestion in the Court's reasoning that *all* parties to the treaties would be "affected"[120]. Otherwise it would make no sense for the Court to enter into an extensive discussion of El Salvador's position.

17. When it came to examine the sources under Article 38 of the Statute, notably customary law, the Court referred to practice before the United Nations and OAS Charters were drafted, to the instruments themselves and to subsequent developments, particularly in the General Assembly and

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[115] *Military and Paramilitary activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 425, paras. 75-76.

[116] *Military and Paramilitary activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 34, para. 48.

[117] *Ibid.*

[118] *Supra* p. 38. Since the United States exception applied as long as only one State was "affected", the Court apparently found it unnecessary to consider the position of Costa Rica and Honduras further.

[119] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 38, para. 56.

[120] Compare the claim in Counter-Memorial of Pakistan, para. 7.58.

in European and Inter-American institutions[121]. As has been explained in Marshall Islands' discussion of customary international law earlier this morning, the materials germane to the RMI's customary law argument range similarly over General Assembly resolutions prior to and after the NPT, the NPT itself, this Court's Advisory Opinion of 1996 and subsequent General Assembly and Security Council resolutions. The existence of a multilateral treaty to which Pakistan is not a party presents no barrier to an examination on the merits of the RMI claims.

18. It is striking that in *Nicaragua*, this Court found that there was jurisdiction based on a customary law argument "even as regards countries that are parties to such conventions"[122]. In the present case, there is no parallel treaty cause of action to muddy the waters, since Pakistan is not a party to the NPT. A typical circumstance in which rules or principles of customary law come into play is precisely when a State is not a party to a treaty containing the same or similar rule or principles.

19. Mr. President, Members of the Court, I thank you. That completes my presentation. I ask you to pass the floor to my colleague, Professor Paolo Palchetti.

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

Mr. PALCHETTI:

**ABSENT THIRD PARTIES**

1. Mr. President, Members of the Court, it is an honour to address this Court on behalf of the Marshall Islands. In its Counter-Memorial, Pakistan argued that the Marshall Islands' Application is inadmissible since the Applicant failed to bring indispensable parties before this Court[123]. My task before you is to address this objection. In particular, I will address the question of the applicability of the *Monetary Gold* principle to the present dispute. I will show that, taking into account (II) the subject-matter of the dispute and (III) the scope of application of the principle, there is no reason for this Court to uphold Pakistan's objection.

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[121]See discussion in *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, especially at pp. 97-104.

[122]*Supra* n. 114.

[123]Counter-Memorial of Pakistan (CMP), para. 1.12.

## I. Preliminary comments

2. Before dealing with the *Monetary Gold* argument, a preliminary comment is called for. In its Counter-Memorial, Pakistan mentioned the *Monetary Gold* principle no fewer than 15 times. It referred to this principle in different contexts and for different purposes. By repeatedly referring to this principle, Pakistan did not make its argument any stronger. To the contrary, the omnipresence of this principle in Pakistan's argumentation makes it hard to understand what is, in Pakistan's view, its precise scope of application.

3. What is even more striking is that, by continuously referring to the *Monetary Gold* principle, Pakistan's reasoning sometimes appears rather contradictory. This is most evident when one considers a few passages in the section of the Counter-Memorial dealing with the "multilateral treaty reservation". In its attempt to convince the Court that this reservation applies to the present dispute, Pakistan made the following observations: "Most importantly, Pakistan confronts the possibility of a legal determination of its rights and interests when the legal rights and interests of other parties — including the obligations of the applicant State vis-à-vis the absent States — *will not be determined*."[124] If one takes this assertion at face value, it can be concluded that there is no room for the *Monetary Gold* principle. But on the very same page Pakistan also observes that "the 'very subject-matter' of the Marshall Islands' Application in fact is the interests of absent States, and the Application is, in accordance with *Monetary Gold*, inadmissible"[125]. Mr. President, how can it be that the legal rights and interests of absent third States form the very subject-matter of the present dispute if, as Pakistan itself recognizes, this Court will not determine the rights and interests of absent States?

## II. The subject-matter of the present dispute

4. The answer to this question is that, contrary to Pakistan's argument, the *Monetary Gold* principle does not apply. This conclusion is inescapable if one considers the subject-matter of the present dispute. As the Application of the Marshall Islands makes clear, the subject-matter of the dispute is Pakistan's international responsibility for its wrongful conduct in respect to nuclear disarmament. The conduct giving rise to such responsibility consists of acts and omissions

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[124]CMP, para. 7.73. See also CMP, para. 7.77.

[125]CMP, footnote 99.

attributable to Pakistan. The responsibility arises from the breach of a customary international law obligation which binds Pakistan. 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 this in order to determine Pakistan's responsibility.

5. Pakistan does not make the slightest effort to examine the Application in order to determine the subject-matter of the dispute. Its objection relies on a number of assertions which, when not groundless, are at best irrelevant.

6. First, Pakistan argues that it is not the proper party to the claims advanced by the Marshall Islands[126]. It goes even further; it argues that in relation to such claims, it is in the position of a third State[127]. It is not clear which State, if any, is, in Pakistan's view, the proper party. At times, it seems to regard the United States as the proper respondent[128]. Sometimes, the role of proper parties is assigned to States possessing nuclear weapons, though only those which are parties to the Non-Proliferation Treaty[129]. The reasons why these other States should be regarded as the proper parties are hard to understand. Pakistan refers to the close connection between the Marshall Islands and the United States in the context of the use of nuclear weapons and nuclear testing. But this element is irrelevant for the purposes of applying the *Monetary Gold* principle. Pakistan also refers to the fact that it is not a party to the Non-Proliferation Treaty. But this, obviously, is not the Marshall Islands' position and, again, it is irrelevant. The Application is clear. The Marshall Islands' claims against Pakistan are based exclusively on customary international law.

7. In its recent Judgment in *Obligation to Negotiate Access to the Pacific Ocean*, this Court observed that "[t]o identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim."[130] The Respondent would have the

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[126]CMP, para. 8.38.

[127]CMP, para. 8.81.

[128]CMP, para. 8.77 ("questions of U.S. sovereignty and national security form the 'very subject-matter' of the proceedings").

[129]CMP, para. 8.80 ("The real cause of action is against the NWS that are party to the NPT.").

[130]*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection*, Judgment of 24 September 2015, para. 26.

Court set aside the dispute as presented in the Application. In fact, the Application leaves no doubt that the Marshall Islands' claims are directed against Pakistan alone. The facts and grounds on which these claims are based relate exclusively to acts and omissions of Pakistan.

8. The Respondent argues that the acts of third States would constitute "the dominant part of the factual dimension of the dispute in question"[131]. Again, this assertion is completely unsubstantiated. A cursory reading of the Application is sufficient to show that it is groundless.

9. Pakistan then asserts that the real subject-matter of the dispute cannot be the one presented in the Application since, in its view, the relief sought against Pakistan would confer no direct benefit on the Marshall Islands. According to the Respondent, the Marshall Islands is in fact seeking a judgment which is targeted at the nuclear weapons States that are party to the Non-Proliferation Treaty[132]. Here, again, Pakistan is mixing up different issues. The *Monetary Gold* principle has nothing to do with the effectiveness of the remedies sought by a party to a case. Moreover, Pakistan cannot misconstrue the dispute simply because, in its view, the relief sought by the Marshall Islands would have no practical consequences.

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

10. Mr. President, Pakistan not only attempts to change the object of the present dispute. It also attempts to widen the scope of the *Monetary Gold* principle. I move now to this question.

11. In its Counter-Memorial, Pakistan asserts that the objective of the Marshall Islands' Application is "to attract judicial statements of a general nature, including in relation to customary law obligations and obligations *erga omnes*"[133]. According to the Respondent, since any findings of the Court on these issues will affect the legal position of the States possessing nuclear weapons, these States must be regarded as "indispensable parties".

12. It simply makes no sense to think that an interest of third States in the Court's determination of customary international law would make any of these States an indispensable party. Under this Court's Statute such an interest would not even be sufficient to justify an

[131]CMP, para. 8.46. See also CMP, para. 8.86.

[132]CMP, para. 8.88.

[133]CMP, para. 7.80.

intervention by a third State. As this Court has consistently held, a third State cannot intervene "simply on an interest in the Court's pronouncement in the case regarding the applicable general principles and rules of international law"[134].

13. Admittedly, third-party intervention may be justified when, as in the present case, the dispute concerns the alleged breach of an obligation *erga omnes*. However, a State to whom an obligation *erga omnes* is owed cannot be regarded as an indispensable party. Let me just note that in neither *Belgium* v. *Senegal* nor the *Whaling* case did this Court decline to exercise jurisdiction because of the absence of other States, even though both cases raised the issue of compliance with *erga omnes* obligations.

14. Pakistan also argued that "the Court could not proceed to adjudicate a claim against it unless the other States alleged by the RMI jointly to have committed the breach were also a party to the proceedings before this Court"[135]. First, the Marshall Islands has never alleged that the States possessing nuclear weapons have jointly committed the breach of the obligation. The contrary is true. The focus of the Marshall Islands' claims is on acts and omissions of Pakistan. The claims are not based upon the conduct of the other States possessing nuclear weapons. However, let us assume, only for the sake of argument, that the conduct complained of in the present case is conduct which is to be attributed simultaneously to Pakistan and to other States. Even in this case, the conditions for the application of the *Monetary Gold* principle would not be satisfied.

15. Mr. President, in its Counter-Memorial, Pakistan referred 15 times to the Judgment in the *Monetary Gold* case, but it carefully avoided referring to the Court's Judgment in the *Nauru* case. Yet the *Nauru* Judgment is of decisive importance for the purpose of the present case. In *Nauru* this Court clarified 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.

16. The Court's Judgment in *Nauru* provides authority for the proposition that the *Monetary Gold* principle does not apply when the conduct complained of may be attributed simultaneously to

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[134] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30.

[135] CMP, para. 7.89.

the Respondent State and to third States. The same conclusion is warranted when the connection between the position of the Respondent and that of third States is less strong than in *Nauru*. This includes cases where 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.

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

17. Mr. President, it should now be clear that the present case is quite different from *Monetary Gold* or *East Timor*. The responsibility of States other than Pakistan does not form the subject-matter of the present dispute. The focus of the Marshall Islands' claim is exclusively on the conduct of Pakistan, including the quantitative build-up, diversification, and qualitative improvement of its nuclear arsenal[136]. In order to establish its claim against Pakistan, the Marshall Islands does not need to prove any act which is attributable to a State other than Pakistan. More importantly, none of the conduct referred to in the Application requires a prior determination of the responsibility of a third State, be it a State possessing nuclear weapons or any other State.

18. In the light of the foregoing, it can safely be concluded that the *Monetary Gold* principle does not apply to the dispute brought by the Marshall Islands against Pakistan. Any objection to the jurisdiction of the Court or to the admissibility of the claim which is based on such principle must be rejected.

19. 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 Mr. John Burroughs.

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

Mr. BURROUGHS:

**THE JUSTICIABILITY OF THE DISPUTE BETWEEN THE REPUBLIC OF THE MARSHALL ISLANDS AND PAKISTAN**

1. Mr. President and Members of the Court, I am honoured and privileged to appear on behalf of the Republic of the Marshall Islands. My task is to demonstrate that adjudication of this

[136] Application of the Marshall Islands (AMI), para. 57.

case is indeed within the judicial function of the Court, contrary to arguments made by Pakistan in Part 8, Chapter 5 of its Counter-Memorial.

2. Most centrally, a judgment by the Court in this case would be capable of "effective application" and have "some practical consequence", criteria stated in the decision of this Court in *Northern Cameroons*[137]. Findings are a common form of relief and, in and of themselves, are considered a sufficient remedy[138]. A judgment would have implications for Pakistan's conduct, regardless of the positions or actions of other nuclear-armed States and of non-nuclear-weapon States, as I will show.

3. In its Counter-Memorial Pakistan nowhere affirms the customary nature of the obligation to pursue negotiations on complete nuclear disarmament. If there is not such an obligation, Pakistan's support for such negotiations in the General Assembly and the Conference on Disarmament is a matter of policy choice[139]. A judgment of the Court affirming the customary international law obligation would clarify that the pursuit of negotiations on complete nuclear disarmament is a legal obligation for Pakistan. A legal obligation is durable; a policy choice is mutable. Further, as the Marshall Islands' requested order spells out, in the view of the Marshall Islands the obligation would require actions beyond taking positions in the General Assembly and Conference on Disarmament, including initiating such negotiations if necessary.

4. In this connection, it bears emphasis, contrary to Pakistan's assumption[140], that it is not the case that the participation in negotiations of all States possessing nuclear arsenals, or at least all the NPT nuclear-weapon States, is required. Multilateral negotiations could commence with the participation of some nuclear-armed States. It is instructive that not all the States then possessing nuclear arsenals participated in negotiation of the NPT; France and the People's Republic of China were absent and did not join the treaty until more than two decades after its entry into force[141].

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

[138] 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 (I),* pp. 232-237 and operative paras. 5-8.

[139] See AMI, paras. 25, 30, 31.

[140] See e.g., CMP, para. 8.101.

[141] See United Nations Office for Disarmament Affairs, Status of Nuclear Non-Proliferation Treaty, http://disarmament.un.org/treaties/t/npt.

Also, among other possibilities, a nuclear disarmament treaty could provide that it would enter into force only when certain States had ratified it, as is true of the Comprehensive Nuclear-Test-Ban Treaty[142]. Or a nuclear disarmament treaty could make some obligations of initial participants contingent on certain non-participants eventually joining.

5. The Marshall Islands also seeks a judgment that would set forth the requirements for Pakistan's conduct with respect to the obligation of pursuit of negotiations regarding cessation of the nuclear arms race[143]. At paragraph 55 of its Application, the Marshall Islands claims that Pakistan is breaching that obligation by, *inter alia*, blocking negotiations on a fissile materials cut-off treaty[144]. Pakistan is also not proposing negotiations on any regional or global measures to limit or end nuclear arms racing, and is therefore failing to "pursue" negotiations in the sense of seeking to bring them about.[145]

6. The Marshall Islands' request for declaratory relief, page 23 of the Application, additionally concerns Pakistan's expansion, improvement, and diversification of its nuclear arsenal. It requests findings that Pakistan's conduct in this regard is contrary to the obligation to pursue negotiations on complete nuclear disarmament and to the subsidiary obligation to pursue negotiations on cessation of the nuclear arms race, and to the requirement of good faith in implementing those obligations. Such declaratory relief would have implications for Pakistan's conduct.

7. At paragraph 8.120 of its Counter-Memorial, Pakistan maintains that the principle of good faith is not an independent source of legal obligation, citing *Border and Transborder Armed Actions*[146], and somehow regards this as a ground for inadmissibility. However, the Marshall Islands is claiming only that the principle of good faith entails certain requirements for implementation of existing obligations to pursue negotiations on nuclear disarmament and

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[142]Art. XIV, para. 1, of the Comprehensive Nuclear-Test-Ban Treaty requires ratifications by 44 States listed in Ann. 2 for the treaty to enter into force. See http://ctbto.org/fileadmin/content/treaty/treaty_text.pdf (accessed on 10 Feb. 2016).

[143]See AMI, para. 13, Remedies *(b)*, p. 23; MMI, para. 2.

[144]See ***AMI,*** paras. 25, 55.

[145]See OED Online, available at http://www.oed.com/view/Entry/155076?redirectedFrom=pursue#eid (accessed on 29 Feb. 2016) (meaning of "pursue" includes: 5. "To seek to reach or attain"; 6. "To try to obtain or accomplish, to work to bring about, to strive for (a circumstance, event, condition, etc.); to seek after, aim at").

[146]*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 105, para. 94.

cessation of the nuclear arms race[147]. Moreover, this claimed breach is one of several, and the others do not depend on it.

8. Considering all the Marshall Islands' claims, the Court could provide effective and reasonable relief based on them. As the Court stated in *Haya de la Torre*, a decision by the Court that an action is not in conformity with an international legal obligation "entails a legal consequence, namely that of putting an end to the illegal situation"[148]. There may be alternative means of coming into compliance, and the Court held in the same case that it is not for the Court to choose on grounds of practicality or expediency among such means[149]. It remains true that declaratory relief would provide the legal parameters for determining and implementing steps to comply with the obligation. The Marshall Islands has also requested an order, whose specifics can be debated at the merits stage.

9. Undoubtedly nuclear disarmament is a complex matter, as Pakistan notes at paragraph 8.197 of its Counter-Memorial, but the Court can and should apply the law bearing on Pakistan's conduct. As I have explained, contrary to Pakistan's contention at paragraph 8.111[150], for all the elements of relief sought by the Marshall Islands, compliance with a judgment would not depend on subsequent approval by the parties to the case, or by other States. Pakistan's arguments for non-justiciability based on considerations of sovereignty and national defence[151] were addressed in Professor Clark's presentation.

10. Pakistan cites the case brought by Australia against France concerning nuclear testing in the Pacific[152]. In the *Nuclear Tests* cases, the Court held that since France had promised, outside the Court, to cease its atmospheric testing, and could be expected to comply with its promise, the

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[147]See AMI, paras. 45-50, 56-59.

[148]*Haya de la Torre (Colombia/Peru), Judgment, I.C.J. Reports 1951*, p. 82.

[149]*Ibid.* p. 83. See also *Northern Cameroons, supra* n. ***137***, at p. 37. Cf. case concerning *Right of Passage over Indian Territory, (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960,* p. 37 ("[T]he day-to-day exercise of the right of passage as formulated by Portugal, with correlative obligation upon India, may give rise to delicate questions of application, but that is not, in the view of the Court, sufficient ground for holding that the right is not susceptible of judicial determination with reference to Article 38 (1) of the Statute").

[150]CMP, para. 8.111, citing *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46,* p. 161.

[151]CMP, paras. 8.114 – 8.118.

[152]*Nuclear Tests (Australia* v. *France) Judgment, I.C.J. Reports 1974*, p. 253, cited in CMP, paras. 8.105, 8.107. Both *Nuclear Tests* cases, *Australia* v. *France* and *New Zealand* v. *France*, *Judgment, I.C.J. Reports 1974,* p. 457, are also cited elsewhere in CMP.

cases were moot. The Court's reasoning was that the French statements had "caused the dispute to disappear"[153] and thus, "the dispute having disappeared, the claim . . . no longer has any object"[154]. In the present case, there is very much a live dispute.

11. Pakistan also refers to the *Northern Cameroons* case[155]. In that case, subsequent to the filing of the Application, the General Assembly validly terminated the Trusteeship Agreement on which Cameroon based its claims. Cameroon had not sought damages for any past breach of the then-terminated Agreement and, the Court stated, "[a]ny judgment which the Court might pronounce would be without object"[156]. In the present case, there is no similar circumstance extinguishing the applicable law, and a judgment will otherwise meet the *Northern Cameroons* criteria of being capable of "effective application" and having "some practical consequence"[157].

12. Pakistan contends in Part 9 of its Counter-Memorial that the Court "should" in "certain circumstances" decline to adjudicate cases that are otherwise admissible and within the Court's jurisdiction[158]. However, in the *Nuclear Tests* cases, the Court stated in holding that the case was moot: "This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others."[159] In any event, contrary to Pakistan's assessment[160], the Marshall Islands' Application, Memorial, and oral pleadings provide a perfectly adequate basis for the Court to decide preliminary issues and to determine that the case should proceed to judgment on the merits.

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[153]*Nuclear Tests (Australia* v. *France)*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France)*, p. 457, para. 58.

[154]*Nuclear Tests (Australia* v. *France)*, p. 271, para. 56; *Nuclear Tests (New Zealand* v. *France)*, p. 476, para. 59.

[155]*Northern Cameroons (Cameroons* v. *United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963, supra* n. ***137***, cited in CMP, paras. 8.105, 8.110, and 9.2, and elsewhere.

[156]*Ibid.* p. 38.

[157]See *ibid.*, pp. 33, 34.

[158]CMP, para. 9.1.

[159]*Nuclear Tests (Australia* v. *France)*, *supra* n. ***152***, p. 271, para. 57, *Nuclear Tests* (*New Zealand* v. *France)*, *supra* n. ***152***, p. 477, para. 60. See also, *Nuclear Tests (Australia* v. *France)**, Judgment, I.C.J. Reports 1974***; joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, p. ***322***, para. ***22***; ***Nuclear Tests (Australia v. France), p. 322,*** *Nuclear Tests (New Zealand* v. *France)*, ***joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, p. 505, para. 21***: "[The Court] has not the discretionary power of choosing those contentious cases it will decide and those it will not."

[160]CMP, para. 9.8.

13. In summary, the present case is well within the judicial function of the Court; a judgment would be capable of effective application by Pakistan and have consequences for Pakistan's conduct.

14. I thank you, Mr. President and Members of the Court, for your attention. May I request, Mr. President, that you turn the floor over to Tony deBrum, Co-Agent of the Marshall Islands, who will make some concluding remarks and read the Marshall Islands' final submissions.

Le PRESIDENT : Merci. La parole est au coagent des Iles Marshall, S. Exc. M. Tony deBrum.

Mr. deBRUM:

**CONCLUDING REMARKS**

1. Mr. President, Members of the Court, as I stated in my opening statement, the Marshall Islands has come before this Court because of its belief in, and reliance upon, the rule of law. It is the rule of law that limits the ***reach*** of a "might makes right" mindset that could, in the absence of the rule of the law, pervade humanity.

2. The dispute in this case concerns the alleged breach of a customary international legal obligation on the part of Pakistan to pursue in good faith negotiations leading to nuclear disarmament and an end to the nuclear arms race.

3. Also, as reflected in my opening statement, the resolution of this dispute is of the highest level of importance to the Marshallese, who know first-hand the horrors of these weapons of mass destruction.

4. 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.

5. 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 and to the admissibility of the Marshall Islands' claims, as submitted by Pakistan in its Counter-Memorial of 1 December 2015;

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

*(c)* to adjudge and declare that the Marshall Islands' claims are admissible."

This concludes my statement, Mr. President.

Le PRESIDENT : Je vous remercie, Excellence.

La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République des Iles Marshall.

Cela nous amène à la fin de la procédure orale sur les questions de la compétence de la Cour et de la recevabilité de la requête 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. Pakistan)*. Je tiens à remercier les coagents, conseils et avocats de la République des Iles Marshall pour l'assistance qu'ils ont apportée à la Cour par leurs exposés oraux.

Les agents des deux Parties devront rester à la disposition de la Cour pour toutes informations ou renseignements dont la Cour pourrait avoir besoin.

Sous cette réserve, je déclare close la procédure orale sur les questions de la compétence de la Cour et de la recevabilité de la requête en la présente affaire. Les Parties seront informées en temps utile par le greffier de la date à laquelle la Cour rendra son arrêt en séance publique.

Je vous remercie. L'audience est levée.

*L'audience est levée à 12 h 55.*