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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Friday 11 March 2016, at 3 p.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 vendredi 11 mars 2016, à 15 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,

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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,

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

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as Agent;

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

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

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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 ;

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comme agent ;

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 adjoint ;

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

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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. Cet après-midi, la Cour entendra les plaidoiries des Iles Marshall pour le premier tour de la procédure orale 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)*.

Je donne la parole à M. Tony deBrum, coagent des Iles Marshall.

Mr. deBRUM:

INTRODUCTION

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

2. The Marshall Islands' counsel will address the finer points of the legal arguments made by the United Kingdom.

3. In the first part of this opening statement, I will respond to certain mischaracterizations that the United Kingdom made in its oral pleadings on Wednesday.

4. These matters relate to:

(a) the very real claims at issue in this dispute, and the strategic bargain of the NPT; and

(b) the fallacy of the United Kingdom's claim that ordering relief would be equivalent to ordering the United Kingdom to be a "one hand clapping"[1].

5. For the second part of this opening I will address the peaceful settlement my country seeks and the rule of law so very important to it.

6. For the final part, I will address briefly the Marshall Islands' acceptance of this Court's compulsory jurisdiction.

7. As a preliminary matter, I wish to confirm that the Marshall Islands seeks no monetary compensation in this case.

[1]CR 2016/03, p. 32, paras. 58-59.

Part I

(a) *The very real claims at issue in this dispute and the strategic bargain of the NPT*

8. I turn now to the very real claims at issue in this dispute and the strategic bargain of the NPT.

9. Mr. President, Members of the Court, the allegation that this case is "an artificial case" is baseless. I listened to the United Kingdom counsel make that allegation five times in a single paragraph on Wednesday[2]. In response, I will address the very genuine nature of my country's claims, including the motivation of my country.

10. Official confirmation of the seriousness of the Marshall Islands' position exists as far back as 1995, when it officially wrote to this very Court in the *Legality of Threat or Use of Nuclear Weapons* case. That 1995 Statement from the RMI is at tab 1 of your judges' folders[3]. On page 2 of that Statement, my country begins an explanation of the dire health consequences suffered by the Marshallese following nuclear contamination, including extreme birth defects and cancers. For example, I will quote Ms Lijon Eknilang of Rongelap Atoll, page 4 of tab 1 in the judges' folders:

> "[W]omen on the island [] have given birth to babies that look like blobs of jelly. Some of these things we carry for eight months, nine months. There are no legs, no arms, no head, no nothing. Other children are born who will never recognize this world or their own parents. They just lie there with crooked arms and legs and never speak. Already we have seven such children."

The Statement also describes many tragic losses to the Marshallese. I will not quote those but they are available for the Court's review at tab 1 in the folders.

11. Importantly, also in that filed Statement, the Marshall Islands links the destruction of its lands and harm to its people from nuclear weapons to its decision to join the NPT, as follows:

> "Given its extensive first hand experience with adverse impacts of nuclear weapons, Marshall Islands decision to ratify the Nuclear Non-Proliferation Treaty this year is understandable. The objective of the treaty of the 'cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons' is wholly consistent with Marshall Islands' foreign policy of peaceful co-existence as well as with the overarching goal of the international community to achieve global peace."[4]

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[2]CR 2016/03, p. 32, para. 58.

[3]Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands, http://www.icj-cij.org/docket/files/95/8720.pdf [accessed on 10 March 2016]; judges' folders, tab 1.

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

12. Mr. President, Members of the Court, the allegation by the United Kingdom that our claims are "artificial" is, at best, mistaken in the extreme. In all seriousness, the Marshall Islands does not go around the world entering into treaties just for fun. It does not give up its legal rights in exchange for no consideration.

13. Briefly, the NPT strategic bargain was that non-nuclear-weapon States would agree to not acquire nuclear weapons, and the existing nuclear-weapon States would agree to negotiate in good faith nuclear disarmament and an end to the nuclear arms race. This is described in our Application[5].

14. The RMI eagerly joined the NPT in 1995 as a non-nuclear-weapon State and in return received the binding legal promise of the States parties to the Treaty, *including the UK*. The fact that the obligation is multilateral does not immunize the United Kingdom from a legal action based on its own conduct.

(b) ***The Fallacy of the United Kingdom's One-Hand-Clapping Claim***

15. Mr. President, Members of the Court, I turn now to the United Kingdom's "one hand clapping" argument. We heard in oral pleadings from the United Kingdom that a hypothetical order requiring it to comply with its obligation to pursue in good faith such negotiations would force it to be the "one hand clapping"[6]. So the point we take from that is that the United Kingdom's position is that *no hands, including its own, are clapping — or negotiating — yet*.

16. This is another way of saying that, to the United Kingdom, no parties are pursuing in good faith such negotiations. Or, put differently still, it is like the person who, caught in poor conduct, replies: "Everybody's doing it."

17. Mr. President, Members of the Court, the "everybody's doing it" defence never worked in my own household, does not work in my country, and should not hold water before this Court. Moreover, the United Kingdom entirely ignores the vast majority of non-nuclear-weapon States, such as the Marshall Islands, that are now seeking such negotiations in earnest.

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[5]Application of the Marshall Islands (AMI), p. 29, para. 82.

[6]CR 2016/03, p. 32, paras. 58-59.

18. The support of this vast majority of non-nuclear-weapon States is reflected in the voting of the United Nations General Assembly (UNGA) for resolutions calling for the immediate commencement of negotiations for a nuclear weapons convention, similar to a chemical weapons convention[7].

19. While the United Kingdom opposes such negotiations and opposes a treaty banning nuclear weapons, it cannot in *any reasonable sense* claim to this Court that it would be the "one hand clapping" if it were ordered to pursue in good faith nuclear disarmament in all its aspects under strict and international control, and fulfil its Article VI obligations.

Part II: Peaceful Settlement and the Rule of Law

20. Turning now to the peaceful settlement of this dispute and the particular importance of the rule of law to the Marshall Islands.

21. Mr. President, Members of the Court as context, and in further response to the UK's claim Wednesday that our claims are "artificial", I wish to provide a brief summary of my country's history with nuclear weapons. While it was designated as a Trust Territory by the United Nations, no fewer than 67 atomic and thermonuclear weapons were deliberately exploded as "tests" in the Marshall Islands.

22. During the "testing" that caused such contamination, several islands in my country were vaporized. Many, many Marshallese died and as described earlier, many suffered birth defects never before seen and cancers. Tragically, the Marshall Islands thus bears *eyewitness* to the horrific and indiscriminate lethal capacity of these weapons, and the intergenerational and continuing effects that they perpetuate over 60 years later.

23. One "test" in particular, called the "Bravo" test, was one thousand times stronger than the bombs dropped on Hiroshima and Nagasaki. From approximately 200 miles away, I witnessed this shocking explosion as a 9-year-old child while fishing with my grandfather, on the beach of Likiep Atoll: the entire sky turned blood red. This distance from which I witnessed this explosion was, in rough terms, approximately equal to the distance between The Hague and Paris — so a significant distance.

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[7]Memorial of the Marshall Islands (MMI), p. 41, para. 91, citing UNGA resolution A/RES/68/32, 5 Dec. 2013 (137-28-20).

24. Radioactive material from fallout from this test was detected in Australia, India, Japan, the United States and Europe. Any suggestion that these thermonuclear weapons can be contained in space and time, or within the domestic borders of any States, is wrong.

25. Additionally, the statement that this dispute is a political matter is likewise mistaken. As is the case here, it is usually the countries that are most powerful that implore others to view existential threats to survival as political matters.

26. When the Marshall Islands — not yet sovereign — brought their objections to nuclear testing to the United Nations and called for it to stop, the United Nations did not heed the call and the so-called testing continued.

27. And matters got even worse. A year *before* the Marshallese were relocated back to the contaminated Rongelap Island in the RMI, in 1956, the health and safety chief of the Atomic Energy Commission infamously said:

> "That island is by far the most contaminated place on earth and it would be very interesting to get a measure of human uptake when people live in a contaminated environment . . . While it is true that these people do not live the way Westerners do, civilized people, it is also true that these people are more like us than the mice."[8]

This quote is referenced in tab 2 of the judges' folders.

28. Later, in 1969, Secretary of State Henry Kissinger infamously said: "There are only 90,000 people out there — who gives a damn."[9]

29. This latter statement, along with others, was made at a time when, according to the UK in its oral pleadings on Wednesday, the UK was operating pursuant to its first mutual defence agreement with the United States with regard to nuclear weapons. *Certainly this statement, as well as the "testing" and resulting suffering and treatment of the Marshallese are not* the basis for our current dispute with the UK. But these experiences give us a unique perspective that we never requested. They help explain why a country of our size and limited resources would risk bringing a case such as this against a nuclear-armed State such as the UK.

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[8]Robert C. Koehler, *Happy Savages: What We Did to the Marshall Islanders*, 15 Feb. 2012, http://www.commondreams.org/views/2012/02/15/happy-savages-what-we-did-marshall-islanders [accessed on 10 March 2016]; judges' folders, tab 2.

[9]Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with written statement of the Government of the Marshall Islands, http://www.icj-cij.org/docket/files/95/8720.pdf [accessed on 10 March 2016]; judges' folders, tab 1, p. 3.

30. And the experiences highlight a very sharp contrast: although the population of the Marshall Islands is very small, at under 70,000 people, it stands as an equal with the UK before this Court. Specifically, as reaffirmed in the Preamble to the United Nations Charter, nations "large and small" have "equal rights"[10]. Indeed, as elaborated in Article 2 of the Charter, the United Nations "is based on the principle of the sovereign equality of all its Members"[11]. To the Marshall Islands, the rule of international law, and the equality of all States under such law, cannot be overstated and is acutely significant.

31. The Marshall Islands is committed to the principles of the Charter of the United Nations, including specifically that nations resolve their legal disputes peacefully pursuant to Article 33.

32. Article 33 of the UN Charter provides States a list of options to take when seeking a peaceful solution to their disputes[12]. "Negotiation" is a listed option, as is "judicial settlement". The selection of the preferred option is a matter of a State's "own choice"[13]. The Marshall Islands' choice here is reflected in its filing of the Application against the UK. The Marshall Islands seeks "judicial settlement".

33. Our goal is to obtain the UK's pursuit in good faith of the required, *promised* and bargained-for negotiations for nuclear disarmament in all its aspects.

Part III: The Marshall Islands Acceptance of Jurisdiction

Encompasses this Dispute

34. The trusteeship of the Marshall Islands, authorized by the United Nations, was not terminated until December 1990, and the Marshall Islands was not admitted to the United Nations until 17 September 1991. Our acceptance of this Court's compulsory jurisdiction covers all disputes arising after that date.

35. In our Statement of Observations, at pages 21-24, we demonstrate that my country's acceptance of the compulsory jurisdiction of this Court was *not* only in relation to or for the

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[10]UN Charter, Preamble.

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

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

[13]*Ibid*.

purpose of this dispute with the UK[14]. This includes references to the RMI's contemplation of climate change litigation in the International Court of Justice (ICJ), and other matters. I will not repeat that detail here, but would note here that *I personally am the signatory to the RMI's declaration*[15].

36. Mr. President, Members of the Court, the Marshall Islands' claims in this dispute are based on the UK's own conduct and its breach of NPT Article VI, *since the time that the Marshall Islands became recognized as sovereign in the international community*. The claims are *not* based on the conduct or breaches of other States. Nor are they based on conduct before the Marshall Islands had any international legal rights.

Conclusion

37. Mr. President, Members of the Court, *there will come a time when eyewitnesses to the nuclear and thermonuclear explosions and their lethal power will no longer be alive.* Given what the Marshall Islands knows first-hand about these weapons, how could it *not* bring this legal dispute to this Court?

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

Le PRESIDENT : Je vous remercie, Excellence. Je donne la parole à M. van den Biesen, coagent des Iles Marshall.

Mr. van den BIESEN:

General observations

1. Mr. President, Members of the Court, it is an honour for me to, again today, appear before this court, this time to — on behalf of the Marshall Islands — respond to the United Kingdom, the Respondent in this case.

2. Mr. President, the opening statements presented by counsel to the Respondent are certainly clarifying where exactly the Parties in this case find themselves. The Respondent states,

[14]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), pp. 21-24, paras. 51-61.

[15]MMI, Ann. 70, p. 2.

quoting the most authoritative source available to it, that is quoting itself, that "[t]he United Kingdom has a strong record on nuclear disarmament"[16]. Mr. President, the Marshall Islands does not agree. The standard against which the conduct of the United Kingdom needs to be tested in this case is not "strong, stronger, strongest" but is whether or not the United Kingdom is "pursu[ing] in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control". The United Kingdom is not engaged in such negotiations; on the contrary it is and continues to be opposed to such negotiations.

3. Also, the United Kingdom states "we agree . . . 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"[17]. Mr. President, the Marshall Islands does not agree. The standard against which the conduct of the United Kingdom needs to be tested in this case is not "less" or "more", but is whether or not the United Kingdom is "pursu[ing] in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control". The United Kingdom is not engaged in just this, on the contrary, it is explicitly opposed to such negotiations.

4. The United Kingdom states "there is no dispute between us"[18]. Mr. President, the Marshall Islands does not agree. The United Kingdom keeps acting according to a standard, which is not the standard that ought to be applied here. What the United Kingdom is doing here, is simply changing the applicable standard into one of its own making in order to enable itself to claim that — presumably — the Parties agree.

5. At no time during these proceedings or — for that matter — outside of these proceedings, has the United Kingdom claimed that it entirely honours the obligation which is central to these proceedings. I will repeat this in order to clarify to the Respondent what precisely the case is

[16]CR 2016/3, p. 11, para. 3.

[17]CR 2016/3, p. 12, para. 2.

[18]*Ibid.*

about: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[19]

6. Obviously if, *arguendo*, the United Kingdom were to change its position overnight and come back on Monday here to say that it would comply fully with that standard, being the obligation as spelled out by this Court in its Advisory Opinion, the Marshall Islands would — while being happy about this change — not agree with the presumed position that the United Kingdom would be acting in accordance with that obligation, because such statement needs to be evidenced by an actual and lasting change of its conduct. All of this just demonstrates that these are issues that all belong to the merits of this case and are unrelated to questions of jurisdiction or admissibility.

7. The United Kingdom alleges, in its preliminary objections, that the Marshall Islands' claims are "manifestly unfounded as to the merits"[20]. Possibly, however not likely, possibly at the merits stage of these proceedings, the Court would come to a finding that the United Kingdom is, indeed, honouring its obligations, but it certainly is not to be excluded that the Court would uphold the Marshall Islands' position. The Marshall Islands in any event has alleged more than enough facts at this point in time to demonstrate that, at a minimum, there is nothing here that is manifestly unfounded. The United Kingdom has not, at any point, alleged, let alone argued, let alone proven that it is acting in accordance with the obligation spelled out by the Court in the Advisory Opinion. Which raises the question as to what exactly is manifestly unfounded in these proceedings?

8. Manifestly unfounded certainly also applies to the Respondent's allegation that the Marshall Islands would have argued that the United Kingdom has been acting in bad faith. The Marshall Islands never has taken this position and this does not change if the United Kingdom repeats this allegation seven times as it did last Wednesday[21]. Yes, the Marshall Islands is, indeed, of the opinion that the United Kingdom is not discharging its obligations in good faith. That is not the same as an allegation that the United Kingdom is acting in bad faith. Back in the 1950s,

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[19] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* p. 276, para. 105 (2) F.

[20] Preliminary Objections of the United Kingdom (POUK), p. 3, para. 5.

[21] CR 2016/3, p. 12, para. 3; p. 15, para. 15; p. 19, para. 24; p. 20, para. 27; p. 26, para. 41; p. 27, para. 44; and p. 31, para. 55.

Sir Gerald Fitzmaurice stated: "There is a natural reluctance to ascribe bad faith to States, in the sense of a deliberate intention knowingly to circumvent an international obligation." Now, the United Kingdom does not seem to be hindered by any reluctance in this case, but this case is not about naming and shaming the United Kingdom but is, indeed, about establishing that the United Kingdom failed and continues to fail to act in good faith[22].

9. Mr. President, the Marshall Islands wanted to have all nine States possessing nuclear weapons appear before this Court and still thinks that all of them should have been here this week; each one in its own case. Not because we cannot do without them from a legal perspective, but because the behaviour of the others deserves also being adjudged by this Court. The United Kingdom takes a similar position (for example, POUK, Part III, Sect. C and Parts IV and V of the oral pleadings by Ms Wells[23]), albeit for entirely different reasons: it states that without the other nuclear weapon States being present, presumably in one single case involving the nine, this Court is unable to reach the requested judgment and therefore is not even allowed to rule on the merits of this case. The United Kingdom's approach cannot be accepted, since there is no necessity for the Court to establish first the legal position of any third party before it may begin to adjudge the Marshall Islands' submissions in the present case. Each and every State is — in the light of the obligation spelled out in the Advisory Opinion — to be judged on its own particular behaviour. Where the Marshall Islands has referred to shared responsibilities, this does not imply that the Marshall Islands considers that the nine States should be seen as participating in some sort of "joint nuclear enterprise", since there exists no such thing between them. Each State draws up its own plans and policies and in any event each of them is at liberty to determine its own choices regarding nuclear weapons. Each also has its own responsibilities in that respect, including its own legal responsibilities.

10. This case against the United Kingdom, therefore, needs to be adjudged on its own particular merits, which will lead to a judgment that is only binding between the Marshall Islands and the United Kingdom (Article 59 of the Statute). Obviously, such a judgment may provide

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[22]Sir Gerald Gray Fitzmaurice GCMG QC, "The Law and Procedure of the International Court of Justice", 1954-9: General Principles and Sources of International Law, 35 *BYBIL* 183, 209 (1958).

[23]CR 2016/3, pp. 47-57, paras. 11-38.

reasons for other States to rethink their own behaviour and policies. But that is true for most judgments and most advisory opinions delivered by this Court and, certainly, never a reason for the Court not to deliver a judgment.

11. In its oral pleadings of last Wednesday (para. 52), the United Kingdom seemed to suggest that the Marshall Islands is asking the Court to somehow confirm its — the Marshall Islands — "political appreciation about the way in which NPT States parties should address their NPT Article VI obligations to negotiate". There again, the United Kingdom is modifying the Marshall Islands' position and then attacks the modified — but incorrect — position. That is not very helpful. The declaratory relief that the Marshall Islands is requesting requires a legal assessment from the Court, nothing less, the same is true for the injunctive relief requested by the Marshall Islands. Discussing the particularities of each of the demands submitted by the Marshall Islands is an issue for the merits and not for the present stage of the proceedings.

12. Then, Mr. President, the United Kingdom seeks to start looking for another way out and claims that negotiating nuclear disarmament is extremely sensitive and would require "fine political judgments in a highly unstable and dangerous world"[24]. The Marshall Islands does not ask the Court to engage in the details of negotiations, but merely requests the Court to apply the law and only the law with respect to the obligation, the existence of which was unanimously determined by this Court at paragraph 105 (F) of its Advisory Opinion.

13. At this point, the United Kingdom's pleadings undergo an explosive *crescendo* where the United Kingdom qualifies a judgment in which the Court would uphold the Marshall Islands' claims as "astonishing"[25] and not only that but according to the United Kingdom such a judgment "would raise some pretty fundamental and searching questions about the judicial function and the principle of effectiveness"[26]. This sounds like a threat, Mr. President, and not a threat aimed at the Marshall Islands; several paragraphs down it becomes clear that this was not an unfortunate slip of a pen, since in paragraph 59 the United Kingdom rather bluntly states that:

> "*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

[24]CR 2016/3, p. 31, para. 55.

[25]*Ibid.*

[26]*Ibid.*

> 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." (Emphasis added.)

14. Mr. President, some time ago, in law school, I was taught that *de minimis non curat praetor*. The United Kingdom, here tries to introduce an opposite concept, *de maximis non curat praetor*. Obviously, such concept does not exist and would be entirely incompatible with a world society that is based on the rule of law. Besides all that, the Marshall Islands has no reason to believe that this Court would not be capable of adjudging cases that fall in the category *"maximis"*. This Court has been dealing with issues of genocide, violations of humanitarian law, the use of force, the issue of self-determination and, no one would be surprised if it, at some point, will also be requested to adjudge the overwhelming consequences caused by climate change. Suffice it to say, Mr. President, that the Marshall Islands puts its trust in this Court and requests that it will not be barred by this Court from having a fair hearing on the merits of its claim.

15. Thank you, Mr. President. I would kindly request you to give the floor now to my friend and colleague Professor Luigi Condorelli.

Le PRESIDENT : Merci. La parole est à M. le professeur Condorelli.

M. CONDORELLI :

L'EXISTENCE DU DIFFÉREND ENTRE LA RÉPUBLIQUE DES ILES MARSHALL ET LE ROYAUME-UNI

Monsieur le président, Mesdames et messieurs les juges, je suis honoré de pouvoir prendre la parole encore une fois devant vous au nom des Iles Marshall, que je remercie très vivement de la confiance qu'elles continuent de m'accorder.

Première partie

1. «La Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire»[27] : voilà un *locus classicus* des plus célèbres de la jurisprudence de la Cour et des plus

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

cités, y compris ces jours-ci dans cette grande salle de justice. Et en voilà un autre : «la Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties»[28]. Par ces deux phrases nettes et très bien tournées, votre Cour exprime une notion fondamentale du droit international contemporain au sujet de laquelle il y a — cela va de soi — plein accord entre les Parties à la présente affaire.

2. Elles sont en revanche en désaccord complet sur la question de savoir si, dans le cas de la présente affaire dont votre Cour est saisie par les Iles Marshall contre le Royaume-Uni, l'existence du différend est incontestable (comme le demandeur le croit fermement), ou bien doit être exclue (ainsi que le soutient le défendeur). Votre Cour a entendu avant-hier le Royaume-Uni illustrer (avec l'éloquence de sir Daniel Bethlehem) l'argument principal sur lequel se base sa thèse négative. Cet argument est parfaitement synthétisé dans le résumé figurant dans la partie IV des exceptions préliminaires du Royaume-Uni :

> «In consequence of the failure by the Marshall Islands to give the United Kingdom any notice whatever of its claim, there is no justiciable dispute between the Marshall Islands and the United Kingdom with the consequence that the Court lacks jurisdiction to address the claims and/or the claims are inadmissible.»

3. Le propos d'après lequel, du fait de l'absence de notice donnée au Royaume-Uni, il n'y aurait pas de différend «justiciable», implique en vérité l'admission qu'il y a bien en l'espèce un différend, mais que ce différend ne pourrait pas faire l'objet d'un règlement judiciaire, une condition prétendument nécessaire à cette fin faisant défaut. Saluons en tout cas ce retour sur scène d'une distinction quelque peu vieillotte qu'on avait tendance à oublier : celle entre différends «justiciables» et «non justiciables». De façon à peu près similaire, lorsque le professeur Verdirame disait mercredi dernier : «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», il semblait admettre qu'il y a bien *in casu* un différend, quoique échappant d'après lui *ratione temporis* à la compétence de la Cour.

4. Mais il convient de laisser de côté ces remarques formelles et focaliser l'attention sur ce qui est central. Chacun sait que — suivant la plus traditionnelle des définitions

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

jurisprudentielles — pour pouvoir affirmer qu'un différend existe «[i]l faut démontrer que la réclamation de l'une des parties se heurte à l'opposition de l'autre»[29]. Cependant, on nous explique du côté du défendeur que non, que cela n'est pas suffisant : on ne saurait admettre que le différend existe (ou plutôt qu'il est justiciable, c'est-à-dire susceptible d'être soumis au juge international) tant que le potentiel demandeur n'a pas préalablement informé de ses griefs le potentiel défendeur. Le Royaume-Uni soutient, en effet, qu'il existerait un principe de droit international coutumier selon lequel un Etat qui entend introduire une instance contre un autre Etat doit l'en informer en lui notifiant sa réclamation, ceci en tant que précondition à l'existence d'un différend susceptible de former l'objet d'un règlement judiciaire. Autrement dit, aucun différend (ou tout au moins aucun différend «justiciable») ne pourrait exister tant que l'Etat qui entend soumettre le différend au juge n'a pas préalablement porté son grief à la connaissance de l'autre. Nos contradicteurs allèguent que ce principe est énoncé à l'article 43 des Articles de la Commission du droit international (ci-après la «CDI») sur la responsabilité de l'Etat et que son existence est confirmée par les instruments juridiques régissant l'activité d'autres cours et tribunaux internationaux.

5. Monsieur le président, il est sans doute intéressant de noter que le Royaume-Uni, en invoquant le principe de la notification préalable, tente de convaincre que des communications et des formes d'interaction entre les parties à un différend devraient obligatoirement et dans tous les cas précéder la saisine de la Cour. En somme, un mode de contact préalable entre les parties serait de toute façon requis, même si l'on n'arrive pas à exiger de véritables négociations préalables. En prêchant en faveur de ce que nous pourrions appeler «le préliminaire réduit», on tente du côté du Royaume-Uni d'ajouter une condition que les Etats devraient remplir pour saisir la Cour, dont ni la Charte des Nations Unies ni le Statut ne parlent aucunement, et cela en échappant ainsi à la rigueur de l'enseignement de votre Cour d'après lequel :

> «Il n'existe ni dans la Charte, ni ailleurs en droit international, de règle générale selon laquelle l'épuisement des négociations diplomatiques serait un préalable à la saisine de la Cour. Un tel préalable n'avait pas été incorporé dans le Statut de la Cour permanente de Justice internationale … Il ne figure pas davantage à l'article 36 du Statut de la présente Cour.»[30]

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

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

6. Il n'y a donc pas de «règle générale selon laquelle l'épuisement des négociations diplomatiques serait un préalable à la saisine de la Cour», précise la Cour, laquelle admet cependant, nous le savons, qu'une règle spéciale en la matière pourrait fort bien être établie dans tel ou tel domaine spécifique. Mais aucune règle spéciale n'existe, souligne la Cour avec vigueur, lorsque la Cour «a été saisie sur la base de déclarations faites en vertu du paragraphe 2 de l'article 36 du Statut, déclarations qui ne contiennent aucune condition relative à des négociations préalables à mener dans un délai raisonnable»[31].

7. Insistons-y en passant, ceci est particulièrement pertinent dans la présente affaire, votre Cour ayant été saisie justement sur la base des déclarations unilatérales faites par le Royaume-Uni et les Iles Marshall en vertu du paragraphe 2 de l'article 36 : deux déclarations qui ne contiennent aucune condition relative à des négociations préalables ni à épuiser, ni à entamer !

8. Monsieur le président, il est donc certain que ni le droit international général ni le Statut de la Cour n'imposent des négociations préalables à la saisine de la Cour[32]. Mais il y a encore un préalable qui n'est pas requis. Je laisse la parole de nouveau au professeur Rosenne qui articule parfaitement ce point :

> «Neither general international law nor the Statute requires a potential applicant to inform the potential respondent of its intention to institute proceedings. In the absence of any such obligation and of any infringement of the respondent's corresponding rights, the respondent cannot in good faith challenge the jurisdiction of the Court on the ground that it had not received previous notice of the intention to bring the proceedings before the Court.»[33]

9. Monsieur le président, ainsi que je viens de le remarquer, des négociations préalables à la saisine de la Cour peuvent certes avoir lieu, mais ne sont pas exigées, et il n'était pas exigé que le demandeur ait informé préalablement le défendeur de son intention de l'attaquer en justice. Ce qui serait par contre requis — nous informe le Royaume-Uni — est un autre, un nouveau «préalable», un «préalable réduit», à savoir qu'un Etat qui entend soumettre au juge un différend l'opposant à un autre Etat doit avoir porté préalablement son grief à la connaissance de cet Etat en le lui notifiant. Mais d'où vient cette condition que les Etats devraient remplir pour pouvoir saisir la

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[31] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 322, par. 109.

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

[33] *Ibid.*

Cour dont, je le répète, ni la Charte des Nations Unies, ni le Statut, ni le Règlement de la Cour ne parlent aucunement ? Elle vient — nous explique-t-on — d'un principe de droit international coutumier que la CDI a reconnu et transcrit dans l'article 43 des Articles sur la responsabilité de l'Etat pour fait internationalement illicite. Un principe portant le titre «Notification par l'Etat lésé», qui est formulé ainsi :

> «1. L'Etat lésé qui invoque la responsabilité d'un autre Etat notifie sa demande à cet Etat.
>
> 2. L'Etat lésé peut préciser notamment :
>
> *a)* le comportement que devrait adopter l'Etat responsable pour mettre fin au fait illicite si ce fait continue ;
>
> *b)* la forme que devrait prendre la réparation, conformément aux dispositions de la deuxième partie.»

10. Monsieur le président, il n'est pas question de contester l'existence et la pertinence d'un tel principe. Les Iles Marshall se gardent bien de le faire ! En effet, il va de soi que, si un Etat qui se considère lésé dans ses droits par les agissements d'un autre Etat entend faire valoir la responsabilité internationale de cet Etat, il faut bien qu'il lui en adresse la demande. Ainsi que le commentaire de la Commission du droit international (CDI) l'explique, en effet

> «[m]ême si la responsabilité d'un Etat est engagée de plein droit à raison de la commission par lui d'un fait internationalement illicite, il est nécessaire, dans la pratique, que l'Etat lésé et/ou l'autre ou les autres Etats intéressés réagissent s'ils souhaitent obtenir la cessation du fait en question ou la réparation. Les réactions peuvent revêtir diverses formes, allant du rappel officiel et confidentiel de la nécessité d'exécuter l'obligation à la protestation formelle, aux consultations, etc.»[34]

Un peu plus loin le même commentaire indique : «Les présents articles n'ont pas vocation à détailler la forme que l'invocation de la responsabilité doit revêtir.»[35]

11. Monsieur le président, voilà le point central : la forme de l'invocation de la responsabilité du Royaume-Uni pour violation de ses obligations découlant de l'article VI du traité de non-prolifération (TNP) qu'ont choisie les Iles Marshall n'a pas été celle des protestations plus ou moins formelles ou des consultations, mais directement la saisine de la Cour. Autrement dit, c'est au moyen de sa requête que l'Etat marshallais a «notifié sa demande» invoquant la responsabilité

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[34] *Annuaire de la Commission du droit international*, 2001, vol. II, 2e partie, p. 119.

[35] *Ibid.*, p. 325.

du Royaume-Uni, en précisant d'ailleurs tant le comportement que devrait adopter l'Etat responsable pour mettre fin aux faits illicites que la forme que devrait prendre la réparation.

12. Rien, je dis bien rien, n'interdit de concevoir que la saisine de la Cour soit un mode approprié et parfaitement légitime par lequel l'Etat lésé «notifie sa demande» à l'Etat dont la responsabilité internationale est invoquée. Ni les Articles de la Commission du droit international sur la responsabilité de l'Etat, ni le commentaire de la CDI y relatif ne s'y opposent aucunement. Tout par contre s'oppose à concevoir la «notification par l'Etat lésé» comme une condition supplémentaire de recevabilité des instances à introduire devant le juge international ou de compétence de celui-ci, comme le prétend le Royaume-Uni. Le commentaire des Articles est explicite à ce sujet : «Les présents articles ne traitent pas des problèmes de compétence des cours et tribunaux internationaux, ni en général des conditions de recevabilité des instances introduites devant eux.»[36] Autrement dit, les Articles en question ne concernent pas l'accès au règlement judiciaire des différends internationaux en matière de responsabilité internationale, ni ne prescrivent des conditions spéciales auxquelles un tel accès serait subordonné.

Deuxième partie

13. Monsieur le président, les considérations que je viens de présenter m'autorisent, je pense, à formuler le point suivant : afin d'exercer sa compétence judiciaire dans le cas présent, la Cour doit certes vérifier que le différend entre les Iles Marshall et le Royaume-Uni existe : c'est-à-dire doit-elle juger que la réclamation des Iles Marshall se heurte à l'opposition du Royaume-Uni ? Par contre, la Cour n'a pas à se soucier de la question de savoir s'il y a eu ou non une «notification par l'Etat lésé» préalable à la saisine, étant donné que, contrairement à ce qu'on prétend de l'autre côté de la barre, une telle notification ne fait pas partie des éléments constitutifs du différend, et n'est pas non plus une condition dont l'absence empêcherait la cristallisation du différend ou le rendrait «non justiciable».

14. Venons-en donc à la vraie question concernant l'existence du différend : peut-on dire ou non dans notre cas que la réclamation des Iles Marshall se heurte à l'opposition du Royaume-Uni ? Monsieur le président, la réponse est facile, d'autant plus que, une fois que la question a été réduite

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

à l'essentiel, on constate aisément que des deux côtés de la barre les opinions ne divergent pas vraiment. Vous avez, de ce côté-ci, les Iles Marshall invoquant le manquement du Royaume-Uni aux obligations qui lui incombent à l'égard du demandeur (ainsi que d'autres Etats), en vertu de l'article VI du traité de non-prolifération sur les armes nucléaires de 1968 et du droit coutumier, de poursuivre de bonne foi et de mener à terme des négociations devant conduire au désarmement nucléaire dans tous ses aspects, sous un contrôle international strict et efficace. De l'autre côté de la barre, le Royaume-Uni vous dit d'emblée «the United Kingdom considers the allegations to be manifestly unfounded on the merits», en se référant justement à la requête des Iles Marshall contre le Royaume-Uni «alleging a breach *inter alia* of Article VI of the NPT, and of asserted parallel obligations of customary international law»[37]. De plus, le Royaume-Uni n'hésite pas à présenter un autoportrait de véritable champion dans le respect de l'article VI du TNP, sans doute pour mettre aussitôt en évidence combien infondées et gratuites devraient être jugées les accusations formulées par les Iles Marshall. Il n'en faut pas plus, me semble-t-il, pour démontrer que votre Cour est confrontée à quelque chose qui ressemble singulièrement à «un désaccord sur un point de droit ou de fait, une opposition de thèses juridiques ou d'intérêt entre deux personnes» : je suis en train de citer la plus célèbre des définitions du différend.

15. Il faut souligner que le Royaume-Uni, en effet, se garde bien de se lancer dans la tentative de démontrer qu'il n'y aurait pas entre les Parties un différend, entendu au sens de «opposition entre thèses juridiques…». Ce serait impossible ! Il tente seulement de mettre en difficulté le demandeur en s'accrochant au principe selon lequel «la compétence de la Cour doit normalement s'apprécier à la date du dépôt de l'acte introductif d'instance»[38] et que, à cette même date, doit s'apprécier l'existence du différend. Dans cette mouvance, une place d'honneur est réservée par le Royaume-Uni à la citation du passage de l'arrêt de 2008 en l'affaire *Croatie c. Serbie* que voici :

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[37] Exceptions préliminaires du Royaume-Uni, p. 3.

[38] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II)*, p. 613, par. 26 ; *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 9, par. 44 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 70, par. 31.

> «il importe de souligner qu'un Etat qui décide de saisir la Cour doit vérifier avec attention que toutes les conditions nécessaires à la compétence de celle-ci sont remplies à la date à laquelle l'instance est introduite. S'il ne le fait pas, et que lesdites conditions viennent ou non à être remplies par la suite, la Cour doit en principe se prononcer sur sa compétence au regard des conditions qui existaient à la date de l'introduction de l'instance.»[39]

16. Le but poursuivi par nos contradicteurs est finalement celui de faire valoir que l'on ne pourrait pas tenir compte des échanges de vues entre les Parties ayant lieu au cours de la procédure (donc après la date de la requête) afin de vérifier qu'un différend existe, puisque — nous dit-on — tous les éléments constitutifs de cette existence doivent être réunis à la date de l'introduction de l'instance[40]. Il s'agit cependant, Monsieur le président, d'un faux problème lorsqu'il est question d'évaluer s'il y a ou non opposition manifeste de la part du défendeur à la réclamation du demandeur. Et le précédent *Croatie c. Serbie* n'est nullement pertinent à ce sujet : les échanges de vues intervenant entre les parties sous les yeux de la Cour en cours de procédure, et avant que celle-ci puisse prendre au sujet des exceptions préliminaires de recevabilité sa décision, peuvent bien témoigner de l'existence ou non d'une véritable opposition entre les thèses juridiques des parties, peuvent en offrir la preuve. Il ne faut cependant pas confondre la date de la preuve avec la date de l'événement qu'il s'agit de prouver ! Autrement dit, si les échanges de vues et les documents échangés entre les parties sous les yeux de la Cour permettent d'inférer ou confirmer que le défendeur s'oppose aux prétentions du demandeur, c'est à la date de ces prétentions que l'opposition du défendeur doit être rapportée, et non pas à la date des éléments, des paroles ou des documents desquels on tire la preuve de l'existence effective d'une telle opposition. Permettez-moi un exemple quelque peu audacieux : si je vous avouais maintenant qu'avant-hier j'ai volé l'une de vos magnifiques robes de juge, le fait de mon vol vous est avoué aujourd'hui mais cela ne permettrait à personne d'affirmer qu'aujourd'hui, c'est également le jour du vol.

17. De toute façon l'existence du différend entre les Parties à la présente affaire peut aussi être inférée aisément d'événements antérieurs à la saisine de la Cour. Je me réfère tout spécialement aux prises de position très officielles, très significatives et tout à fait pertinentes que les Iles Marshall ont publiquement adoptées avant la saisine de la Cour : des prises de position dont

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[39] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), exceptions préliminaires, arrêt, C.I.J. Recueil 2008*, p. 438, par. 80.

[40] CR 2016/3, p. 17.

les écritures et les plaidoiries du demandeur ont déjà souligné et continuent de souligner l'importance.

18. C'est surtout sur la déclaration de Nayarit[41] de février 2014 qu'il convient d'attirer encore une fois l'attention de la Cour. Les Iles Marshall s'exprimaient ainsi :

> «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 fulfill their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law.»

19. En février 2014, bien avant la saisine de la Cour, les Iles Marshall se sont donc spécifiquement et solennellement adressées à tous les Etats possédant des arsenaux nucléaires, y compris le Royaume-Uni évidemment, qui n'était cependant pas présent à la conférence de Nayarit. Une conférence très importante, ayant joui d'une participation très large d'Etats ainsi que d'une vaste couverture médiatique, et dont les résultats et délibérations ont été largement répandus à l'échelle mondiale. Il est d'ailleurs difficile de comprendre comment cela se fait que le Royaume-Uni n'en ait pas eu connaissance, comme l'a déclaré sir Daniel Bethlehem mercredi dernier (quand il a soutenu — sans doute par erreur — en avoir eu vent seulement grâce à la requête des Iles Marshall qui, à vrai dire, n'en parlait pas). Ce que les Iles Marshall ont reproché aux Etats nucléaires, à tous les Etats nucléaires et, partant, au Royaume-Uni est bien précis : elles les ont accusés de manquer à leurs obligations relatives aux négociations devant aboutir à la cessation de la course aux armements nucléaires et au désarmement nucléaire ; de surcroît, la source des obligations en question était identifiée : l'article VI du TNP et le droit international coutumier.

20. Monsieur le président, la Cour saura dans sa sagesse apprécier si la déclaration de Nayarit des Iles Marshall mérite ou non d'être évaluée comme une forme de «notification de l'Etat lésé» préalable à la saisine de la Cour, notamment à l'égard du Royaume-Uni. En soi, en vérité, le seul fait de ne pas avoir réagi et de l'avoir ignorée ne serait nullement idoine à lui ôter une telle signification. Mais quoi qu'il en soit, la déclaration de Nayarit garde en tout cas beaucoup de

[41] Seconde conférence sur l'impact humanitaire des armes nucléaires, Nayarit (Mexique), 13-14 février 2014 (http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf).

pertinence s'agissant du processus d'appréciation par la Cour «par inférence» de l'existence d'un différend entre les Iles Marshall et le Royaume-Uni.

21. Monsieur le président, je clos ici mon intervention, en remerciant vivement la Cour de son attention et de sa patience. Puis-je vous prier, Monsieur le président, de bien vouloir donner maintenant la parole à M[e] Laurie Ashton.

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

Ms ASHTON:

OPTIONAL CLAUSE DECLARATION RESERVATION 1 (III)

Introduction

1. Thank you. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of the Marshall Islands, this time in its dispute with the United Kingdom.

2. The UK alleges that reservation 1 (iii) in its optional clause declaration precludes jurisdiction here. For clarity, I note here that the UK declaration at issue is the one dated 5 July 2004, which controls this case, not the 31 December 2014 declaration.

3. Reservation 1 (iii) excludes disputes where the "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" or where the acceptance of this Court's jurisdiction was filed "less than 12 months prior" to the filing of the application[42].

4. This reservation does not preclude jurisdiction in this case.

5. As a preliminary matter, the Court confirmed in the *Fisheries Jurisdiction* case that a declaration must be interpreted "as it stands" with regard to the words "actually used"[43]. Additionally, under the reasoning of the *Aerial Incident of 1999* decision, any intention of the UK with regard to its reservation must be reflected in the actual text of the declaration[44].

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[42]Memorial of the Marshall Islands (MMI), Ann. 70, p. 3; judges' folders, tab 2.

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

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

United Kingdom reservation 1 (iii): acceptances "only in relation to or for the purpose of" this dispute

6. Mr. President, Members of the Court, turning now to the reservation. In its preliminary objections, the UK raised the "12 months" language but stated it was content to rest its arguments on other bases. The Marshall Islands explained in its Statement of Observations why the "12 months" language does not bar jurisdiction[45], and the UK did not dispute that explanation in the oral pleadings[46]. Therefore, the "12 months" portion of this reservation is not at issue today.

7. Mr. President, Members of the Court, turning to the other portion of the reservation: the Marshall Islands' acceptance of compulsory jurisdiction was not "only in relation to or for the purpose of" this dispute with the United Kingdom.

8. As a preliminary matter, the United Kingdom does not dispute that the word "only" modifies both "in relation to" and "for the purpose of" in this reservation[47].

9. And during its oral pleadings, the United Kingdom conceded for the first time, as follows:

> "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*."[48]

10. But the United Kingdom asks this Court to find that even though the Marshall Islands' acceptance is sufficiently broad to capture other disputes, jurisdiction is still barred because the Marshall Islands' acceptance was allegedly "only for the purpose of" this dispute with the UK. That is simply incorrect.

11. The difference in meaning between "in relation to" and "for the purpose of" is, in the present circumstances, a distinction with no difference. It is unsurprising that in the UK's only citation to the history of this reservation, the United Kingdom's Secretary of State explained in 1957 that the entire reservation is intended to reserve jurisdiction where a consent is "only for the purposes of that particular dispute"[49]. Thus, the allegation of UK counsel in oral pleadings that the UK intended to separate out two different meanings in the reservation is both contrary to the

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[45]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), pp. 24-25.

[46]See CR 2016/3, p. 32, para. 58 (Bethlehem).

[47]See CR 2016/3, p. 43, para. 40 (Verdirame); see also, WSMI, p. 21, para. 52, citing the Preliminary Objections of the United Kingdom (POUK), para. 8 (3), p. 33, and pp. 34-35, para. 79.

[48]See CR 2016/3, p. 43, para. 41 (Verdirame); emphasis added.

[49]POUK, pp. 34-35, para. 79.

testimony of the UK Secretary of State — and entirely unsupported by anything in the record in this dispute. And it is also irrelevant.

12. The UK cites a single instance of what it labels "circumstantial"[50] conduct on the part of the Marshall Islands, to controvert the Marshall Islands' detailed explanation that its acceptance was not "only" for the purpose of this dispute[51]. That conduct, according to the UK, is simply the filing of the Application on 23 April 2014.

13. But the filing date of the Application says nothing about whether the Marshall Islands' acceptance of jurisdiction was *only* for the purpose of this dispute. It simply does not follow logically that the proper timing of the Application against the UK evidences an acceptance of the Marshall Islands to jurisdiction "only" for the purpose of this dispute.

14. And the RMI has never claimed that the proper timing of the filing of the Application was a coincidence, as the UK contends.

15. In any event, the UK has failed to overcome the Marshall Islands' detailed demonstration in its statement of observations that it did not accept the compulsory jurisdiction of this Court only for the purpose of this case. Therefore, fundamentally, the word "only" in the reservation remains decisive in this matter. That the Marshall Islands' declaration was not deposited only for the purposes of this dispute remains evidenced by at least three points.

16. First, nothing in the wording of the Marshall Islands' declaration reflects any intention that it apply "only" for the purpose of this dispute. The very breadth of the language of the reservation demonstrates both that it was not "only in relation to this dispute", and that it was not "only for the purpose of" this dispute.

17. And while the UK references the Oxford definition of "purpose", the definition more telling here is the definition of "only", which is: "and no one or nothing more besides; solely or exclusively"[52].

18. It is worth briefly comparing at this point the wording of the 2004 UK declaration at issue here, with the wording of the Marshall Islands' declaration. The two, short declarations are at

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[50]POUK, pp. 26-27, para. 60; see also, *ibid.*, p. 33, para. 76.

[51]WSMI, pp. 21-22.

[52]http://www.oxforddictionaries.com/us/definition/american_english/only (last accessed on 10 March 2016).

tabs 3 and 4 of the judges' folders[53]. A quick comparison reveals that with few exceptions, they are identical. Other than different *ratione temporis* dates, the differences are that the UK reserves jurisdiction where another party is a member of the Commonwealth, and where a declaration is filed less than 12 months prior to the Application. In other words, the Marshall Islands' declaration, to the extent it is not identical to the UK declaration, is broader and allows for even more disputes to be heard by this Court.

19. Second, the Marshall Islands' consent to compulsory jurisdiction has been on file for nearly three years, and the Marshall Islands has not denounced, modified or limited its declaration since it was deposited on 24 April 2013. If the Marshall Islands had intended to accept jurisdiction only for the purpose of this dispute, it could easily have withdrawn that declaration after commencing these proceedings. But it has not done so.

20. Third, importantly, if the Court were to look beyond the Marshall Islands' declaration, ample evidence exists that the Marshall Islands publicly anticipated climate change litigation before this Court for many years. This is reflected in press articles quoting the Marshall Islands' Co-Agent, Tony deBrum, and is covered in the Marshall Islands' Statement of Observations at pages 21 to 23. I will not repeat those points here.

21. Suffice it to say that the Marshall Islands' acceptance of the Court's compulsory jurisdiction clearly had a history independent of these proceedings.

22. As this Court held in *Right of Passage*[54], by filing a declaration a State:

> "must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance"[55].

23. And in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*[56], this Court likewise held that any State that files a declaration of consent makes

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[53]MMI, Ann. 70; judges' folders, tab 3 (UK declaration); tab 4 (RMI declaration).

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

[55]*Ibid.*

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

> "a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be fulfilled."[57]

24. Mr. President, Members of the Court, the UK's apparent indignation at the Marshall Islands' acceptance of the UK's *standing invitation* to resolve disputes involving international law and the interpretation of treaties is misplaced.

25. For the foregoing reasons, the Marshall Islands' consent is, unequivocally, not within the UK's reservation that excludes jurisdiction where acceptance of this Court's jurisdiction was "only in relation to or for the purpose of" this dispute.

I thank the Court for its attention and would ask you, Mr. President, to give the floor to my colleague, Professor Christine Chinkin or, if the Court would prefer, to have the break now.

Le PRESIDENT : Merci, Madame. Oui, la Cour entendra Mme Chinkin après une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 16 h 20 à 16 h 35.

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole à Mme la professeur Chinkin.

Ms CHINKIN:

RATIONE TEMPORIS

1. Mr. President, Members of the Court, it is truly a privilege to appear before this Court as a representative of the Republic of the Marshall Islands in this case against the United Kingdom.

2. In these submissions I will address the United Kingdom's argument that the Court lacks jurisdiction because of the *ratione temporis* exclusion in the Marshall Islands' optional clause declaration.

3. The Marshall Islands accepts that by operation of the condition of reciprocity, the relevant date for determining whether a dispute is within the Court's jurisdiction is that specified by the

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

Marshall Islands in its Article 36 (2) declaration, that is, "all disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date".

4. The UK denies that it has a dispute with the Marshall Islands in this regard. But — and somewhat contradictorily — it also argues that, if there is such a dispute, it rests upon facts and situations arising before 17 September 1991 — indeed, on a continuous pattern of conduct by the United Kingdom dating back to the entry into force of the NPT for the UK on 5 March 1970 — and that accordingly jurisdiction is excluded *ratione temporis*. The Marshall Islands disagrees and its position is supported by the case law of this Court.

5. In the leading case, that concerning the *Electricity Company of Sofia and Bulgaria*, the Permanent Court held that "a dispute may [and we might in parentheses add, inevitably does] presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact"[58].

6. That distinction was reiterated by this Court in the *Right of Passage* case. Accordingly, a distinction must be drawn 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". Since only the latter are to be taken into account for the purpose of applying the declaration accepting the jurisdiction of the Court, the Court must determine what were the situations or facts which constituted the source, "those which are '[the] real cause' [of the dispute]"[59].

7. The United Kingdom has made much of the fact that in its Memorial, the Marshall Islands had outlined a course of conduct by the United Kingdom stretching back to 1970 and even beyond. But the Marshall Islands was in no way suggesting that such conduct was the source of the dispute. Rather, the purpose was to explain the historical context and background that led up to the subsequent facts and situations that are materially relevant to the Marshall Islands' rights under Article VI of the NPT and customary international law, and are the source or real cause of the dispute. I will outline some of these facts and situations shortly. Contrary to the United Kingdom's assertion, pre-1990s situations are not at the heart of this case or the object of the Marshall Islands' claims. The reference in the Application to "ensuring that the legal

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[58] *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 82.

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

obligations undertaken 44 years ago by the United Kingdom . . . do indeed deliver the promised result" was because, as a matter of historical fact, 1970 was when the NPT entered into force for the United Kingdom.

8. So it is not the case as the United Kingdom argues that "[t]he source or real cause of the dispute goes back to at least 1970". As I shall now explain, new situations have arisen which render the *ratione temporis* reservation inapplicable to the dispute between the Marshall Islands and the United Kingdom.

9. First, Mr. President and Members of the Court, the Marshall Islands was admitted to membership of the United Nations on 17 September 1991 — the critical date in its optional clause declaration. As the President of the United Nations Security Council had earlier observed, this admission marked "the final steps in the process leading to the full integration of the Republic of the Marshall Islands into the international community"[60].

10. In its oral submissions, the United Kingdom cited the *Phosphates in Morocco* case where the Permanent Court held, *inter alia*, that in determining whether a given situation or fact is prior or subsequent to a particular date, or determining the situations or facts with regard to which the dispute arose, "it is necessary always to bear in mind the will of the [Declarant] State"[61]. The Marshall Islands (whose optional clause declaration we are dealing with) chose as its "critical date" the date on which it became a member of the United Nations and thus a fully-fledged and fully integrated member in the international community.

11. This was a logical date to choose. The Marshall Islands could not be a party to a dispute with another State until that point in time. And any facts or situations prior to that date can have no relevance as the source or real cause of this dispute between the Marshall Islands and the United Kingdom — or indeed of any dispute between the Marshall Islands and any other State, except of course with the United States regarding the latter's conduct during the Trusteeship period. It would also make no difference if the boot were on the other foot and the Marshall Islands were the respondent State accused of violating its international obligations. A new

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[60]Statement of the President of the Security Council, following the adoption of Security Council resolution 704, 9 Aug. 1991.

[61] CR 2016/3, p. 36, para. 16.

situation existed as of the date of the Marshall Islands' entry into membership of the United Nations. The clock could not and did not start ticking until that point in time.

12. A little over three years later, on 30 January 1995, the Marshall Islands acceded to the NPT. This is a juridical fact and one that is not in dispute. But it is also the source of another new situation of vital significance for this case: until that date, there was no relationship under the NPT between the United Kingdom and the Marshall Islands. There could not be, as the Marshall Islands was not a party to the NPT until then. Accordingly, the Marshall Islands makes no legal claim under the NPT with respect to any facts or situations arising before that date: 30 January 1995.

13. Mr. President, Members of the Court, the source or real cause of the Marshall Islands' dispute with the UK concerning the latter State's conduct in relation to Article VI of the NPT cannot pre-date the moment at which the legal relationship between the two States under that Treaty was established and mutual rights and obligations under the Treaty came into existence.

The Marshall Islands' position in this regard is also supported by the jurisprudence of this Court. In *Right of Passage*, the Court held that there were three elements to the dispute: (1) the disputed existence of a right of passage in favour of Portugal; (2) the alleged failure of India in July 1954 to comply with its obligations concerning that right of passage; and (3) the redress of the illegal situation flowing from that failure. The Court went on to say that all three constituent elements had to be present: "The dispute before the Court, having this three-fold subject, could not arise until all its constituent elements had come into existence."[62]

14. Now, while the Court was considering there the existence of a dispute rather than the facts or situations which were its source or real cause, it emphasizes that there cannot be a dispute until there is a right, or at least a claimed right. And since there cannot be a dispute until there is a right, any facts or situations prior to the date on which the right came into existence can have no relevance as the source or real cause of that dispute. Until then, such facts or situations are unattached — unrelated to any legal claim.

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

15. In respect of Italy's counter-claim against Germany in the *Jurisdictional Immunities* case[63], this Court found that the violations of international humanitarian law during World War II were not the source or real cause of the dispute. The source or real cause of the dispute was the legal régime established after the war for the payment of reparations. That régime still pre-dated the compromissory clause in the European Convention for the Peaceful Settlement of Disputes and thus excluded the counter-claim from jurisdiction. But the point is that the source or real cause of the dispute was the legal régime determining the rights and obligations of both parties.

16. In the present case, the applicable legal régime is the NPT, which could not be relevant until the United Kingdom and the Marshall Islands had both become parties to it.

17. Although the critical issue is not the date on which the dispute arose but the date of the facts or situations in relation to which the dispute arose[64], as regards Article VI of the NPT, neither of those dates can possibly pre-date the Marshall Islands' accession to the NPT. To find otherwise would be to apply the NPT retroactively, contrary to the principles enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 1969. While the dispute may presuppose the existence of prior situations or facts, the specific facts or situations with regard to which it has arisen and which are its source or real cause all post-date the Marshall Islands' accession to the NPT.

18. The breaches section of its Application demonstrates that the Marshall Islands claims are founded on the post-1995 conduct of the United Kingdom. Since 1995 the United Nations General Assembly has adopted resolutions calling for the commencement of multilateral negotiations on nuclear disarmament and establishing an Open-ended Working Group to Take Forward Multilateral Negotiations on Nuclear Disarmament. The United Kingdom has opposed these resolutions. Those resolutions are cross-referenced in paragraphs 102 and 103 of Part IV of the Application, Obligations Breached by the United Kingdom. Paragraph 106 of the Application, concerning breach of the obligation relating to cessation of the nuclear arms race, is based in part on the United Kingdom's efforts to qualitatively improve its nuclear weapons system and to maintain and

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[63] *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 320, para. 28.

[64] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 25, para. 48.

extend that system indefinitely. That paragraph cross-refers to Part II.C.4 of the Application, which concerns United Kingdom conduct in the period from 2006 to 2013. Such conduct is clearly inconsistent with the obligation to negotiate in good faith.

19. Similarly, the date of the facts or situations in relation to which the dispute concerning the customary international law obligation has arisen cannot be before that obligation was authoritatively recognized for the first time on 8 July 1996, when this Court delivered its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which it concluded, unanimously: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[65]

20. It is only from the date of the Advisory Opinion in which this Court recognized that a rule of customary international law had emerged, that States could reasonably be expected to be aware of the universality and scope of that obligation. Accordingly, the Marshall Islands alleges no such obligation of the United Kingdom towards it under customary international law prior to 8 July 1996.

21. Mr. President, Members of the Court, the United Kingdom's conduct under the NPT goes back to the Treaty's entry into force for the United Kingdom in 1970. The dispute may even presuppose the existence of certain prior situations or facts. But the specific situations or facts which are the source or real cause of the dispute in this case are, with regard to Article VI, the United Kingdom's conduct after 30 January 1995; and, with regard to customary international law, the UK's conduct after 8 July 1996.

22. Both of those dates are well after the critical date of 17 September 1991 in the Marshall Islands' optional clause declaration — the date on which the Marshall Islands became a member of the United Nations and was fully integrated into the international community, and the date on which the clock began to tick. For this reason, the *ratione temporis* reservation does not exclude the jurisdiction of this Court over this dispute.

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

23. Mr. President, Members of the Court, those are my submissions. I thank the Court for its kind attention and ask you, Mr. President, to invite my colleague, Professor Paolo Palchetti to the podium. Thank you.

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

Mr. PALCHETTI:

ABSENT THIRD PARTIES

1. Thank you. Mr. President, Members of the Court, it is an honour to address this Court again on behalf of the Republic of the Marshall Islands. In its Preliminary Objections and in its oral presentation, the United Kingdom argued that the Court cannot entertain the present dispute because of the absence of essential parties whose interest, in the United Kingdom's view, would be "directly and inevitably" engaged by the Marshall Islands' claims[66]. In my submissions, I will address this objection.

2. I will divide my pleadings into three parts. The first part focuses on the subject-matter of the present dispute. The United Kingdom would have the Court believe that the real object of the Marshall Islands' claims in the present case is the "shared responsibility" of all States possessing nuclear weapons[67]. I will argue that this misconstrues the dispute as presented in the Marshall Islands' Application and Memorial. In the second part, I will examine this Court's case law concerning the scope of the *Monetary Gold* principle. Unsurprisingly, in its Preliminary Objections and in its oral presentation, the United Kingdom has attempted to downplay the importance of the Court's Judgment in the *Nauru* case. In that Judgment, this Court has clarified that the *Monetary Gold* principle only applies where the determination of the responsibility of a third State is a prerequisite for the determination of the responsibility of the respondent State. I will argue that this is the test to be used in order to assess whether the Court should decline to exercise its jurisdiction over the Marshall Islands' claims. In the third and last part of my presentation, I will argue that precisely because the determination of the responsibility of a third

[66]CR 2016/3, p. 57, para. 39. See also Preliminary Objections of the United Kingdom (POUK), para. 113 *(c)*.

[67]CR 2016/3, p. 46. See also POUK, paras. 87 and 93.

State is not a prerequisite for the determination of the responsibility of the United Kingdom, the objection made by the Respondent must be rejected.

3. I first address the question of the subject-matter of the present dispute.

I. The subject-matter of the present dispute

4. In its recent Judgment in *Obligation to Negotiate Access to the Pacific Ocean*, this Court observed that "[t]o identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim."[68]

5. The Application of the Marshall Islands, as well as its Memorial, leaves no doubt as to the subject-matter of the present dispute. The subject-matter is, in form and in substance, whether the United Kingdom, through the conduct of its organs, has breached its obligation to negotiate in good faith nuclear disarmament. The Application does not ask the Court to adjudge that States possessing nuclear weapons are jointly responsible. There is no need for the Court, in order to establish the responsibility of the United Kingdom, to determine, as a preliminary matter, whether other States possessing nuclear weapons are equally responsible.

6. The United Kingdom argues that the real subject-matter of the present dispute is the "shared responsibility" of all States possessing nuclear weapons[69]. In its view, the fact that the Marshall Islands filed similar Applications against the other States possessing nuclear weapons would be evidence that the object of the present dispute is different from that described in the Application. It is not clear, however, why this circumstance should be relevant at all for the purposes of determining the subject-matter of the present dispute. It is not.

7. As this Court has frequently observed, "applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties"[70]. The present dispute against the United Kingdom arises in the context of a wider disagreement between the Marshall Islands and all States possessing nuclear weapons. This does not mean that

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

[69] CR 2016/3, p. 46. See also POUK, paras. 87 and 93.

[70] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objections, Judgment of 24 September 2015*, para. 32.

the subject-matter is the joint responsibility of all these States. Nor does it mean that the Court is precluded from exercising its jurisdiction over this dispute.

8. The United Kingdom also argued that Marshall Islands' claim inevitably involves the conduct of other States because of the very content of the obligation allegedly breached. According to the United Kingdom, its conduct in negotiations can only be assessed in the context of the attitude and actions of other States and therefore the Court will inevitably be drawn into a consideration of absent third States[71]. Mr. President, there is no reason to believe that compliance by each and every State with the obligation to negotiate cannot be assessed separately. The Court can evaluate whether a State, by its conduct, has breached its obligation to negotiate in good faith without this requiring an assessment of the conduct of the other States. In its Judgment in the *Pulp Mills* case, this Court focused on the conduct of Uruguay in order to establish whether this State had complied with its obligation to negotiate. It found that, "by authorizing the construction of the mills and the port terminal at Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute"[72]. In the present case, the Marshall Islands asks the Court to do the same: to focus on the conduct of the United Kingdom in order to establish whether such conduct is compatible with its obligations under Article VI of the Non-Proliferation Treaty and under customary international law.

9. Mr. President, I would emphasize a point with respect to the conduct of the United Kingdom that this Court is now called upon to assess. Both in its Preliminary Objections and in its oral presentation, the United Kingdom made reference only to a very limited set of specific acts. These essentially consist of joint statements made by the United Kingdom with other States and bilateral agreements concluded with third States. By focusing exclusively on these acts, the United Kingdom attempts to demonstrate that the real subject-matter of the present dispute is the conduct of third States. I will examine these acts later. Here I draw the Court's attention to the fact that the conduct which the United Kingdom focused on constitutes only a minor part of the overall sets of acts and omissions referred to by the Marshall Islands as evidence of the alleged

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[71]CR 2016/3, p. 46.

[72]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* pp. 67-68, para. 149.

breach. The greatest part of the factual allegations underlying the Marshall Islands' claims concerns acts and omissions which are attributable exclusively to the United Kingdom. This includes in particular the qualitative improvement of United Kingdom's nuclear arsenal. An assessment by this Court of the lawfulness of these acts would in no way affect the interests of third States. The assessment of these acts would be sufficient to show that the United Kingdom has breached its obligation to engage in good faith negotiations.

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

10. I now move to the question of the scope of the *Monetary Gold* principle.

11. The *Monetary Gold* principle is constantly invoked when a judgment of this Court may have implications of whatever nature for the legal interests of third States. However, it has been applied only in exceptional cases. According to its Judgment in *Monetary Gold* itself, this Court is prevented from exercising its jurisdiction when the legal interests of the third party "would not only be affected by a decision, but would form the very subject-matter of the decision"[73]. This Court has also recognized 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"[74].

The Annex VII Arbitral Tribunal dealing with the dispute between the Philippines and China has recently noted that there are only "few cases" in which an international court or tribunal has declined to exercise its jurisdiction due to the absence of an indispensable third party[75]. It cannot be otherwise. An extensive interpretation of the scope of *Monetary Gold* principle, such as the one suggested by the United Kingdom, would be tantamount to recognize immunity from judicial scrutiny in a great variety of situations.

12. This Court has been careful in restricting the operation of the principle. In particular, it has applied it only to situations where the prior determination of the responsibility of a third State is required for the determination of the responsibility of the respondent State. This point was

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[73] *Case of the 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.

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

[75] *The Republic of the Philippines* v. *The People's Republic of China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 181 (http://www.pcacases.com/web/sendAttach/1506).

clearly made by the Court in its Judgment in *Nauru*. It has constantly been reaffirmed in subsequent judgments.

13. On Wednesday, counsel for the United Kingdom attempted to introduce a new test in order to determine the applicability of the *Monetary Gold* principle. According to Ms Wells, 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"[76]. The key words here are "by implication". With these two words the United Kingdom extends the scope of the *Monetary Gold* principle dramatically. Should the Court decline to exercise jurisdiction each time that a judgment may have implications for the legal position of a third State, this Court would be deprived of a great deal of its jurisdiction. More importantly, this test squarely contradicts the position of the Court as spelled out in *Nauru*.

14. In the *Nauru* case, Australia, New Zealand and the United Kingdom were jointly responsible for the administration of the territory. The Court, however, excluded the application of the *Monetary Gold* principle, finding that "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"[77]. The Court also observed that

> "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia"[78].

15. The Court itself uses the word "implications". However, the Court's position is diametrically opposed to that advanced by the United Kingdom: the fact that the legal position of a third State may be affected "by implication" by a judgment is not sufficient to trigger the *Monetary Gold* principle. A preliminary finding in respect to that legal situation is needed as a basis for the Court's decision. Put simply, the determination of the responsibility of the third State must be a prerequisite for the determination of the responsibility of the respondent State. Mr. President, if this is not enough clear, let me use Professor Kolb's words: "the only situation which up to now,

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[76]CR 2016/3, p. 55, para. 33.

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

[78]*Ibid.*

the Court has accepted as permitting it not to exercise its jurisdiction is when the Court would, in order to decide the dispute before it, have to give a prior decision on the legal position of, or on a dispute with, a third State"[79].

16. Mr. President, Members of the Court, *Nauru* is not an unfortunate, isolated incident. I can understand that the United Kingdom is uneasy with Nauru and would prefer to rely on the views expressed by some dissenting judges. However, the test applied in *Nauru* has been consistently confirmed by this Court.

17. The Judgment in the *Application of the Interim Accord of 13 September 1995* is of particular interest for the purpose of the present case. In the *Interim Accord* case, the subject-matter of the dispute concerned the lawfulness of acts taken by Greece within the context of an international organization — NATO. This case presents some similarities with the present dispute. Among the acts complained of by the Marshall Islands, there is also the voting record of the United Kingdom in the United Nations General Assembly. Now, the United Kingdom argues that the Court cannot assess the lawfulness of its voting records because this would have implications for the legal positions of third States[80]. In the *Interim Accord* case, Greece had raised the same objection. It argued that the Court could not exercise its jurisdiction since it would have needed to determine the responsibility of NATO or of its member States in order to assess the conduct of the Respondent. This Court rejected such objection. It noted:

> "The present case can be distinguished from the *Monetary Gold* case since the Respondent's conduct can be assessed independently of NATO's decision, and the rights and obligations of NATO and its member States other than Greece do not form the subject-matter of the decision of the Court on the merits of the case (*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. 19; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 34); nor would the assessment of their responsibility be a 'prerequisite for the determination of the responsibility' of the Respondent (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55)."[81]

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[79] R. Kolb, *The International Court of Justice*, 2013, p. 574.

[80] CR 2016/3.

[81] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, pp. 660-661, para. 43.

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

18. Mr. President, Members of the Court, the *Monetary Gold* principle does not apply to the dispute brought by the Marshall Islands against the United Kingdom. To summarize, first, the subject-matter of the present dispute is the United Kingdom's international responsibility. Second, the focus of the Marshall Islands' claim is on the conduct of the United Kingdom. Third, none of the conduct referred to in the Application requires a prior determination of the responsibility of any third State.

19. The United Kingdom's attempt to distinguish the present case from *Nauru* is devoid of any merit. The specific acts referred to by the United Kingdom to justify the application of the *Monetary Gold* principle are acts attributable simultaneously to the United Kingdom and to third States, or acts taken by the United Kingdom within an international organization. The Court's Judgment in *Nauru* provides clear authority for the proposition that the *Monetary Gold* principle does not apply when the conduct complained of can be attributed simultaneously to the respondent State and to third States; it does not apply where the respondent and third States, by undertaking distinct acts, contribute to the same wrongful act; it does not apply when the respondent and third States commit distinct wrongful acts by breaching the same obligation. In all these cases, the determination of the responsibility of the respondent State "may well have implications" for these other States. But contrary to what the United Kingdom suggests, this is not sufficient to trigger the application of the *Monetary Gold* principle.

20. This concludes my presentation. I thank the Members of the Court for their kind attention and I would ask the Court to give the floor to Professor Nick Grief.

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

Mr. GRIEF:

"THE JUDGMENT WOULD BE INEFFECTIVE"

1. Thank you, Mr. President and Members of the Court, it is an honour and a privilege to address you again today on behalf of the Marshall Islands. I will conclude the Marshall Islands' oral pleadings today by responding to the United Kingdom's observations on the judicial function of the Court and its assertion that a judgment on the merits would be ineffective.

2. This is not a situation like *Northern Cameroons* where any judgment would be incapable of "effective application" or would not have "some practical consequence"[82].

3. In its opening oral pleadings, however, the United Kingdom professed to be unable to see any practical consequences of the relief sought by the Marshall Islands. The United Kingdom reduced the requested relief to an order that would require good-faith participation in negotiations once underway[83]. This not only misrepresents what the Marshall Islands is claiming but, as clearly laid out in its Application, Memorial, and Statement of Observations on the United Kingdom's Preliminary Objections, and as I will discuss in more detail shortly, the Marshall Islands requests both declaratory relief and injunctive relief. As to declaratory relief, the Marshall Islands asks the Court to find, under both conventional and customary law, first, that the UK is in breach of the obligation to pursue and bring to a conclusion negotiations on complete nuclear disarmament; secondly, that the United Kingdom is in breach of the obligation to pursue and bring to a conclusion negotiations on cessation of the nuclear arms race at an early date; and thirdly, that the United Kingdom is in breach of the requirement that these obligations be implemented in accordance with the principle of good faith.

4. Mr. President, Members of the Court, in making findings as to whether the conduct of the United Kingdom is consistent with its legal obligations, the Court would be performing a task "at the heart of the Court's judicial function", to quote the dissent by four judges in the *Nuclear Tests* cases[84]. Moreover, such findings would in turn require the United Kingdom to bring its conduct into conformity with the obligations, as the Court made clear in *Haya de la Torre*[85], thus having "some practical consequences". Indeed, in this case, what is envisaged is not merely "some" practical consequences but the fulfilment of promises which the United Kingdom made when it became a party to the NPT.

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

[83] CR 2016/3, p. 30, para. 51 (Bethlehem).

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

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

5. In the Statement of Observations, at paragraph 130, the Marshall Islands explained the practical effects of a finding with respect to the obligation to pursue negotiations on complete nuclear disarmament, and stated that: "In conclusion, the Republic of the Marshall Islands' first submission seeks forward-looking, legally and practically meaningful declaratory relief. That is also true of the other submissions."[86]

6. Mr. President, Members of the Court, let me revisit, briefly, the first submission[87]. As the Marshall Islands' Application and Memorial document[88], in its votes on General Assembly resolutions the United Kingdom systematically opposes the commencement of multilateral negotiations on nuclear disarmament. For example, in 2013 the United Kingdom opposed deliberations aimed at facilitating such negotiations through the United Nations Open-ended Working Group on Taking Forward Multilateral Negotiations on Nuclear Disarmament. The General Assembly established the Open-ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons[89]. The United Kingdom voted against the resolution[90] establishing the Working Group and did not attend any of its meetings[91]. In a statement made with France and the United States in the General Assembly First Committee in November 2012, the United Kingdom declared that it was "unable to support this resolution, the establishment of the Open-ended Working Group and *any outcome it may produce*"[92].

7. Members of the Court, the United Kingdom continues to oppose such deliberations. It recently voted against the General Assembly resolution establishing the 2016 United Nations

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[86]WSMI, p. 48, para. 130.

[87]AMI, p. 39, Remedies, *(a)*.

[88]MMI, paras. 76, 77, 82, 91, 92; AMI, 69, 71, 79, 80.

[89]A/RES/67/56, "Taking forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons", 3 Dec. 2012 (147-4-31).

[90]UN doc. A/67/PV.48, pp. 20-21.

[91]Hansard, HL Deb, 15 July 2013, col. WA93.

[92]Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/eov/L46_France-UK-US.pdf; emphasis added.

Open-ended Working Group[93], in which the UK is not participating. The 2016 Open-ended Working Group is a resumption of the 2013 Working Group.

8. A finding of this Court affirming that Article VI and customary international law require the United Kingdom to pursue multilateral negotiations on complete nuclear disarmament would entail the following: first, that the United Kingdom end its systematic opposition to such negotiations and instead systematically support their commencement in relevant forums, including the General Assembly, the Conference on Disarmament, NPT Review Conferences, and other bodies such as the United Nations Open-ended Working Group; secondly, that the United Kingdom participate in good faith in deliberations and negotiations on complete nuclear disarmament; and, thirdly, that the United Kingdom, if necessary, initiate such negotiations.

9. As the Marshall Islands said in its statement of observations[94], such a finding would not necessarily require the United Kingdom to vote for a particular General Assembly resolution. This is just an example, in line with the Court's recognition that States have some latitude in implementing legal obligations based on considerations such as practicality and expedience. A finding would require, however, that the United Kingdom adopt an effective and proactive approach to bringing about the commencement of negotiations and participating in them. It would not require the United Kingdom to engage in pointless activity, such as "negotiating" without partners.

10. Mr. President, Members of the Court, a finding of the Court as requested by the Marshall Islands' second submission[95] would require the United Kingdom to pursue negotiations to cease nuclear arms racing, in particular, qualitative improvement of nuclear forces, through a comprehensive disarmament measure or other measures[96]. The earlier points about the pursuit of negotiations on complete nuclear disarmament under the first submission apply equally here. Such a finding would also require the United Kingdom to cease taking actions to qualitatively improve its nuclear weapons system and maintain it for the indefinite future.

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[93]A/RES/70/34, "Follow-up to the 2013 high-level meeting of the General Assembly on nuclear disarmament", 7 Dec. 2015 (140-26-17); voting result at http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com15/votes-ga/34.pdf.

[94]WSMI, p. 47, para. 127.

[95]AMI, p. 39, Remedies, *(b)*.

[96]See MMI, p. 94, para. 221 and fn. 366.

11. The third and fourth submissions[97] restate the first and second submissions as a matter of customary international law, and are within the Court's judicial function for the reasons I have just stated.

12. The fifth submission requests the Court to adjudge and declare that

> "the United Kingdom has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by modernizing, updating and upgrading its nuclear weapons capacity and maintaining its declared nuclear weapons policy for an unlimited period of time, while at the same time failing to pursue negotiations as set out in the four preceding counts"[98].

A finding by the Court upholding this submission would have practical consequences. It would entail that the United Kingdom cease those activities.

13. A finding pursuant to the sixth submission[99] would require the United Kingdom to alter its conduct, particularly with respect to its pursuit of multilateral disarmament negotiations, to facilitate rather than obstruct the performance of Article VI obligations by non-nuclear weapon States.

14. In summary, Mr. President, findings upholding the Marshall Islands' submissions would themselves have practical consequences. A declaratory judgment is in itself relief. As the Court stated in *Haya de la Torre*, a decision by this Court that an action is not in conformity with an international legal obligation "entails a legal consequence, namely that of putting an end to the illegal situation"[100]. Regarding the requested order[101], it would encompass the consequences flowing from the submissions and impose a time frame. The Marshall Islands would underline that in this contentious proceeding, it seeks a binding judgment of this Court, subject to Article 94 (1) of the United Nations Charter, which provides: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

15. Mr. President, Members of the Court, I turn finally to Sir Daniel Bethlehem's suggestion on behalf of the United Kingdom, that:

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[97] AMI, p. 39, Remedies, *(c)* and *(d)*.

[98] *Ibid.*, *(e)*.

[99] *Ibid.*, *(f)*.

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

[101] *Ibid.*, p. 40.

> "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."[102]

Members of the Court, there is no basis in law for that suggestion. The Court does not have a residual discretion in contentious proceedings to decline to proceed because of some perceived fear of the political aspects of the case, or because of a veiled threat by one of the parties to withdraw from the optional clause. There may well be a discretion to refuse to answer in advisory proceedings, although the Court has declined to exercise it, even in some very politically fraught situations. But this is not the case in contentious proceedings. The Court should exercise its judicial function, no more and no less.

16. As the Court said in the *Nuclear Tests* Judgment: "This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others."[103] ~~***And T***~~***T***he joint dissenting opinion in that case makes the same point: "[The Court] has not the discretionary power of choosing those contentious cases it will decide and those it will not."[104] And Professor Tomuschat comments:

> "The Court would emasculate itself if it refrained from agreeing to clarify the legal position in disputes of great importance for the peace and security of the world . . .
>
> Rightly, [he continues] the ICJ views itself as part and parcel of the machinery established by the UN Charter with the foremost task of promoting the purposes and principles of the Charter over their entire breadth. Neither any act-of-State doctrine [he concludes] nor any political-question doctrine hampers the discharge of its function."[105]

17. The United Kingdom asserts, Members of the Court, that the Marshall Islands has devised an "artificial" case[106] and that it is "seeking to use the contentious jurisdiction of the Court as a device to procure from the Court an advisory opinion"[107]. Mr. President, the Marshall Islands

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[102]CR 2016/3, pp. 31-32, para. 57; emphasis added.

[103]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 57; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C J. Reports 1974*, p. 477, para. 60.

[104]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*; joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, p. 322, para. 22; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*; joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, p. 505, para. 21.

[105]C. Tomuschat, "Article 36", in A. Zimmerman, C. Tomuschat, K. Oellers-Frahm & C. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd ed., 2012, p. 645 (footnote omitted).

[106]CR 2016/3, p. 32, para. 58.

[107]CR 2016/3, p. 33, para. 60.

has not come to this Court to obtain some sort of political guidance; there are other forums for that purpose. The Marshall Islands requests a judgment honouring its rights under the NPT and under customary international law. The Marshall Islands does not deny that there are political aspects of the search for nuclear disarmament. One would be hard pressed to find a legal dispute between States that did not have a political aspect. But in the *Tehran Hostages* case, the Court observed that "never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them"[108]. The Court, as noted earlier in that quotation by Professor Tomuschat, and unlike some national courts, does not have a "political question" doctrine which enables it to avoid making a decision on the basis that the dispute is politically sensitive. The Marshall Islands contends that there are legal issues here, issues that can be refined and adjudicated upon in terms of the sources of law in Article 38 of the Statute of the Court.

18. Mr. President, Members of the Court, thank you for your kind attention. This brings me to the end of my submissions and concludes the Marshall Islands' first round of oral pleadings in these proceedings. Thank you.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Un membre de la Cour souhaite poser une question qui s'adresse aux deux Parties. Je lui donne la parole. Monsieur le juge Bennouna.

Judge BENNOUNA: I thank you, Mr. President. I would like to put my question to both Parties. My question is as follows:

One of the United Kingdom's counsel stated at the hearing of 9 March 2016:

> "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." [CR 2016/3, p. 18, para. 22 (Bethlehem).]

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[108] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980,* p. 20, para. 37. See also the discussion of the Court's extensive comparable jurisprudence in Advisory Proceedings in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 155, para. 41.

Can the United Kingdom and the Marshall Islands clarify to the Court, each for its own part, what their position was, on the date when the Application in this case was filed, 24 April 2014, as regards the interpretation and application of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and in what context they explicitly or implicitly adopted that position?

I thank you, Mr. President.

Le PRESIDENT : Thank you. Le texte de la question sera communiqué aux Parties sous forme écrite dès que possible. Les Parties sont invitées à y répondre oralement au cours du second tour de plaidoiries.

Cela met fin à l'audience d'aujourd'hui et clôt le premier tour de plaidoiries. Les audiences dans la présente affaire reprendront le lundi 14 mars à 15 heures, pour entendre le second tour de plaidoiries du Royaume-Uni. A l'issue de l'audience, le Royaume-Uni présentera ses conclusions finales sur les exceptions préliminaires qu'il a soulevées en la présente affaire.

Les Iles Marshall, pour leur part, prendront la parole le mercredi 16 mars, à 15 heures, pour leur second tour de plaidoiries. A la fin de l'audience, les Iles Marshall présenteront à leur tour leurs conclusions finales.

Je rappellerai que le second tour de plaidoiries a pour objet de permettre à chacune des Parties de répondre aux arguments avancés oralement par l'autre Partie ou aux questions posées par les membres de la Cour. Le second tour ne doit donc pas constituer une répétition des présentations déjà faites par les Parties, qui ne sont, au demeurant, pas tenues d'utiliser l'intégralité du temps de parole qui leur est alloué.

Je vous remercie. L'audience est levée.

L'audience est levée à 17 h 35.

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