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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Wednesday 9 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.* United Kingdom)**

Preliminary Objections

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le mercredi 9 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. Royaume-Uni)**

Exceptions préliminaires

COMPTE RENDU

Present:	President	Abraham
	Vice-President	Yusuf
	Judges	Owada
		Tomka
		Bennouna
		Cançado Trindade
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
	Judge *ad hoc*	Bedjaoui
	Registrar	Couvreur

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

M. Couvreur, greffier

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

H.E. Mr. Tony deBrum,

Mr. Phon van den Biesen, Attorney at Law, van den Biesen Kloostra Advocaten, Amsterdam,

as Co-Agents;

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

as Member of the Delegation;

Ms Laurie B. Ashton, Attorney, Seattle, United States of America,

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel;

Ms Amanda Richter, member of the English Bar,

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

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

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

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

Mr. Rob van Riet, London, United Kingdom,

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

as Assistants;

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

as Technical Adviser.

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

S. Exc. M. Tony deBrum,

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comme coagents ;

Mme Deborah Barker-Manase, chargé d'affaires a.i. et représentant permanent adjoint de la République des Iles Marshall auprès de l'Organisation des Nations Unies à New York,

comme membre de la délégation ;

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

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

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

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

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

M. Roger S. Clark, *Board of Governors Professor* à la faculté de droit de l'Université Rutgers, New Jersey, Etats-Unis d'Amérique,

comme conseils et avocats ;

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

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

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

comme conseils ;

Mme Amanda Richter, membre du barreau d'Angleterre,

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

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

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

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

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

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

comme assistants ;

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

comme conseiller technique.

The Government of the United Kingdom of Great Britain and Northern Ireland is represented by:

H.E. Sir Geoffrey Adams, K.C.M.G., Ambassador of the United Kingdom of Great Britain and Northern Ireland to the Kingdom of the Netherlands;

Mr. Iain Macleod, ***Legal Adviser, Foreign and Commonwealth Office,***

as Agent;

~~***Ms Catherine Adams,***~~

Mr. Shehzad Charania, ***Legal Adviser, Embassy of the United Kingdom of Great Britain and Northern Ireland, The Hague,***

as Deputy Agent~~s~~;

Mr. Christopher Stephen, ***Assistant Legal Adviser, Foreign and Commonwealth Office,***

as Adviser;

Sir Daniel Bethlehem, Q.C., ***member of the English Bar,***

Mr. Guglielmo Verdirame, ***Professor of International Law, King's College London, member of the English Bar,***

Mrs. Jessica Wells, ***member of the English Bar,***

as Counsel ***and Advocates***.

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

S. Exc. sir Geoffrey Adams, K.C.M.G., ambassadeur du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord auprès du Royaume des Pays-Bas ;

M. Iain Macleod, ***conseiller juridique au ministère des affaires étrangères et du Commonwealth,***

comme agent ;

~~**Mme Catherine Adams,**~~

M. Shehzad Charania, ***conseiller juridique à l'ambassade du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord au Royaume des Pays-Bas,***

comme agent~~s~~ adjoint~~s~~ ;

M. Christopher Stephen, ***conseiller juridique adjoint au ministère des affaires étrangères et du Commonwealth,***

comme conseiller ;

sir Daniel Bethlehem, Q.C., ***membre du barreau d'Angleterre,***

M. Guglielmo Verdirame, ***professeur de droit international au King's College, Londres, membre du barreau d'Angleterre,***

Mme Jessica Wells, ***membre du barreau d'Angleterre,***

comme conseils ***et avocats***.

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

La Cour se réunit à partir d'aujourd'hui pour entendre les plaidoiries des Parties sur les exceptions préliminaires soulevées par le Royaume-Uni 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. Royaume-Uni)*.

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

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

Bien que M. Bedjaoui ait 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 avant-hier, en ouvrant les audiences en 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. Monsieur Bedjaoui.

M. BEDJAOUI :

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

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

* *

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 le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, faisant en particulier grief à celui-ci d'avoir manqué à des obligations qui lui incomberaient en vertu du traité sur la non-prolifération des armes nucléaires de 1968 et du 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 Royaume-Uni le 5 juillet 2004 (déclaration déposée auprès du Secrétaire général des Nations Unies le 5 juillet 2004 également) et par elles-mêmes le 15 mars 2013 (déclaration déposée auprès du Secrétaire général le 24 avril 2013).

Par ordonnance en date du 16 juin 2014, la Cour a fixé au 16 mars 2015 et au 16 décembre 2015, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire des Iles Marshall et d'un contre-mémoire du Royaume-Uni. Le mémoire des Iles Marshall a été déposé dans le délai ainsi prescrit.

Le 15 juin 2015, dans le délai prescrit au paragraphe 1 de l'article 79 du Règlement, le Royaume-Uni a soulevé des exceptions préliminaires à la compétence de la Cour et à la recevabilité de la requête. En conséquence, par ordonnance du 19 juin 2015, le président, constatant que la procédure sur le fond était suspendue en application du paragraphe 5 de l'article 79 du Règlement, et compte tenu de l'instruction de procédure V, a fixé au 15 octobre 2015 la date d'expiration du délai dans lequel les Iles Marshall pourraient présenter un exposé écrit contenant leurs observations et conclusions sur les exceptions préliminaires soulevées par le Royaume-Uni. Les Iles Marshall ont déposé un tel exposé dans le délai ainsi fixé, et l'affaire s'est alors trouvée en état pour ce qui est des exceptions préliminaires.

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

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Je note la présence devant la Cour des agents, conseils et avocats des deux Parties. Conformément aux dispositions relatives à l'organisation de la procédure arrêtées par la Cour, les audiences comprendront un premier et un second tour de plaidoiries. Chaque Partie disposera d'une séance de trois heures pour le premier tour, et d'une séance de 90 minutes pour le second. Il s'agit bien évidemment d'un temps de parole maximal, que les Parties ne devront utiliser qu'en tant que de besoin. Le premier tour débute aujourd'hui et se terminera le vendredi 11 mars. Le second tour de plaidoiries s'ouvrira le lundi 14 mars et s'achèvera le surlendemain, c'est-à-dire le mercredi 16.

Le Royaume-Uni, qui a soulevé des exceptions préliminaires en l'espèce, sera entendu le premier aujourd'hui.

Je donne la parole à l'agent du Royaume-Uni, M. Macleod.

Mr. MACLEOD:

1. Mr. President, Members of the Court, it is an honour for me to appear before you today as the Agent of the United Kingdom.

2. Mr. President, allow me to introduce to the Court the members of the United Kingdom delegation: First, His Excellency Sir Geoffrey Adams, British Ambassador to the Netherlands; then, appearing as Deputy Agent is Mr. Shehzad Charania, Legal Adviser from our Embassy in The Hague. Counsel for the United Kingdom are: Sir Daniel Bethlehem, Q.C.; Professor Guglielmo Verdirame; and ***Mrs.*** Jessica Wells. Together, counsel will present the United Kingdom's oral argument. Acting as Adviser is my colleague, Mr. Christopher Stephen, of the Foreign & Commonwealth Office Legal Advisers.

3. Mr. President, the United Kingdom's oral argument will be structured and divided as follows.

4. First, Sir Daniel will address the *first* and *fifth* of the United Kingdom's preliminary objections in this case, as ordered in our written statement of 15 June 2015. The first objection is that there is no justiciable dispute between the Marshall Islands and the United Kingdom. And the fifth is that, in any event, any judgment of the Court would be incapable of effective application and that therefore the Court should decline to exercise jurisdiction in this case.

5. Second, Professor Verdirame will then address the United Kingdom's *second* and *third* preliminary objections, which concern the respective optional clause declarations of the Marshall Islands and the United Kingdom, and the question of jurisdiction *ratione temporis*. The terms of these declarations — the United Kingdom submits — deprive this Court of jurisdiction over this case brought by the Marshall Islands.

6. Finally, ***Mrs.*** Wells will address the United Kingdom's *fourth* preliminary objection; namely that in the absence before this Court of other essential parties whose interests are directly engaged by the Marshall Islands' claim, the Court lacks jurisdiction to hear this case or the case is inadmissible or, indeed, both.

7. Mr. President, with your leave, I would now ask you to invite Sir Daniel Bethlehem to address the Court. Thank you.

Le PRESIDENT : Je donne à présent la parole à Sir Daniel Bethlehem. Vous avez la parole.

Sir Daniel BETHLEHEM:

I. Introduction and preliminary observations

1. Mr. President, Members of the Court, it is an honour and a privilege to appear before you again representing the United Kingdom. I will be on my feet for about 70 minutes or so. Mr. President, if it is helpful to anticipate this, I imagine that the mid-morning break might conveniently follow my submissions.

2. Mr. President, Members of the Court, the submissions we make today, objecting to the jurisdiction of the Court and the admissibility of the Application brought by our friends from the

Marshall Islands, are advanced more in sorrow than in anger. We agree with the objective at the heart of their Application, namely, that more should and must be done towards the objective in Article VI of the Non-Proliferation Treaty (NPT) to pursue negotiations in good faith on effective measures towards nuclear disarmament. We also acknowledge our obligation under Article VI of the NPT, in common with all the other NPT parties. There is no dispute between us. This case should never have reached the Bar of the Court.

3. As this is a hearing on jurisdiction, we will not engage with the merits of the allegations made by the Marshall Islands. Our objections to jurisdiction and admissibility are of an entirely preliminary character. This said, the Marshall Islands alleges that we have acted in bad faith, over decades, in the performance of our treaty obligations. Given the seriousness of this allegation, it is appropriate, for the record at least, to draw attention to the document at Annex 2 of our written submissions and also to the statement made in the United Kingdom's 22 April 2015 Report on the implementation of the action plan of the 2010 NPT Review Conference. In that Report[1], a publicly available document on the United Nations website, the United Kingdom stated:

> "[that it] is committed to a world without nuclear weapons in line with our obligations under article VI of the [NPT] and firmly believes that the best way to achieve this goal is through gradual disarmament negotiated using a step-by-step approach within the framework of the United Nations disarmament machinery and the Treaty on the Non-Proliferation of Nuclear Weapons.
>
> . . . . . .

[The statement continues]

> We remain determined to continue to work with partners across the international community to prevent proliferation and to make progress on multilateral nuclear disarmament, to build trust and confidence between nuclear and non-nuclear weapon States, and to take tangible steps towards a safer and more stable world, in which countries with nuclear weapons feel able to relinquish them.
>
> The United Kingdom has a strong record on nuclear disarmament. We have steadily reduced the size of our own nuclear forces by well over 50 per cent since our Cold War peak and since 1998 all of our air-delivered nuclear weapons have been withdrawn and dismantled."

[1]Document NPT/CONF.2015/29, at paragraphs 4, 7 and 8; readily publicly available on the UN website at: http://www.un.org/en/ga/search/view_doc.asp?symbol=NPT/CONF.2015/29.

II. Scheme of submissions

4. Mr. President, Members of the Court, against this background, the scheme of my submissions to come is as follows. I will first make some brief observations on the Marshall Islands' case, to place our submissions in context (Section III). I will then address the point that the Court's jurisdiction must be assessed on the date of the filing of the Application instituting proceedings (Section IV). This is closely linked to our first preliminary objection. I will thereafter address in greater detail the first and last preliminary objections addressed in the United Kingdom's written statement, namely, first, that there is no justiciable dispute between the Marshall Islands and the United Kingdom over which the Court can properly assume jurisdiction (Section V), and, second, that the Marshall Islands' claim falls outside the judicial function of the Court and the Court should accordingly decline to exercise jurisdiction (Section VI). Finally, I will make some brief concluding observations (Section VII).

III. The Marshall Islands' case

5. Mr. President, Members of the Court, I turn to some brief observations on the Marshall Islands' case for purposes of placing our jurisdictional submissions in context. In doing so, I note that the case against the United Kingdom is the only one of the three cases that you are hearing in parallel in which the Marshall Islands has filed a Memorial on the merits. We know therefore, with clarity, the case that the Marshall Islands is advancing on the merits against the United Kingdom. This is directly relevant to a number of our objections to jurisdiction and admissibility, as will become plain in our submissions today.

6. In its Statement of Observations (WSMI) in reply to our Preliminary Objections (POUK), the Marshall Islands responded to the United Kingdom's *legal* objections to jurisdiction and admissibility. They made no comment, however, on our description, carefully accurate, of the case that they have brought against us. They evidently considered that we had described their case fairly, even if in summary terms. It is important for purposes of this jurisdictional hearing that the Court has a clear appreciation of the case that the Marshall Islands brings against the United Kingdom, as this goes directly to a number of the preliminary objections that we have made.

7. We addressed the Marshall Islands' case in general terms in paragraphs 19 to 23 of our written submissions as well as elsewhere in the pleading in more detail going to the particular

objection that was then being addressed. There are three brief points that I would make that go to our jurisdictional objections in general terms.

8. The *first point* is that the very core of the Marshall Islands case is that the breaches alleged against the United Kingdom are described as "continuing breaches". This is their language. We see this set out in paragraph 7 of their Application where the Marshall Islands alleges that the United Kingdom is in *continuing breach* of its obligations under Article VI of the NPT; is in *continuing breach* of customary international law with regard to the same obligations; and is *continuing breach* of its obligation to perform its international obligations in good faith. This language is repeated in identical terms in paragraph 7 of the Marshall Islands' Memorial.

9. The *second point* is that the particular allegations that the Marshall Islands levels at the United Kingdom reference conduct by the United Kingdom in the 1950s, in the 1960s, in the 1970s, in the 1980s and in the early 1990s, all pre-dating the Marshall Islands' accession to the NPT on 30 January 1995, the date which the Marshall Islands' identifies as the "critical date" for purposes of their case. "Critical date" is not a term that the Marshall Islands uses but the import of the discussion in their Statement of Observations is clear. The actionable breach that they allege is a breach that they trace back to their accession to the NPT on 30 January 1995[2], although on the basis of alleged antecedent conduct going back before this date to which they would wish you to have regard.

10. The discussion of the roots of the Marshall Islands' case is to be found in their statement of facts at paragraphs 19 to 29 of their Application, as well as in the corresponding factual discussion in their Memorial. More particularly, it is to be found in paragraphs 61, 66, 67, 68, 69 and 70 of their Memorial, all of which root post-1995 UK conduct in the United Kingdom's longer-term approach to nuclear disarmament.

11. In their written reply to our preliminary objections, the Marshall Islands describes this discussion of developments as being merely "by way of historical background"[3]. As you will hear from Professor Verdirame, however, the Marshall Islands' case cannot be so easily parsed up into "historical background" and, distinctly, post critical-date allegations of breach. The case that they

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[2]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), para. 76.

[3]WSMI, para. 72.

bring against us rests on allegations of an ongoing, a continuing, violation, with core elements of post-1995 practice being firmly rooted in pre-1995 conduct.

12. My *third point* is that the allegation that the Marshall Islands levels at the United Kingdom is an allegation of *shared responsibility* for breach of the Article VI, NPT obligations and what are alleged to be parallel obligations of customary international law. Significantly, this allegation of shared responsibility is not simply cast in generic terms. It is developed by way of allegations that go expressly to bilateral conduct of the United Kingdom with other States — States that are not before the Court in these proceedings. This element will be developed and addressed further in the submissions of ***Mrs.*** Wells.

13. Mr. President, Members of the Court, I note these features of the Marshall Islands' case as they go directly to the issue of jurisdiction now before you. The United Kingdom is here at the Bar of the Court because we alone amongst the NPT nuclear-weapon States have an optional clause declaration that may arguably found the jurisdiction of the Court. The case levelled against us, however, is a case that, by the device of an alleged bilateral dispute between the Marshall Islands and the United Kingdom, seeks to put in issue before the Court wider and deeper questions of the systemic effectiveness and application of a multilateral treaty commitment in respect of which the United Kingdom would be the defendant for the conduct of its 190 States parties.

14. And, Mr. President, Members of the Court, I must add that it would not be appropriate to parse up the Marshall Islands' allegations against the United Kingdom to pick and choose particular allegations over which the Court has jurisdiction and those over which it does not. The Marshall Islands has put forward a case against the United Kingdom. It is a case that rests on allegations of bad faith. The Court cannot address the merits of a bad-faith case against the United Kingdom by parsing up the entrails of that case. The Marshall Islands case must stand or fall on the allegations that they have advanced, not on some subset of those allegations that may, through creative analysis, be found to have escaped the strictures of otherwise applicable jurisdictional limitations.

IV. Jurisdiction must be assessed on the date of the filing of the Application

15. Mr. President, Members of the Court, I turn to the point that the Court's jurisdiction must be assessed at the moment of the filing of an application instituting proceedings. This point is closely linked with our first preliminary objection that there is no justiciable dispute. It is a trite observation to say that jurisdiction must be assessed at the moment of the filing of the application. The Court's jurisprudence is replete with affirmations of this principle, as the United Kingdom has noted in its written submissions[4]. As we will show, the Marshall Islands stumbles on this principle, fatally, in our submission.

16. The Marshall Islands attempts to get round this requirement by saying that there is no bar to consideration of conduct or the views of the Parties after the filing of the Application as part of an assessment of whether a dispute existed on the date of the filing. They pray in aid of this proposition an observation by the Court in the *Cameroon* v. *Nigeria Land and Maritime Boundary* case of 1998[5]. It is plain, however, both from the very extract of the *Cameroon* v. *Nigeria* Judgment quoted by the Marshall Islands — and from the Judgment of the Court in that case more generally — that what the Court was there concerned with was a determination of the *scope of the dispute* over which it had jurisdiction, not whether there was a justiciable dispute between the parties at all. In the paragraph of the Court's Judgment in *Cameroon* v. *Nigeria* preceding that quoted by the Marshall Islands, the Court notes various arguments advanced by Nigeria that Nigeria had failed to particularize regarding a specific portion of the Cameroon–Nigeria boundary that Cameroon sought to bring within the dispute but which Nigeria had contended was settled. In the passage of the Judgment relied upon by the Marshall Islands, the Court goes on to note that while "Nigeria is entitled not to advance arguments that its considers are for the merits" at the jurisdictional stage, the Court cannot decline jurisdiction on the ground that "[b]ecause of Nigeria's position, *the exact scope of the dispute* cannot be determined at present"[6]. In the United Kingdom's contention, the *Cameroon* v. *Nigeria* Judgment does not avail the Marshall Islands in this case.

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[4]Preliminary Objections of the United Kingdom (POUK), para. 28.

[5]WSMI, para. 29.

[6]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 317, para. 93; emphasis added.

17. The Marshall Islands, in footnote references to other cases, seeks to suggest that it is common for the Court to take account of exchanges of views between the parties during the course of judicial proceedings. That may be the case for some purposes, but not for purposes of determining whether a justiciable dispute existed at the point at which the application instituting proceedings was filed. One such judgment that they cite is the Judgment of the Court in the *Bolivia* v. *Chile Obligation to Negotiate Access to the Pacific Ocean* case, with which all on the Bench today will be very familiar, including the Marshall Islands' judge *ad hoc*. In that case, however, the exercise in which the Court was engaged in the paragraph cited by the Marshall Islands was the determination of the *subject-matter of the dispute*[7]. The issue of the subject-matter of a dispute, for purposes of the determination of which the Court may properly have regard to the way in which the parties have developed their arguments in pleadings subsequent to the application, is not the same as the existence of a dispute per se, which stands to be determined on the date on which the application instituting proceedings is filed. In the *Bolivia* v. *Chile* case, there was no contention that there was no dispute between the Parties. The contention was that the dispute was not as it had been characterized by the Applicant in that case. This is a world apart from the preliminary objections with which you are faced in this case.

18. The general rule was addressed by the Court in some detail in its Judgment in the *Croatia* v. *Serbia Application of the Genocide Convention* case, which finds no reference at all in the Marshall Islands Written Statement on this issue. In that case, the Court observed that "it is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether [the conditions governing the Court's jurisdiction] are met"[8]. The Court, going on to observe that it is easy to see why this rule exists, addressed the risks of abuse as a result of a different approach. The Court stated as follows:

> "it must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time [the] proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in

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

[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, paras. 79-80.

> principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings."

19. The Court went on to consider exceptions to this rule, none of which apply in the present case[9]. Notably, the Marshall Islands could not today resubmit its Application in this case in an attempt to rely on post-24 April 2014 developments to found their claim that there is a justiciable dispute between the Parties. The United Kingdom's optional clause declaration precludes just such abusive resubmissions of Applications previously submitted[10].

20. Significantly, for present purposes, as this is a judgment and an approach that the United Kingdom contends is controlling in this case, the Court in the *Belgium* v. *Senegal* case explicitly rejected the contention that it could look to post-Application conduct to determine whether a dispute existed between the parties. The Court put the issue in unvarnished terms: "Interms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties . . ."[11]

21. Having regard to the diplomatic exchanges between the parties in that case, the Court concluded that Belgium had not been able to show that a dispute existed between the parties on the matter under review "on that date", i.e., on the date of the filing of the Application[12].

22. Mr. President, Members of the Court, as in the *Belgium* v. *Senegal* case so also in the present case. The Court's jurisdiction in this case must be determined by reference to the question: was there a dispute between the Marshall Islands and the United Kingdom over the United Kingdom's compliance with its Article VI NPT obligations, and any alleged parallel obligation of customary international law, on 24 April 2014, the date of the filing of the Marshall Islands' Application instituting proceedings. As I will come to address more fully in just a moment, the answer to this question is unavoidably and resoundingly "no". There is no basis whatever, not a shred or scintilla of evidence presented by the Marshall Islands, on which the Court

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[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 438-440, paras. 81–85.

[10] Paragraph 1 (iv) of the United Kingdom's optional clause declaration of 31 December 2014 excludes jurisdiction with regards to "any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another Party."

[11] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 444, para. 54.

[12] *Ibid.*, p. 444, para. 54, also, para. 55.

could properly found jurisdiction on the grounds of the existence of a dispute between the Parties on 24 April 2014.

V. There is no justiciable dispute between the Marshall Islands and the United Kingdom over which the Court can properly assume jurisdiction

(i) The United Kingdom's contention

23. Mr. President, Members of the Court, against this background, and building on the point just addressed about the date on which the Court's jurisdiction falls to be determined, I turn more directly to our preliminary objection that there is no justiciable dispute between the Marshall Islands and the United Kingdom over which the Court can properly assume jurisdiction.

24. Up until the point of the filing of the Marshall Islands' Application instituting these proceedings against the United Kingdom, there had been no diplomatic exchanges, no discussions, no démarches, no correspondence, no side comments in the margins of some other meeting, *nothing*, not a single word, from the Marshall Islands to the United Kingdom raising the issue of nuclear disarmament and what the Marshall Islands now contends is the United Kingdom's bad faith, going back decades, in its conduct pursuant to the obligations created by Article VI of the NPT. Not content with the absence of any record of such discussions in the Marshall Islands' Application, in its Memorial and in its Statement of Observations, the United Kingdom has gone back over all the records that we can find in our bilateral diplomatic exchanges with the Marshall Islands to see if there is any reference to the Marshall Islands ever having raised with the United Kingdom the issue of nuclear disarmament, of the interpretation and application of Article VI of the NPT, of the United Kingdom's conduct in pursuit of this commitment. We found nothing. Not a single sentence. *Nothing!*

25. The same goes for our records of multilateral discussions in which both the Marshall Islands and the United Kingdom participated — not simply limited to meetings concerned with nuclear disarmament, such as the successive NPT Review Conference meetings — but also any and all multilateral meetings at which representatives from the Marshall Islands interacted with their counterparts from the United Kingdom. Despite the opportunity presented by such meetings, there is no record anywhere, at any time, at any place, of a representative of the Marshall Islands

saying to a counterpart from the United Kingdom "we would like to talk to you about Article VI of the NPT and the steps you are taking in implementation thereof". There is no record of a report by a United Kingdom diplomat recording that he or she was demarched by the Marshall Islands on nuclear disarmament. There is no note in the United Kingdom diplomatic archives that records an allegation, whether the provenance was the Marshall Islands or a third State reporting on the Marshall Islands' views, that the Marshall Islands considered United Kingdom conduct in the field of nuclear disarmament to be in some way in bad faith by reference to its NPT obligations. There is nothing! There is only silence!

26. Mr. President, Members of the Court, silence is telling. Silence can be interpreted. It has legal implications. And I do not here talk in terms of acquiescence or estoppel or waiver. I am simply talking here about whether there is anything, anything at all in the evidential record, that suggests that, until the moment that the United Kingdom learned through the press that the Marshall Islands had filed an Application with the Court, there had been some dispute lurking in the shadows between the Marshall Islands and the United Kingdom over our conduct in respect of Article VI of the NPT. There is nothing. Indeed, the United Kingdom had thought, although naively, as it now appears, that we had a strong record on nuclear disarmament. We have unilaterally reduced our nuclear arsenal. As our Written Statement notes[13], we have participated actively in initiatives, both regional and global, to lay the groundwork for a more comprehensive approach to nuclear disarmament. We have reported assiduously and in detail through the NPT Review Conference process on the steps that we have taken towards the fulfilment of Article VI of the NPT.

27. Mr. President, Members of the Court, in our Written Statement, the United Kingdom drew attention to Article 43 of the International Law Commission's Articles on State Responsibility which, under the heading "Notice of claim by an injured State", says as follows: "An injured State which invokes the responsibility of another State shall give notice of its claim to that State." This injunction is repeated in Article 48 (3) of the ILC Articles with regard to circumstances in which the State invoking responsibility of another is not itself the injured State.

[13]POUK, para. 4.

28. Lest there be any doubt that the International Law Commission was here addressing pre-litigation notice to the State whose responsibility was being invoked, the commentaries to Article 43 makes it clear that this is exactly what was in contemplation. The commentaries recall the Court's observations in the *Certain Phosphates Lands in Nauru* case, between Nauru and Australia[14], in which the Court rejected an objection to the admissibility of the Application on the ground that Australia had been aware of the claim from diplomatic communications from Nauru[15]. The point on the importance of notice is underlined in the Third Report of the Special Rapporteur in the following terms, and I quote an extract from paragraphs 237 to 239 of the Third Report of the Special Rapporteur in which he says:

> "237 . . . despite its flexibility and its reliance on the context provided by the relations between the two States concerned the Court does seem to have had regard to the fact that the claimant State had effectively notified the respondent State of the claim.
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> 238. In the Special Rapporteur's view, this approach is correct as a matter of principle. There must be at least some minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State is aware of the allegation and in a position to respond to it (e.g. by ceasing the breach and offering some appropriate form of reparation). No doubt the precise form the claim takes will depend on the circumstances. But the draft articles should at least require that a State invoking responsibility should give notice thereof to the responsible State. In doing so, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take. In addition, since the normal mode of inter-State communication is in writing, it seems appropriate to require that the notice of claim be in writing.
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> . . . . . .
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> 239. If a State having protested at a breach is not satisfied by any response made by the responsible State, it is entitled to invoke the responsibility of that State by seeking such measures of cessation, reparation, etc. as are provided for in part two."

29. The *Nauru* v. *Australia* Judgment was given in 1992. The ILC State Responsibility Articles and Commentaries were adopted in 2001. Since then, the Court has had occasion in two cases to further add its own imprimatur to the principle expressed in Article 43, paragraph 1, of the

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[14]Responsibility of States for Internationally Wrongful Acts, Commentaries, at Art. 43, para. (4): http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[15]*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 253-255, paras. 31–36.

State Responsibility Articles. These cases are *Georgia* v. *Russia* in 2011[16] and *Belgium* v. *Senegal* in 2012[17].

30. Mr. President, Members of the Court, I do not repeat here the discussion of these Judgments set out in our written pleadings at paragraphs 38 to 44. I will return to the cases in just a moment when addressing the Marshall Islands' response to the United Kingdom's objection. I note simply at this point that the Court's Judgments in these cases are *ad idem* with the approach taken by the International Law Commission and its Special Rapporteur a decade earlier and by the Court itself two decades earlier in the *Nauru* v. *Australia* case. These Judgments also reflect the importance that the Court attaches to identifying, for jurisdictional purposes, that the claim by the applicant is opposed by the respondent *at the point at which the application is filed.*

31. In support of the principle that emerges from these cases, the United Kingdom also pointed to the trend in other dispute settlement procedures of international law to explicitly require prior notification before the filing of a claim. These procedures include those under the United Nations Convention on the Law of the Sea (UNCLOS), those under the dispute settlement procedures of the World Trade Organization, and those that are common in the field of international investment disputes.

(ii) The Marshall Islands' reply

32. Mr. President, Members of the Court, the Marshall Islands written response to this objection advanced three points. *First*, they say that ILC Article 43 is not concerned with questions of the jurisdiction of international courts and tribunals and the admissibility of claims, and quote in support the commentaries to Article 44 of the ILC Articles. They draw support for this reading from the failure of the Court to refer to Article 43 in any of its judgments. In this regard, they take issue with the United Kingdom's reliance on the *Nauru* v. *Australia* Judgment. The Marshall Islands also, in this regard, dismisses as inapposite and misplaced any suggestion that the

[16] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70.

[17] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 422.

developing juridical practice from other international courts and tribunals has any relevance for the ICJ.

33. *Second*, the Marshall Islands says that the existence of a general requirement of prior notification does not find support in the case law of the Court. In this regard, they cite the Judgment in *Cameroon* v. *Nigeria* to the effect that there is no requirement that the dispute between the parties should have been manifested in a formal way, and they draw from this a rejection of any requirement of prior notification. They go on to attempt to distinguish both *Georgia* v. *Russia* and *Belgium* v. *Senegal*. In respect of *Belgium* v. *Senegal*, the Marshall Islands contends that it "made its claims as regards the Respondent's breaches of its obligations under the NPT and customary international law *before the filing of its Application*"[18]. In respect of *Georgia* v. *Russia*, they contend that nowhere in that Judgment is there a reference to a general requirement of prior notification. The Marshall Islands further contends that the Court has avoided setting rigid parameters to determine the existence of a dispute. In their view, a dispute crystallizes when one State makes a complaint or a protest against the conduct of another State[19], and that, by reference to *Cameroon* v. *Nigeria*, there is no bar to the consideration of conduct or views after the filing of the Application as part of the assessment of whether a dispute existed on the filing date[20].

34. *Third*, the Marshall Islands contends that there is in fact a dispute between the Marshall Islands and the United Kingdom over the United Kingdom's compliance with its obligations under Article VI of the NPT and what the Marshall Islands alleges are parallel obligations of customary international law[21]. In support of this contention, the Marshall Islands points to what it describes as "repeatedly expressed" concerns "with regard to the fulfilment by all States possessing nuclear weapons of their obligation to pursue good [faith] negotiations leading to nuclear disarmament"[22]. Addressing the reality, which they implicitly accept, as they must, that they have not addressed *any* diplomatic correspondence or other communication to the United Kingdom on this issue, the Marshall Islands nonetheless contends that "it must be concluded that

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[18]Written Statement of Observations of the Marshall Islands (WSMI), para. 19; United Kingdom's emphasis.

[19]WSMI, para. 25.

[20]WSMI, para. 29.

[21]WSMI, paras. 30 ff.

[22]WSMI, para. 32.

the United Kingdom must reasonably be considered to have been aware of the statement made by the Marshall Islands" in the course of the mid-February 2014 Nayarit, Mexico, conference on the humanitarian impact of nuclear weapons[23].

(iii) The United Kingdom's response

35. Mr. President, Members of the Court, I turn to our response to the Marshall Islands' arguments. For all the veneer of doing so, the Marshall Islands does not in fact engage with the United Kingdom's objection at a level of specificity that is at all persuasive. They miss the quite deep trend in the development of the principle of prior notification in the jurisprudence of the Court and in international law more generally. They misconceive the Court's jurisprudence in important respects. Most egregious of all, they attempt to skate over the reality from which they cannot escape, namely, that, prior to the filing of their Application on 24 April 2014, they had never, not once, raised with the United Kingdom the very serious allegations that they set out in their Application.

36. On the law, in their discussions of Article 43 of the ILC State Responsibility Articles, the Marshall Islands fails conspicuously to address the ILC's reliance on *Nauru* v. *Australia* in its commentaries on the Article *and* the Court's Judgment in that case *and* the Special Rapporteur's analysis that informed the ILC text. I note in passing, in this regard, that the relevant extracts from the Special Rapporteur's reports were annexed to the United Kingdom's written pleading and extracted in our statement. These were not therefore issues of which the Marshall Islands could be said to have been ignorant. Their silence reflects the only conclusion that is available, namely, that they do not have a credible response to the United Kingdom's case on this point.

37. The Marshall Islands contends, by reference to the commentaries to Article 44 of the ILC Articles, that the Articles are not concerned with questions of jurisdiction and admissibility. What they do not reference, however, is the discussion in the commentaries to Article 44 that follows the opening sentence that they quote, in which the Commission, referencing such doctrines as the requirement to exhaust other means of dispute settlement, comments: "By contrast [to these other doctrines], certain questions which would be classified as questions of admissibility when

[23]WSMI, para. 46.

raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of the State in the first place."[24] The Article 43 prior notification obligation is just such a requirement of a more fundamental character, a condition for invoking the responsibility of the State in the first place. And both the ILC commentaries and the Special Rapporteur's reports make it clear that they were concerned with prior notification before the lodging of a statement of claim[25].

38. Mr. President, Members of the Court, in her 2010 chapter in the Crawford, Pellet and Olleson tome on *The Law of International Responsibility*, Jacqueline Peel, addressing Article 43, concludes that, in practice, "a responsible State must be made aware of a breach and of the injured State's claims before it will be in a position to respond through taking action to cease any continuing violations or providing reparation for the injury suffered"[26]. The same point is made elegantly by Georges Abi Saab in a 2013 essay entitled "Negotiation and Adjudication: Complementarity and Dissonance". He puts it in the following terms:

> "At the beginning or at the creation, the whole process is triggered by the emergence of a 'dispute'. And how can such a dispute emerge except through some kind of an exchange, i.e. [a negotiation] between the parties? In a book I wrote 45 years ago, I defined a dispute as '*un accord sur un désaccord*', 'an agreement to disagree'. This is the point of crystallization of the dispute. It is when the parties, however they communicate, put forward contradictory contentions and claims they reciprocally reject over the same subject matter. They don't have to negotiate directly. They can make their positions publicly known through the media or in the General Assembly of the UN . . .
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> Thus, whether we consider prior negotiations a separate admissibility condition or a constitutive part of the condition of existence of a dispute, some kind of an exchange or negotiation between the contenders, be they within a multilateral forum or even by proxy, is a necessary prelude to adjudication."[27]

39. Mr. President, Members of the Court, let me repeat this last sentence, as it captures the very essence of what we are talking about: "whether", says Abi Saab,

> "whether we consider prior negotiations a separate admissibility condition or a constitutive part of the condition of existence of a dispute, some kind of an exchange

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[24]Cf. *supra*, fn 14: International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 44, comment (1).

[25]*Ibid.*, Art. 43, comment (3).

[26]Crawford, Pellet and Olleson, *The Law of International Responsibility*, OUP, 2010, p. 1033.

[27]Georges Abi Saab, "Negotiation and Adjudication: Complementarity and Dissonance", in Dupuy, P-M, *Recourse to the International Court of Justice for the Purpose of Settling a Dispute*, Nijhoff, 2013, p. 329.

> or negotiation between the contenders, be they within a multilateral forum or even by proxy, *is a necessary prelude to adjudication*" (emphasis added).

40. Mr. President, Members of the Court, I have already addressed the Marshall Islands' reliance on *Cameroon* v. *Nigeria*, reference to which recurs throughout their pleading. The Marshall Islands prays this in aid of the proposition that international law does not require a State to inform another of its intention to bring proceedings before the Court. The reality of the Judgment is quite different, however, as a review of the passages to which the Marshall Islands refers make clear. The Court, in that case, was addressing the principle of good faith and whether it could be relied upon to found an obligation on an applicant before the Court to inform the putative respondent *of its intention to bring proceedings*. The Court concluded that the principle of good faith could not be relied upon to found such an obligation. The situation, however, is not the same as the one in this case. The issue here does not concern the notification of an intention to bring legal proceedings. What we are here concerned with is a failure to crystallize a dispute by notifying the State whose responsibility is invoked of the claim asserted by the injured State. Whether it is seen as a separate admissibility requirement or as a constitutive part of the existence of a dispute, some kind of a prior exchange between the contenders is a necessary prelude to adjudication.

41. Mr. President, Members of the Court, the Marshall Islands attempts to distinguish the Court's recent Judgments in *Belgium* v. *Senegal* and *Georgia* v. *Russia*. In respect of *Belgium* v. *Senegal*, they do so by contending that they in fact made their claims before the filing of their Application in this case. There is no substance to this contention whatsoever. The conduct that they point to consists, in its entirety, of only two entirely generic statements made in multilateral fora, neither of which address the United Kingdom and neither of which, by any stretch of the imagination, can be taken as an expression, let alone a notification, of an allegation of a bad-faith violation by the United Kingdom of its NPT obligations.

42. Mr. President, Members of the Court, I invite you to look for yourselves at these two statements on which the Marshall Islands rests its case. They are at Annexes 71 and 72 of the Marshall Islands' Memorial. The first statement, on 26 September 2013, says as follows:

> "Disarmament comes with political will — and we reaffirm and welcome bilateral progress in this regard, including between the United States and Russia. We urge all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament."[28]

There is nothing, not a single syllable, in this statement that can be taken to be a notification of dispute to and against the United Kingdom.

43. The second statement, made in mid-February 2014 at the Nayarit conference in Mexico says in material part as follows:

> "Mr. Chairman, the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that states possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every state under Article VI of the Non Proliferation Treaty and customary international law."[29]

44. Mr. President, Members of the Court, this statement was made almost as the ink was drying on the nine Applications that the Marshall Islands filed on 24 April 2014. More importantly, it was made at a conference at which the United Kingdom was not present. The statement makes no reference to the United Kingdom. The statement does not contain, even by implication, any allegation of a bad-faith breach of the NPT by the United Kingdom. The Marshall Islands made no effort to bring this statement to the attention of the United Kingdom, the fact of which we learned for the first time in the Marshall Islands' Application.

45. Mr. President, Members of the Court, these are the acts, *the sole acts*, on which the Marshall Islands bases its case that they made their claim before the filing of their Application. This is the practice, *the sole practice*, on which the Marshall Islands relies to distinguish the Court's Judgment in *Belgium* v. *Senegal*. With the greatest of respect to our friends on the other side, their case is simply unsustainable.

46. As for the *Georgia* v. *Russia* case, the Marshall Islands contends that nowhere in the Judgment is there a reference to a general requirement of prior notification. Again, with all due respect to our friends on the other side, the phrase to which they refer may not have been used by the Court but the Court's analysis and conclusions are as plain as day. I do not repeat here what we

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

[29] *Ibid.*, Ann. 72.

have said in our written statement, suffice to say that the Court undertook a detailed review of the diplomatic practice of both States and failed to find evidence of the existence of the claimed dispute in virtually every item of practice cited to it as none evidenced any direct allegation against the respondent. The admissibility of the claim was only upheld by the Court on the basis of "the exchanges between the Georgian and Russian representatives in the Security Council on 10 August 2008, the claims made by the Georgian President on 9 and 11 August and the response on 12 August by the Russian Foreign Minister" which "establish by that day, the day on which Georgia submitted its Application, [that] there was a dispute between Georgia and the Russian Federation"[30].

47. Mr. President, Members of the Court, the United Kingdom does not come before you to contend that there is an immutable, inflexible rule of international law applicable in any and all cases that requires the prior written notification of a claim as a precondition for the crystallization of a dispute and the jurisdiction of the Court, at the point at which the application seising the Court is filed. It is possible to conceive of cases in which the acute urgency of the matter, the nature and severity of the conduct that is the subject-matter of the claim, the character of the breach that is alleged, and a manifest appreciation of notice derived from the circumstances in issue of the opposing views of the parties, may suffice to crystallize a dispute. Such a case, for example, may be a death penalty case in which the application is accompanied by a request for provisional measures. Beyond such exceptional cases, however, invariably involving provisional measures proceedings as well, it is difficult to conceive of cases in which prior notification would not be readily apparent from the circumstances or be readily achievable by a good-faith applicant intent on exploring the possibilities of the peaceful settlement of the claimed dispute. And the case now before you is quite clearly, by any measure, not such a case. The allegations advanced in this case are deeply rooted in conduct going back decades and the claim alleges a breach of an obligation to negotiate. It does not raise any question of impending conduct.

48. Mr. President, Members of the Court, the United Kingdom does not point to the practice of the World Trade Organization or under the United Nations Convention on the Law of the

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[30] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113.

Sea (UNCLOS) or in the field of investment arbitration for purposes of suggesting that these developments are somehow controlling of the approach that we commend to the Court. The Court is the principal judicial organ of the United Nations with a *sui generis* jurisdiction and competence, and a unique authority. What the United Kingdom does contend is that the Court's case law has been instrumental in the development of a principle of general international law that requires prior notification. The International Law Commission built on the Court's jurisprudence. The Court has added its weight to the developing principle. It is a principle that is entirely in keeping with the wider tide of international dispute settlement.

49. In the present case, the claim of jurisdiction is rooted in Article 36 (2) of the Court's Statute. This founds jurisdiction "in all legal disputes" that come within the scope of the declarations made by States pursuant to this provision. The requirement upon an applicant to show the existence of a "legal dispute" is a requirement to show that there is a disagreement on a point of law or fact, a conflict of legal views or of interests, between the applicant and the respondent *assessed at the point of the filing of the application instituting proceedings*. The Marshall Islands cannot meet its burden in this case. The existence of a justiciable dispute cannot be established by the sole act of the filing of an application. It requires some prior exchange between the putative parties. Whether this goes to a condition necessary for the existence of a justiciable dispute, or to jurisdiction, or to admissibility, is of no moment. The Marshall Islands cannot bring itself within this threshold requirement.

VI. The Court's judicial function and the principle of effectiveness

50. Mr. President, Members of the Court, I come now to our fifth preliminary objection rooted in the judicial function of the Court and the principle of effectiveness. I can address this succinctly. I do not repeat what we have said in our written pleadings other than to summarize our contention, based in the Court's Judgments in the *Northern Cameroons* case and the *Nuclear Tests* case[31] that the Court should decline to exercise jurisdiction in circumstances in which to do so would require it to render a judgment that is incapable of effective application. This, in our

[31] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; Preliminary Objections of the United Kingdom (POUK), paras. 104-112.

submission, is what the Marshall Islands asks of the Court in this case; a judgment that would be incapable of any meaningful and effective application.

51. In its prayer for relief, in identical terms in its Application and Memorial, the Marshall Islands asks the Court for declarations that the United Kingdom has violated and continues to violate its NPT obligations and the alleged parallel obligations under customary international law. The Marshall Islands goes on to request the Court to order the United Kingdom to take all steps necessary to comply with its obligations including, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament. In its response to the United Kingdom's preliminary objections, the Marshall Islands addresses the practical consequences of the relief that they seek in terms that contemplate an order that the United Kingdom support the commencement of negotiations on nuclear disarmament, although falling short of any particular action such as voting for a particular General Assembly resolution. The United Kingdom would though, on this conception, be required to actively participate in good faith in negotiations once underway.

52. Mr. President, Members of the Court, the Marshall Islands' allegations go to their *political* appreciation about the way in which NPT States parties should address their NPT Article VI obligation to negotiate. But a judgment on the merits by the Court would not bind any of the 190 States parties to the NPT apart from the Marshall Islands and the United Kingdom. And, while the United Kingdom would be happy to open a bilateral dialogue with the Marshall Islands about nuclear disarmament, it bears emphasis that the Marshall Islands has never, not once, ever sought such a dialogue with the United Kingdom.

53. Mr. President, Members of the Court, the Court, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons* concluded that it was unable to reach a view that the policy of deterrence was unlawful, referring repeatedly to the practice of an appreciable section of the international community in support of such a policy[32]. In bilateral proceedings of the kind now in contemplation, it is inconceivable that the Court could revisit this conclusion with any different result.

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[32] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254 ff, *inter alia*, at paras. 66, 67, 73 and 96.

54. The same holds true for the now famous conclusion by the Court, contained in paragraph 97 of the Advisory Opinion and paragraph E of the *dispositif*, decided on the casting vote of the then President of the Court that the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstance of self-defence, in which the very survival of a State would be at stake. On this point, too, it would be inconceivable that the Court could revisit its conclusion in bilateral proceedings of the kind now in contemplation.

55. Against this background, and given both the stakes and the risks, negotiations towards a treaty on general and complete disarmament in the nuclear field are about as sensitive an endeavour as it is possible to imagine, engaging fine political judgments in a highly unstable and dangerous world. A judgment by the Court on the merits would not bind any State other than the Marshall Islands and the United Kingdom. It would not bind any non-State actor. Yet it is into this world that the Marshall Islands would seek to inject declarations by the Court of bad-faith illegality and an order of the Court compelling one NPT nuclear-weapon State to negotiate. Such an outcome would be astonishing and would raise some pretty fundamental and searching questions about the judicial function and the principle of effectiveness.

56. Even when pressed by the United Kingdom's preliminary objections, the Marshall Islands was unable to provide any more specificity to its request. The Marshall Islands' written response to the United Kingdom's preliminary objections lays bare the shortcomings of their case and goes directly to the mantle of effectiveness that is at the core of the Court's function. They accept that the United Kingdom would not, could not, be ordered to vote for any General Assembly resolution. There is no course of action other than good faith participation in negotiations that they identify. And, even here, the Court would tread at its peril, given the legal uncertainties of its advisory opinion legacy and the factual risks of the environment into which it is asked to intrude. The Court could *ex hypothesi* order the United Kingdom to be the one hand clapping but this goes straight to the very heart of the principle of effectiveness and the judicial integrity of the Court.

57. Mr. President, Members of the Court, any judgment of the Court in this matter could have no practical consequence. The Marshall Islands' Application is hopelessly misconceived. If, contrary to our other submissions, the Court concludes that the Marshall Islands Application is

otherwise admissible and within the Court's jurisdiction, the Court should decline to exercise that jurisdiction in this case on the ground that to do so would be incompatible with its judicial function.

VII. Concluding observations

58. Mr. President, Members of the Court, this brings me to my concluding observations. By every yardstick of law, the balance falls against the jurisdiction of the Court in this case. *This is an artificial case* in which the United Kingdom, by dint of being the only NPT nuclear-weapon State to have made an optional clause declaration, is sought to be enjoined to be the one hand clapping. *It is an artificial case* in which the Marshall Islands waited to the exact date of the expiry of the anti-ambush clause in the United Kingdom's optional clause declaration to file its Application, but then denies that its own optional clause declaration was made for purposes of the present dispute. *It is an artificial case* in which the Marshall Islands has no jurisdictional basis on which to implead the other NPT nuclear-weapon States but nonetheless rolls up their conduct in allegations directed at the United Kingdom. *It is an artificial case* insofar as the Marshall Islands avers the effectiveness of the judgment on the merits that it seeks from the Court but can find nothing more to say than that a finding by the Court "would have the practical consequence of requiring the United Kingdom generally to support the commencement of negotiations on nuclear disarmament"[33]. And, most significantly of all, *it is an artificial case* because, until the United Kingdom learned from press reports that the Marshall Islands had filed this case with the Court, the issue of any alleged dispute between the Marshall Islands and the United Kingdom had never once, *ever*, been raised in diplomatic exchanges between the Marshall Islands and the United Kingdom.

59. Mr. President, Members of the Court, the assumption of jurisdiction in this case would call into real question the judicial function of the Court as an arbiter of legal disputes between States. It would raise far-reaching questions about the judicial function. It would go to the very heart of the Court's optional clause jurisdiction and its sustainability as a mechanism to found and develop the compulsory jurisdiction of the Court. It would raise real questions about the wisdom of such declarations. The systemic implications of an assumption of jurisdiction in this case are self-evident and are manifest.

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[33]WSMI, para. 127.

60. Mr. President, Members of the Court, the Marshall Islands is in this case seeking to use the contentious jurisdiction of the Court as a device to procure from the Court an advisory opinion. This is not the function of the Court. For the reasons I have given, as well as for those to come from Professor Verdirame and ***Mrs.*** Wells, the Court should decline to exercise jurisdiction in this case.

61. Mr. President, Members of the Court, this brings me to the end of my submissions. I thank you for your attention. Mr. President, after the break, may I ask you to invite Professor Verdirame to continue the United Kingdom's submissions.

Le PRESIDENT : Merci. La Cour entendra le professeur Verdirame après une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 15 à 11 h 30.

Le PRESIDENT : Veuillez vous asseoir. Je donne la parole au professeur Verdirame.

Mr. VERDIRAME: Thank you, Mr. President.

I. Introduction

1. Mr. President, Members of the Court, it is a great honour and privilege to appear before you on behalf of the United Kingdom. With your permission, Mr. President, I propose to address you for no more than 35 minutes.

2. I will deal with two of the United Kingdom's preliminary objections.

3. I will begin with the objection *ratione temporis*. I will show that the dispute which the Marshall Islands alleges it has with the United Kingdom is a dispute with regard to situations or facts prior to the earliest possible date for the Court's jurisdiction.

4. The other preliminary objection that I will address in my presentation concerns the acceptance by the Marshall Islands of the compulsory jurisdiction of the Court only "for the purpose of this dispute". The consequence of having thus accepted the compulsory jurisdiction of the Court is that, under the terms of the optional declaration of the United Kingdom, the dispute — *even if* justiciable — must fall outside the jurisdiction of the Court.

II. Objection *ratione temporis*

5. Mr. President, let me begin with the jurisdiction *ratione temporis*. Put quite simply, our case is that the situations and facts giving rise to the Marshall Islands' claim stretch back at least to 1970, and that is well beyond any of the points in time from when this Court's jurisdiction could have possibly begun. As I will show, this temporal characterization of the relevant situations and facts is one that the Marshall Islands themselves adopted throughout their Application and Memorial.

6. Mr. President, I will develop my submissions on this objection in four parts. *First*, I will briefly set out the different dates discussed by the Parties in their written submissions, explain the relevance of each of those dates, and then tease out the crucial issue on limitations *ratione temporis* in this case. *Secondly*, I will discuss the legal principles arising from the jurisprudence of the Permanent Court and of this Court which are relevant for our purposes. *Thirdly*, I will consider the Marshall Islands' position on the effects of the limitations *ratione temporis* in this case. And, *fourthly*, I will explain why the dispute alleged by the Marshall Islands is clearly in respect of situations and facts excluded from the temporal jurisdiction of the Court.

(a) *Relevant dates and crucial issue*

7. Let me turn to the first step in the analysis and begin by looking at the dates discussed by the Parties in their written submissions as relevant to the scope *ratione temporis* of the Court's jurisdiction.

8. The first relevant date is 17 September 1991. Under the terms of the optional clause declaration of the Marshall Islands, the Court has jurisdiction "over all disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date". This date is subsequent to the date which appears in the applicable United Kingdom declaration but, in line with the principle of reciprocity, it is the one that matters for present purposes.

9. The second date is 30 January 1995. This is the date when the Marshall Islands became a party to the NPT.

10. The third date is 8 July 1996 — that is the date of the Advisory Opinion of the Court on the *Legality of the Threat or Use of Nuclear Weapons*[34]. According to the Marshall Islands, this is the date that matters for their case under customary international law. However, the NPT was in force at that time as between the United Kingdom and the Marshall Islands, and so, for all practical purposes, we are really left with the two earlier dates: 17 September 1991 and 30 January 1995.

11. Mr. President, Members of the Court, the Marshall Islands do not appear to have a clear position on which of those two dates defines the temporal jurisdiction of the Court in relation to situations or facts giving rise to its alleged dispute. In some places, they refer to 17 September 1991 as the "critical date"[35], but in others they say that only post-1995 conduct can be the "source" or "real cause" of the dispute[36].

12. As we shall see, however, the situations or facts giving rise to the dispute go back far beyond 1991. Ultimately not much turns on whether it is pre-1995 or pre-1991 situations or facts that are to be excluded. And so the crucial issue under this preliminary objection is really this: did the situations or facts giving rise to this dispute alleged by the Marshall Islands occur prior to the 1990s or not? Our friends from the Marshall Islands say that they did. We say that they did not. But we both agree that, if those situations or facts pre-date 1995, or 1991 at the earliest, the *ratione temporis* limitation would be engaged and the Court's jurisdiction excluded.

13. To be clear, Mr. President, we are not at this point concerned with the date of the dispute. It is possible, in principle, for a dispute to arise subsequent to the critical date for jurisdiction, while the situations or facts giving rise to it took place before that date. For the reasons developed earlier by Sir Daniel, the view of the United Kingdom is that *at no time* prior to the filing by the Marshall Islands of its Application instituting these proceedings did a dispute between the United Kingdom and the Marshall Islands crystallize. But if, *arguendo*, a dispute had crystallized at some point before the filing date, would the Court still lack jurisdiction over it as a result of the exclusion of "situations or facts" prior to the critical date? This is the central question affecting the jurisdiction *ratione temporis* of the Court in this case.

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[34]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), para. 70.

[35]E.g., WSMI, paras. 82 and 91.

[36]E.g., WSMI, para. 87.

(b) ***The Applicable Principles***

14. Mr. President, I will now turn to the second part of my submissions on this preliminary objection and consider the principles that are relevant to the exclusion *ratione temporis* of situations or facts prior to the critical date. There are four principles to which I would like to draw to your attention.

15. *First*, as emphasized by the Permanent Court in *Phosphates in Morocco*, the terms "situations or facts" in an optional declaration are not to be given a narrow meaning. For the use of these terms evidences the intention of the State — and I quote from that Judgment — "to embrace, in the most comprehensive expression possible, all the different factors capable of giving rise to a dispute"[37].

16. *Secondly*, in that same case, the Permanent Court set out an approach to the *ratione temporis* exclusion of situations and facts that is crucial for present purposes. The relevant passage in the Judgment of the Court reads as follows:

> "The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute."[38]

17. *Thirdly*, Mr. President, the relationship between subsequent and earlier situations — to which the last part of the passage I just read refers — was addressed again by this Court in the *Certain Property* case. The issue there was whether the dispute had "its source or real cause" in facts or situations which occurred in the 1990s, over which the Court would have had jurisdiction; or whether the "source or real cause" of the dispute was conduct going back to the 1940s or 1950s, which was outside the temporal jurisdiction of the Court. The Court observed that the dispute had been "triggered" by conduct taking place in the 1990s. But it did not follow that the dispute *related* to that conduct. When situations or facts antecedent to the critical date for jurisdiction are engaged,

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[37] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B No. 74*, p. 24.

[38] *Ibid.*

it will not be enough for a State to be able to point to merely triggering conduct that is subsequent to that date. There has to be a real change, "a new situation"[39].

18. *Fourthly*, a distinction must be drawn between the "source of the rights" and "the source of the dispute". This distinction, first introduced by the Permanent Court of International Justice in *Electricity Company of Sofia and Bulgaria*[40], was endorsed by this Court in *Right of Passage* as where it was described as arising between "the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute"[41].

19. Mr. President, Members of the Court, each of these principles supports the United Kingdom's analysis of the effects of the *ratione temporis* exclusion in this case but, before setting out that analysis, I will turn to the third part of my submission and assess the arguments of the Marshall Islands on the time factor and in particular their attempt to rely on some of the principles and jurisprudence I've just outlined.

(c) ***The Marshall Islands' position in their Statement of Observations***

20. In their Statement of Observations, the Marshall Islands rely, in particular, on the distinction between sources of rights and sources of disputes. In an important passage in their Statement, they write as follows — and I will read out this passage because it is quite important for understanding their case:

> "In the present case there is no doubt that the rights under NPT Article VI that the RMI claims vis-à-vis the United Kingdom only arose with the RMI's accession to the NPT, and the rights under customary international law that the RMI claims vis-à-vis the United Kingdom only arose with the existence of the customary rule in question. It is self-evident [they say, it is self-evident] that any facts or situations that may have given rise to a dispute relating to such rights could only arise after those rights had come into existence. In other words, [they continue] the RMI's accession to the NPT and the emergence of the customary rule brought about a 'new situation' in the relationship between itself and the UK, and it is in relation to this new situation that the present dispute arose."[42]

And that is the end of this important passage.

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[39] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 25, paras. 48-49.

[40] *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77.*

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

[42] WSMI, para. 74.

21. In other passages in their Observations, the Marshall Islands say that "the facts and situations which constitute the real cause of the present dispute are inextricably linked" to the accession of the Marshall Islands to the NPT — or to the date of the Advisory Opinion for the purposes of the customary case[43] — they also say that "only that conduct which post-dates the RMI's accession to the NPT in January 1995 can be the 'source' or 'real cause' of the legal dispute between the RMI and the UK" as far as Article VI of the NPT is concerned[44].

22. Mr. President, Members of the Court, the position that emerges from these statements of the Marshall Islands is confused and ultimately untenable. Allow me to make four points.

23. *First*, it is simply not true that the situations or facts giving rise to this dispute are "inextricably linked" to the Marshall Islands' accession to the NPT. It is of course no more than stating the obvious to say that the dispute the Marshall Islands allege they have with the United Kingdom is connected to the obligations they allege were breached. But the dispute does not relate to the accession of the Marshall Islands to the NPT. The juridical fact of their accession to the NPT can in no way be said to be in dispute between the Parties.

24. *Secondly*, the Marshall Islands are muddling the distinction between the source of the rights and the source of the dispute drawn by the Permanent Court in *Electricity Company* and endorsed by this Court in *Right of Passage*. In terms of that distinction, the accession to the NPT is a juridical event which constitutes the source of the rights claimed by the Marshall Islands under the NPT. Similarly, the emergence of a relevant rule of customary international law constitutes a juridical event that pertains to the source of the rights claimed by the Marshall Islands under customary international law. As already mentioned, it is of course true that a dispute between the Marshall Islands and the United Kingdom over those rights and corresponding obligations could have arisen at any point after those dates, but not before — ***could*** have arisen. But those events and the dates connected to them go to the source of the rights, not to the source of the dispute.

25. *Thirdly*, and following from the first and the second point, the Marshall Islands also say that a "new situation" emerged when they became a party to the NPT — or alternatively when the rule of customary international law parallel to Article VI of the NPT was recognized by this Court

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[43]WSMI, para. 85.

[44]*Ibid.*, para. 76.

in the 1996 ***Advisory Opinion***. These dates are, again, relevant to the source of the rights but not the source of the dispute. They are not the new situations to which the Court was referring in the *Certain Property* case.

26. *Fourthly*, the Marshall Islands commit a fundamental error when they say that it is "self-evident that any facts or situations that may have given rise to a dispute relating to such rights could only arise after those rights had come into existence". This statement simply begs the question: when did the situation or facts to which the Marshall Islands' case relates occur? The question is not***:*** when should they have occurred***?*** ***W***e know the answer to that question***.*** ***T***he fact that in a legal sense, they had to occur *after* a certain date is of course no evidence that they did occur then and not before — or, indeed, that they occurred at all. David Hume famously said that it is a fallacy to make claims about what "ought" to happen on the basis of what "happens": one cannot derive an "ought" from an "is". Our friends on the other side are now experimenting with the reverse. They want to derive an "is" from an "ought": the situations or facts occurred subsequent to the critical date — they say — because they had to occur subsequent to the critical date. But, even without the assistance of Scottish philosophers, Mr. President, we can confidently conclude that the inference they wish to draw is fallacious.

(d) ***The situations and facts giving rise to the dispute are outside the temporal jurisdiction of the Court***

27. Mr. President, Members of the Court, the Marshall Islands' analysis of the time factor in this case is fundamentally flawed. Their analysis does not in any way detract from the central proposition on time that we advanced in our written statement, namely that the dispute alleged by the Marshall Islands is in respect of situations and facts outside the temporal jurisdiction of the Court. And, it is to this central point that I now turn in the final section of my submissions on the preliminary objection *ratione temporis*.

28. It is clear from both the Application and the Memorial of the Marshall Islands that conduct prior to the 1990s is integral to their case, and that the situation of which the Marshall Islands complains is one which arose well before 1991. Contrary to the Marshall Islands' later contention in their Observations, the situations and facts that pre-date the jurisdiction of the Court were not discussed by the Marshall Islands in those pleadings "by way of historical

background"[45]. Rather, and as the Marshall Islands put it in the Application, the facts discussed in the Application "are relevant for an assessment of the Respondent's non-compliance with its international obligations with respect to nuclear disarmament and the cessation of the nuclear arms race"[46].

29. Mr. President, Members of the Court, these are not mere slips of the pen. Indeed, in their Memorial the Marshall Islands summarize the case on the United Kingdom's alleged breach of the first limb of Article VI of the NPT as follows: "Forty-five years after entry into of force of the NPT, the UK's delay in fulfilling its obligation to pursue negotiations on nuclear disarmament is manifestly unreasonable."[47] ~~***(Emphasis added.)***~~

30. The same concluding assessment is made in relation to the other limb of the Article VI of the NPT. The Marshall Islands' Memorial reads as follows: "Forty-five years after entry into of force of the NPT, the UK's delay in fulfilling its obligation to pursue negotiations on cessation of the nuclear arms race is manifestly unreasonable."[48] ~~***(Emphasis added.)***~~

31. It is not true that the NPT entered into force between the United Kingdom and the Marshall Islands 45 years ago. The NPT entered into force between these two States 21 years ago. But what is true, as the Marshall Islands know and repeatedly asserted in their Application and Memorial, is that *their* case is about situations and facts occurring over a far longer time frame than the time the treaty has been in force between the Parties — in fact a time frame that is more than double the time frame in regard to which the Court could exercise its jurisdiction. Pre-1990s situations and facts are clearly not mere historical background. They are at the heart of the Marshall Islands' case.

32. To circumvent their difficulties with the temporal limitations, the Marshall Islands now accuse the United Kingdom of emphasizing "the existence of continuing conduct . . . to persuade the Court that the facts which constitute the real cause of the dispute occurred prior to the critical date of 17 September 1991"[49]. The Marshall Islands claim that "the subject-matter of the present

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[45]WSMI, para. 72.

[46]Application Instituting Proceedings Against the United Kingdom by the Marshall Islands (AMI), para. 99.

[47]Memorial of the Marshall Islands (MMI), para. 213; emphasis added.

[48]*Ibid.*, para. 221; emphasis added.

[49]WSMI, para. 88.

dispute is not whether the United Kingdom, by the conduct it pursued prior to the critical date, has a committed a continuing wrongful act"[50].

33. Mr. President, Members of the Court, I would respectfully invite you to compare these assertions in the observations of the Marshall Islands with the Introduction and Summary of the Marshall Islands' Application. In 18 paragraphs, introducing and summarizing the dispute, there is no discussion of any post-1995 United Kingdom conduct which might have given rise to the dispute. Right before alleging, for the first time, that the United Kingdom is in "continuing breach" — their words — of its obligations the Marshall Islands mention three time frames. One of these time frames is by reference to the date of the Court's Advisory Opinion in *Nuclear Weapons* and, for reasons I have discussed before, this does not relate to the situations or facts giving rise to the dispute. The other two time frames do deal with situations and facts, but they stretch well beyond 1990: into the 1980s, 1970s and 1960s[51]. And crucially, in the same Introduction and Summary of their dispute with the United Kingdom, found in the Application, the Marshall Islands describe the purposes of the Application as follows: "This Application seeks to ensure that the legal obligations undertaken 44 years ago by the UK in the context of the NPT do indeed deliver the promised result."[52]

34. As discussed earlier, Mr. President, Members of the Court, this is the same crucial time frame which runs through the Memorial, although of course by the time the Memorial was filed 44 years had become 45 years. This is the time frame of the alleged continuing breaches which the Marshall Islands had clearly in mind in their Application and Memorial. The source of the dispute is not conduct between 1995 and 2016, or even 1991 and 2016. The source or real cause of the dispute goes back to at least 1970 and in some respects beyond. It is of course true that the United Kingdom did not assume legal obligations vis-à-vis the Marshall Islands for the first 25 years of the duration of the situation at the heart of their case, but this is a legal factor which cannot be determinative of the time frame of the situations and facts with regard to which the Marshall Islands' case arises.

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[50]WSMI, para. 89.

[51]AMI, para. 7.

[52]AMI, para. 10.

35. In conclusion, on this preliminary objection, Mr. President and Members of the Court, this is a dispute that, if it arises at all, it does so clearly with regard to situations or facts which are excluded from the temporal jurisdiction of the Court because they are antecedent to the date of accession of the Marshall Islands to the NPT — and, in any event, pre-date the critical date of 17 September 1991.

III. The Marshall Islands' acceptance of the Court's compulsory jurisdiction was only for the purposes of the present dispute

36. Mr. President, Members of the Court, I will now turn to the other preliminary objection of the United Kingdom which I am to address.

37. The relevant optional declaration of the United Kingdom excludes from the jurisdiction of the Court "any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute". This exclusion is consistent with the United Kingdom's policy of supporting the settlement of international disputes through adjudication as a general principle and strategy in the conduct of international affairs, rather than as a mere tactical device.

38. Before looking at this preliminary objection in more detail, I will summarize briefly the principles that govern the interpretation of optional clause declarations as settled in the jurisprudence of this Court. And I would also emphasize, Mr. President, that these principles are relevant to the interpretation of the temporal reservations in optional declarations discussed earlier.

39. This Court stated in the *Fisheries Jurisdiction (Spain* v. *Canada)* case that "what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State"[53]. What matters, as the Court put it later in the *Aerial Incident* case, is "the intention of a declarant State, as expressed in the actual text of its declaration"[54]. The Court has also emphasized that a declaration under the optional clause is "a unilateral act of State sovereignty" to which the rules on treaty interpretation in the Vienna Convention on the Law of

[53] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 455, para. 52.

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

Treaties "may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction"[55].

40. Applying these principles to the present case, the United Kingdom submits that the jurisdiction of the Court is excluded by operation of the "for the purpose of" reservation in the its optional clause declaration. The relevant part of the declaration sought to exclude two categories of disputes: any dispute in respect of which acceptance had been only in relation to it, as well as any dispute in respect of which acceptance had been only for the purpose of it. The Court must give effect to the distinction between what the acceptance relates to and what the purpose of the acceptance might be, for such a distinction was clearly intended by the United Kingdom on the making of its declaration.

41. It is true, Mr. President, that the acceptance of the Court's jurisdiction by the Marshall Islands was not only in relation to the particular dispute that it has submitted to the Court. The terms of that acceptance are sufficiently broad to capture other potential disputes.

42. But the question whether the acceptance was only for the purpose of the dispute that the Marshall Islands are submitting is a different one. A State may file an acceptance of the Court's jurisdiction which is potentially in relation to a wider category of disputes than the one it is specifically submitting, but still do so for the purpose of submitting that particular dispute. This is an interpretation that accords with the meaning of the word "purpose" in the *Oxford English Dictionary* as: "That which a person sets out to do or attain; an object in view; a determined intention or aim."

43. The clearest evidence of the Marshall Islands' acceptance of the dispute is offered by the date of the deposit of the optional clause declaration with the Secretary-General of the United Nations on 24 April 2013 and the date of the filing of the present Application on 24 April 2014**.** ***O***n what they thought was the first good moment for filing the Application they did so. It beggars credibility to think that this is mere coincidence of timing. On the contrary, this ~~***coincidence***~~ suggests clearly that what the Marshall Islands set out to do with their acceptance of the Court's

[55] *Fisheries Jurisdiction*, p. 453, para. 46.

jurisdiction a year earlier was to file this dispute, and that the filing of this dispute was the object in its clear view at the time of that acceptance.

IV. Conclusion

44. Mr. President, Members of the Court, this concludes my submissions on the preliminary objections of the United Kingdom concerning, first, the jurisdiction *ratione temporis* of the Court; and, second, the exclusion from the United Kingdom's optional clause declaration of any dispute in respect of which the other Party has accepted the jurisdiction of the Court only for the purpose of the dispute.

45. I thank you for your attention and I would now invite you to hand the floor to my colleague, ***Mrs.*** Jessica Wells, who will conclude the United Kingdom's submissions today.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à Mme Jessica Wells.

Mrs. WELLS:

I. Introduction

1. Mr. President, Members of the Court, may I begin by saying that it is an honour and a privilege to appear before the Court on behalf of the United Kingdom.

2. In my submissions I shall be dealing with the fourth preliminary objection made by the United Kingdom — namely that the Application brought against the United Kingdom by the Marshall Islands necessarily and directly engages the essential interests of States which are not before the Court in these proceedings and that consequently, in accordance with the principle which, by way of shorthand I shall refer to as the "essential parties" principle, this Application is inadmissible and/or the Court lacks jurisdiction to hear it.

II. Scheme of submissions

3. Mr. President, Members of the Court, with your permission, I intend to address the Court for about 45 minutes.

4. I will open with a few preliminary remarks about the nature and context of the Marshall Islands' case against the United Kingdom. Next, I will consider in some detail the scope of the

"essential parties" principle as it has developed through the Court's jurisprudence. Finally, I will take the Court through the detailed allegations which have been made against the United Kingdom.

5. In a nutshell, the United Kingdom's case is that the Court cannot decide this Application against the United Kingdom without *necessarily* evaluating the lawfulness of the conduct of third States. At a general level, the Court cannot, for instance, decide whether the United Kingdom has negotiated in good faith without considering its conduct in the context of the behaviour of other States. But, more particularly, the specific allegations made against the United Kingdom directly impugn the conduct of third States. The United Kingdom therefore submits that this case falls four-square within the "essential parties" principle.

III. Opening remarks

6. Mr. President, Members of the Court, the Marshall Islands assert, in their Statement of Observations:

(a) That they are "challenging solely the conduct of the Respondent, claiming that that conduct is in breach of the United Kingdom's obligation to the Marshall Islands under NPT Article VI and customary international law"[56]; and

(b) That "Nothing in this Application can be interpreted as requesting the Court to pronounce on whether the other States possessing nuclear weapons, either before or not before the Court, have also breached their obligations or to order such States to negotiate and conclude negotiations *inter se*."[57]

7. With respect, this is disingenuous.

8. The Marshall Islands are manifestly *not* challenging solely the conduct of the United Kingdom. They have issued *eight* other applications, essentially mirroring the broad claims in this Application, against each of the States which are said to possess nuclear weapons. The fact that only three of these States have optional declarations and that the other six applications cannot therefore proceed, should not detract from the reality of the Marshall Islands' position: that those

[56]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), para. 102.

[57]*Ibid*., para. 104.

States which possess nuclear weapons share responsibility for the performance of the obligation to negotiate for nuclear disarmament.

9. Focusing solely on the Application as against the United Kingdom, the very nature of the Marshall Islands' claim inevitably involves the conduct of other States. There are three particular aspects to this:

— *First*, the Marshall Islands acknowledge the trite but fundamental proposition that a State cannot conduct and conclude negotiations by itself[58]. However, it contends that: "What is required from the United Kingdom is, at least, a genuine effort to pursue such negotiations in good faith. This genuine effort can and must be made irrespective of the attitude of the other States possessing nuclear weapons."[59] That may be the case, but it does not follow that the Court can evaluate in a vacuum whether the United Kingdom's efforts to negotiate are in good faith and/or are genuine. The United Kingdom's submission is that its conduct in such negotiations can only be properly assessed in the context of the attitude and actions of other States — in particular those States which possess nuclear weapons — and thus the Court will inevitably be drawn into a consideration of the conduct of other States which are not before the Court.

— *Secondly*, the Marshall Islands make much of the assertion that the obligation to conduct negotiations for nuclear disarmament, both under Article VI and the alleged customary law obligation, is an obligation *erga omnes*[60]. Again, this may be so, but it tells us nothing about whether the Court has, or should exercise, jurisdiction over this case.

— *Thirdly*, and crucially, as will be discussed in more detail, when one looks at the specific acts and omissions which are relied upon by the Marshall Islands as evidence of the United Kingdom's alleged breach, it is readily apparent that those matters are precisely mirrored or reflected in the conduct of other States — in particular the United States and France. Our friends from the Marshall Islands miss the point, when they contend that "the fact that other States may have breached the obligation to negotiate does not and cannot exclude the

[58]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), para. 102.

[59]*Ibid*., para. 102.

[60]*Ibid*., para. 105.

possibility for the Court to assess independently whether the United Kingdom is complying with the same obligation"[61]. The problem is not that the other States may in theory also be in breach of their obligations, but rather that the Court cannot decide whether or not the United Kingdom is in breach without also necessarily evaluating the lawfulness of the conduct of other States which have acted, or failed to act, in materially the same way.

10. Mr. President, Members of the Court, it is for these broad reasons that the United Kingdom submits that the "essential parties" principle is engaged in this case. With these general points in mind, I will move on to examine the scope of this principle in more detail.

IV. The "essential parties" principle

11. The "essential parties" principle is a reflection of perhaps the most fundamental tenet of the Court's jurisdiction. In the words of Professor Rosenne: "It is an uncontroversial principle of general international law that no State is obliged to submit any dispute with another State or *to give an account of itself* to any international tribunal. The agreement of the parties to the dispute is the prerequisite to adjudication on the merits."[62] (Emphasis added.)

12. The basic proposition that the Court cannot adjudicate over the legal rights of a State which has not consented to its jurisdiction is straightforward. However, in the context of third States which are not parties to proceedings, as Professor Amerasinghe has commented, "while the basis in consent of the rule is clear, it is still open to discussion what the exact limits are of the rule"[63].

13. Mr. President, Members of the Court, the authorities on the "essential parties" principle will be well known to you. However, in seeking to determine the limits of the principle it is, in the United Kingdom's submission, necessary to focus on the precise circumstances in which the Court has determined whether third State's interests have — or have not — engaged the consent principle. This, in our submission, provides clearer guidance on the proper limits of the principle than seeking to identify a formulation which is expected to provide a clear dividing line and be

[61]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), para. 105.

[62]Rosenne, *The Law and Practice of the International Court: 1920-2005*, Martinus Nijhoff, 2006, Vol. II, p. 549.

[63]Amerasinghe, *Jurisdiction of International Tribunals*, p. 236.

easily applicable in every case. With the Court's permission, therefore, I will summarize the pertinent facts and the approach of the Court, in the key cases.

14. The first case to which I would like to take the Court is the *Monetary Gold* case. This case is usually taken as the origin of the principle — although the Permanent Court had already — in particular in the *Eastern Carelia* Advisory Opinion — adverted to the limits imposed by the consent principle on the consideration of claims affecting third States.

15. As the Court will recall, in the *Monetary Gold* case, Italy requested the Court to determine that any share of the monetary gold that might be due to Albania under the Paris Act of 1946 should be delivered to Italy in partial satisfaction for damage caused to Italy by the Albanian law of January 1945. As the Court explained:

> "In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has *committed any international wrong* against Italy, and whether she is under an obligation to pay compensation to her . . . In order to decide such questions, it is necessary to determine whether the Albanian law of . . . 1945, was *contrary to international law*. In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — *only two States, Italy and Albania, are directly interested*. To go into the merits of such questions would be to decide a dispute between Italy and Albania.
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> The Court cannot decide such a dispute without the consent of Albania . . . *To adjudicate upon the international responsibility of Albania without her consent* would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[64]

16. The Court went on to consider the relationship between the consent principle and Article 62 of the Court's Statute, which provides for a third State to request permission to intervene in proceedings if it considers that it "has an interest of a legal nature which may be affected by the decision in the case". It was in this context that the Court gave its oft-repeated statement that: "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[65]

17. Mr. President, Members of the Court, it is respectfully submitted that the earlier passage which I have cited is more illuminating than the rather more widely cited "very subject-matter"

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

[65] *Ibid*.

formulation. The longer passage explains the basis for the Court's conclusion that Albania's interests formed the "very subject-matter" of the claim. The building blocks for that conclusion were:

— *first*, that in order to determine Italy's claim, it would be necessary to consider whether Albania's conduct was contrary to international law;

— *secondly*, that in determining that issue, only two States — Albania and Italy — were directly interested; and

— *thirdly*, that the Court could not adjudicate upon the international responsibility of Albania without her consent.

18. The second case to which I would like to take the Court is the *Military and Paramilitary Activities in Nicaragua* case[66] — a case which is generally regarded as confining the scope of the "essential parties" principle.

19. The United States contended that the Nicaraguan Application was inadmissible on the basis that it implicated third States, in particular Honduras, in the alleged unlawful activities. It was, in particular, alleged that Honduras had permitted its territory to be used as a staging ground for unlawful uses of force against Nicaragua. The United States argued that the adjudication of its international responsibility for the actions alleged by Nicaragua would necessarily involve determining the international responsibility of those third States and, in particular, whether those States were entitled to take measures to protect themselves from unlawful uses of force. It was further contended that Nicaragua's request for an order that the United States "cease and desist" from all support to any nation engaged or planning to engage in military or paramilitary actions against Nicaragua would impair the rights of third States to individual and collective self-defence[67].

20. The Court (with respect) did not engage in any detailed analysis of the scope of the "essential parties" principle, nor of the manner in which the legal rights and interests of the third States were alleged to be affected by Nicaragua's claim against the United States. It dismissed the United States' objections in a single paragraph, which simply:

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[66] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392.

[67] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* Counter-Memorial of the United States, pp. 437-438.

(a) reiterated the "very subject-matter" formula from the *Monetary Gold* Judgment;

(b) noted that the Court had, in principle, merely to decide upon the submissions made by the parties before it and that, under Article 59 of the Statute, its decision would have binding force for those parties only;

(c) recorded that third States were free to institute separate proceedings or to employ the procedure of intervention;

(d) stated that there was no trace, in the Statute of the Court or in the practice of international tribunals, of an "indispensable parties" rule; and

(e) concluded that "[t]he circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction"[68].

21. It is notable that the Court did not, in this passage, refer at all to the consent principle, nor consider whether its judgment would require it to rule on the legal interests or rights of third States. In essence, the Court simply confined the *Monetary Gold* case to its own, unusual, facts.

22. Mr. President, Members of the Court, the next case in the chronology — a case on which the Marshall Islands rely heavily — is the *Certain Phosphate Lands in Nauru* case[69].

23. Nauru sought to establish that Australia was responsible for breaches of a number of international obligations arising under the Trusteeship Agreement for Nauru. The Trusteeship Agreement jointly designated Australia, New Zealand and the United Kingdom as the Administering Authority, although in practice the administration of Nauru was undertaken solely by Australia. Nauru's claim (unlike this Application) was therefore based solely on the conduct of Australia towards Nauru. The *conduct* of New Zealand and the United Kingdom was not in issue but Australia's position was that the acts of one State under the Trusteeship Agreement were equally attributable to the other two Trustee States, and thus any finding of breach against Australia would inevitably involve a decision on the international responsibility of the United Kingdom and New Zealand. Australia, therefore, submitted that the Court could not hear the dispute in the absence of these two States.

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

[69] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

24. In rejecting this submission, the Court concluded that the interests of New Zealand and the United Kingdom would not constitute the "very subject-matter of the judgment". It appeared to add the following gloss to the formulation of the threshold in *Monetary Gold*:

> "In the latter case, the determination of Albania's responsibility was a *prerequisite* for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, *the only object of Nauru's claim* . . .
>
> In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well *have implications for the legal situation* of the two other States concerned, but no finding in respect of that legal situation will be *needed as a basis* for the Court's decision on Nauru's claims against Australia."[70] (Emphasis added.)

25. The approach of the majority of the Court on this issue in *Nauru* was strongly criticized in the dissenting opinions of Judges Jennings, Ago and Schwebel. In the United Kingdom's submission, it is not apparent from the Judgment why the majority of the Court thought that the "essential parties" principle is only engaged when a finding in relation to a third State's legal rights is a "prerequisite" or "needed as a basis" for the Court's decision. The distinction between "implications for the legal situation" of a third State and a "finding in respect of that legal situation" is, we submit, a fine one. Moreover, if one takes a step back and recalls that the principle is based on the overarching proposition that the Court only has jurisdiction over States which have consented thereto, it is difficult to discern any principled basis on which the Court might be permitted to make an incidental or a simultaneous evaluation of the lawfulness of a third State's conduct in the absence of that State.

26. In any event, the United Kingdom submits, for the reasons which I will elaborate shortly, that in the present case an evaluation of the lawfulness of the conduct of third States will be unavoidable, or "needed as a basis", for the determination of the Marshall Islands' claims. The contrast between the *Nauru* case and the present Application can be put shortly:

(a) in *Nauru*, the allegations of breach arose solely from the conduct of Australia towards Nauru. Australia was (properly) described as "the only object of Nauru's claim". The "legal

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

implications" for New Zealand and the United Kingdom arose from the possibility that they might be found jointly or secondarily liable in respect of that conduct;

(b) By contrast, in the present case the United Kingdom cannot properly be described as the only object of the Marshall Islands' claim. Nor does the present Application rely solely upon the alleged conduct of the United Kingdom towards the Marshall Islands. Rather, it is premised on the United Kingdom's conduct in common with other States. A decision on whether that conduct constitutes a breach of the obligation to negotiate is "needed as a basis" for the determination of the Marshall Islands' claim. The Court cannot limit that decision to the United Kingdom, whatever language it uses. If the United Kingdom's conduct is a breach, it must follow that the materially identical conduct of other States is also a breach.

27. In the United Kingdom's submission, therefore, even if the *Nauru* "gloss" is applied, it does not defeat this preliminary objection in the present case.

28. Mr. President, Members of the Court, I now turn to the *East Timor* case[71]. Here Portugal maintained that Australia, by negotiating and concluding a treaty with Indonesia in relation to the Timor Gap, had infringed the rights of the East Timorese people to self-determination and sovereignty over their resources. Australia contended that the Court would not have jurisdiction to decide this issue if it would be required to rule on, *inter alia*, the lawfulness of Indonesia's entry and continued presence in East Timor or the validity of the Timor Gap Treaty. In response, Portugal contended that its application was concerned solely with the objective conduct of Australia and that the rights to self-determination which Australia was alleged to have breached were rights *erga omnes.* Portugal contended that these matters could be considered independently from any consideration of the lawfulness of Indonesia's conduct.

29. Mr. President, Members of the Court, there are strong echoes of Portugal's approach in the Marshall Islands' attempt to characterize its claims as relating solely to the United Kingdom's obligations.

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[71] *East Timor (Portugal* v. *Australia), Judgment, .I.C.J. Reports 1995*, p. 90.

30. The Court upheld Australia's preliminary objection and, again, it is illuminating to consider all the steps in the Court's reasoning. The relevant passage is at paragraphs 26 to 34 of the Judgment, and can be summarized as follows:

First, the Court recalled the fundamental principle that it cannot decide a dispute between States without the consent of those States to its jurisdiction.

Second, the Court carefully considered the approach of Portugal, which sought to separate Australia's behaviour from that of Indonesia, but concluded that:

> "Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor . . . The Court could not make such a determination in the absence of the consent of Indonesia."[72]

Thirdly, the Court noted that Portugal's assertion that the right of peoples to self-determination was a right *erga omnes* was "irreproachable", but emphasized that: "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" and that, whatever the nature of the obligation, the Court cannot rule on the lawfulness of the conduct of a third State without its consent.

Fourthly, the Court stated that it "could not rule on the lawfulness of the conduct of a State when its judgment would *imply an evaluation* of the lawfulness of the conduct of another State which is not a party to the case"[73].

Fifthly, the Court acknowledged that it was not necessarily prevented from adjudicating in circumstances where its judgment might merely "affect the legal interests of a State which is not a party to the case" (the Article 62 threshold), but emphasized that in this case, "the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor *are unlawful* . . . Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment . . ."[74].

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[72] *East Timor (Portugal* v. *Australia), Judgment, .I.C.J. Reports 1995*, p. 102, para. 28.

[73] *Ibid.*, para. 29; emphasis added.

[74] *Ibid.*, para. 34; emphasis added.

31. Mr. President, Members of the Court, four particular points of guidance for this case can be drawn from the *East Timor* Judgment:

First, in determining whether a third State's rights "form the very subject-matter" of a judgment, the key question is whether the effect of the judgment would constitute an evaluation of the lawfulness of the third State's conduct.

Secondly, it is sufficient if the evaluation of the lawfulness of the third State's conduct would be *implied* by the Court's judgment.

Thirdly, if the third State's interests are so affected, it is irrelevant that the obligation invoked between the parties to the proceedings is an obligation *erga omnes*.

Fourthly, the Court must look beyond the way in which the claimant has formulated its case, and consider whether in substance the application affects the interests of third States.

32. The four cases which I have just discussed all involved the potential international responsibility of third States. But this Court has also been alive to the potential effects of judgments on third States in the different context of land and maritime delimitations. The Marshall Islands dismiss the delimitation cases as irrelevant for the purposes of determining the scope of the "essential parties" principle in an "international responsibility" case[75]. But, whilst the delimitation cases are, of course, very different on their facts from the present case, in the United Kingdom's submission they are nonetheless relevant (and support the United Kingdom's preliminary objection). In particular, the Court has expressly reiterated the principle that jurisdiction is founded on the consent of the parties and that it cannot therefore decide upon the legal rights of third States who are not parties to the proceedings. And, even where the Court has undertaken a delimitation, it has made sure that its decision does not trespass on the rights or interests of third States. In the present case, however, the Marshall Islands have put directly in issue bilateral and shared conduct of the United Kingdom and third States which are not before the Court and thus the effect of the Court's judgment in this case cannot be confined to the United Kingdom alone.

33. Mr. President, Members of the Court, the precise outer limits of the "essential parties" principle may be unclear. However, the United Kingdom submits that, on a proper analysis, the

[75]WSMI, para. 107.

authorities which I have just outlined yield the following guidance in determining whether this Court can hear a claim which involves third States:

One: the key question is whether the effect of the Court's judgment will be to evaluate (expressly or by implication) whether a third State's conduct is unlawful under international law.

Two: in considering this question, the Court must look beyond the way in which the claimant has formulated its case and consider the substance of the claim. And,

Three: the fact that an *erga omnes* obligation is asserted by the applicant State is irrelevant to the issue of whether the Court has jurisdiction.

34. Mr. President, Members of the Court, I will now move to the third section of my presentation and examine how these guiding principles apply in the context of the Marshall Islands' Application against the United Kingdom.

V. The application of the "essential parties" principle in the present case

35. In my opening remarks, I explained why, in broad terms, the Court cannot consider these claims against the United Kingdom in isolation from the implications for third States and why any determination of these claims will necessarily involve an evaluation of the lawfulness of the conduct of other States.

36. Mr. President, Members of the Court, the Marshall Islands has set out the detail of their case against the United Kingdom in their Memorial. As Professor Verdirame has highlighted, the Marshall Islands rely heavily on a general pattern of conduct by the United Kingdom which stretches back to at least the 1970s. In their statement of observations, the Marshall Islands seek to get around the problem which Professor Verdirame has addressed by asserting that the "facts and situations which constitute the real cause of the present dispute are inextricably linked to the RMI's accession to the NPT on 30 January 1995 and the Advisory Opinion of 8 July 1996". But even the barest of glances at the more recent allegations and omissions which are mentioned in the Memorial is sufficient to see that the Court cannot, in these proceedings, avoid determining the lawfulness of the conduct of at least some other States. In particular, the Marshall Islands mention the following instances of conduct:

One: the renewal of the UK-US Mutual Defence Agreement in 2014, which was, in any event, originally entered into in 1958 and has since been renewed several times[76].

Two: The conclusion of a bilateral Treaty for Defence and Security Co-operation with France and a further agreement on co-operation on nuclear warhead research concluded between Prime Minister Cameron and President Hollande in January 2014[77].

Three: The joint statement made with the United States of America and France at the United Nations General Assembly High-Level Meeting on Nuclear Disarmament in September 2013, in which the three States welcomed the increased enthusiasm around the nuclear disarmament debate but expressed regret that energy was being directed towards initiatives such as the High-Level Meeting and the Open-Ended Working Group[78].

Four: The joint statement, issued by the P5 Nuclear Weapon States at the conclusion of their conference in London in February 2015, which reaffirms "that a step-by-step approach to nuclear disarmament that promotes international stability, peace and undiminished and increased security for all remains the only realistic and practical route to achieving a world without nuclear weapons"[79].

Five: The joint statement, with France, dated 6 November 2012, stating that the two States were unable to support the establishment of the Open-Ended Working Group or any outcome it might produce[80]. And,

Six: The United Kingdom's voting record in the United Nations General Assembly, in particular with regard to resolutions relating to the establishment of the Open-Ended Working Group[81], following up the Nuclear Weapons Advisory Opinion[82] and following up on the High-Level Meetings in 2013 and 2014[83].

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[76]Memorial of the Marshall Islands (MMI), para. 61.

[77]MMI, paras. 62-64.

[78]MMI, para. 90.

[79]MMI, para. 81.

[80]MMI, para. 77.

[81]MMI, para. 76.

[82]MMI, para. 82.

[83]MMI, para. 91.

37. Mr. President, Members of the Court, some of these allegations directly concern bilateral conduct between the United Kingdom and other States: all of them directly impugn the conduct of third States. Consequently a determination by the Court that the United Kingdom is in breach of its obligations to negotiate by reason of this conduct cannot be confined to the United Kingdom alone. On the contrary, it would inevitably constitute an evaluation of the lawfulness of the conduct of, at the very least, the United States of America and France, as counterparties to the bilateral conduct, as co-authors of the joint statements and as joint participants in the voting patterns in the United Nations.

38. To be clear: this is not a case like *Nauru*, where it is alleged that one State has engaged in conduct which might be attributable to a third State. Nor is it a case like *Nicaragua*, where allegations of unlawful conduct of a different nature are made against third States. In this Application, third States — particularly the United States of America and France — are directly implicated in the unlawful conduct alleged against the United Kingdom.

VI. Conclusion

39. Mr. President, Members of the Court, for the reasons which I have elaborated, in order to decide this Application against the United Kingdom, the Court will necessarily have to evaluate the lawfulness of the conduct of other States which are not before it in these proceedings. Whether this is expressed on the basis that such evaluations will be "needed as a basis" for the Court's decision or will "form the very subject-matter" of its judgment, it is clear that the issue of the lawfulness of the conduct of third States — the essential interests of those third States — are directly and inevitably engaged. Bearing in mind, as the Court must, the essential principle that a State cannot (in the words of Professor Rosenne) be required "to give an account of itself" unless it consents to the Court's jurisdiction, it must follow, in the United Kingdom's respectful submission, that the Court lacks jurisdiction to hear this Application and/or that the Application is inadmissible.

40. Mr. President, Members of the Court, that concludes the United Kingdom's first round submissions in this case. I thank you for your attention.

Le PRESIDENT : Merci, Madame Wells. Voilà qui met un terme au premier tour de plaidoiries du Royaume-Uni. La Cour se réunira de nouveau en cette affaire le vendredi 11 mars 2016 à 15 heures pour entendre les Iles Marshall en leur premier tour de plaidoiries.

Je vous remercie. L'audience est levée.

L'audience est levée à 12 h 35.

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