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CR 2016/7

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Monday 14 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 lundi 14 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 Co-Agents;

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

as Member of the Delegation;

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

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

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

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

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

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

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

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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,

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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,

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

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

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

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

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

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

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

comme assistants ;

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

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as Agent;

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

as Deputy Agent;

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

as Adviser;

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

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

Mrs. Jessica Wells, member of the English Bar,

as Counsel and Advocates.

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

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

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

comme agent ;

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,

comme conseiller ;

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

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

Mme Jessica Wells, membre du barreau d'Angleterre,

comme conseils et avocats.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit cet après-midi pour entendre le second tour de plaidoiries du Royaume-Uni en l'affaire des *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni)*.

Je donne maintenant la parole à sir Daniel Bethlehem. Vous avez la parole.

Sir Daniel BETHLEHEM:

I. Introduction

1. Mr. President, Members of the Court, there is a surreal dimension***,*** of ~~***the***~~ sliding doors***, to*** the parallel proceedings before you. In keeping with your injunction, Mr. President, our second round argument will be responsive to the issues raised by the Marshall Islands in their submissions on Friday. I anticipate that we will, collectively, be on our feet for just over an hour. I will speak for about 40 minutes, I will be followed by Professor Verdirame, who will be followed, in turn, by Mrs. Wells. The United Kingdom Agent, Mr. Macleod, will conclude our presentation with the United Kingdom's formal submissions. In the course of my submissions, Mr. President, I will respond also to the question posed by Judge Bennouna.

2. My submissions will follow under three headings. I will start with some preliminary observations on the case before you and its wider context (Sec. II). I will then turn to the issue of the claimed justiciable dispute of which the Marshall Islands would seise the Court and address the arguments advanced by counsel for the Marshall Islands (Sec. III). I will thereafter address the issue of the judicial function and also the suggestion by the Marshall Islands that our submissions somehow amounted to a threat (Sec. IV). They do not, as I will make plain.

II. Preliminary observations

3. Mr. President, Members of the Court, in opening our oral submissions last Wednesday, I noted that we were here more in sorrow than in anger. There is no hot blood between the United Kingdom and the Marshall Islands in this case. We recognize and respect their special interest in the issues that they would bring before the Court, a special interest that is borne of an historical legacy that is not of their making, and with consequences that are shocking to us all. We

have taken no point of standing against them. There are a few in this ***G***reat Hall of Justice today, I amongst them, who was in the Court on the morning of Tuesday, 14 November 1995, when the Marshall Islands presented their submissions in the *Nuclear Weapons* Advisory Opinion proceedings[1]. In addition to their counsel, Mr. Kronmiller, who addressed the legal aspects of the legacy of 67 nuclear tests on their territory with which they were living daily, the Marshall Islands statement included testimony by Mrs. Lijon Eknilang, the Honourable Council Member of the Rongelap Atoll Local Government. She spoke in a quiet, dignified tones of the terrible effects that the atmospheric testing had had on her life and on the lives of the Marshallese. It was the most affecting testimony that anyone could hear, along with that given by the Mayors of Hiroshima and Nagasaki in the preceding days[2]. No one who heard that testimony, or who read it, or who is aware of the legacy of nuclear weapons, whether used in anger or in experiment, could fail to recognize and to endorse, and to take to heart to pursue the injunction towards good faith negotiations on effective measures of nuclear disarmament that is found in Article VI of the NPT. I do not tread into the merits of the case when I say that the United Kingdom has always explicitly acknowledged the imperative of Article VI of the NPT and has acted and continues to act towards the end that it mandates. I will return to this issue later in response to the question posed by Judge Bennouna.

4. Mr. President, Members of the Court, I make these observations to underline that we take the Marshall Islands seriously and would not wish the fact of our objections to jurisdiction and admissibility to be taken for dismissiveness or a lack of regard for the issues that they raise. We are neither dismissive nor do we minimize the seriousness of the issues that they highlight. Our objection to jurisdiction and admissibility is not a contention that the United Kingdom does not have an obligation under Article VI of the NPT or, indeed, that as one of the NPT nuclear-weapon States, that we do not have a special responsibility under the Treaty. We do, and we neither shrink from it nor do we seek to minimize it. That does not detract, however, from the appreciation of law that the Court lacks jurisdiction to hear this case and that the Application is inadmissible.

5. The Marshall Islands has emphasized that, before the Court, all States are equal, despite disparities of power and population. That is as it should be. That is the virtue of the law and of the

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[1]CR 1995/32, pp. 18 *et seq.*

[2]CR 1995/27, pp. 22 *et seq.*

fact that we, the Parties, are here at the Bar of the Court, below you, addressing a higher authority. But that equality before the law and before the Court brings also an equality *of* law. The pain of the Marshallese experience does not give rise to a special entitlement to found the Court's jurisdiction where none would otherwise exist. The virtue of the interest that they seek in their judgement to expound does not entitle a less exacting scrutiny of their Application than would be the case if the claim that they seek to advance would have been brought by the United States. The relief that they would wish from the Court does not become more consonant with the judicial function simply because it comes with an appeal to sentiment.

6. A great deal of what we heard from Mr. deBrum and Mr. van den Biesen on Friday was on the merits of the claim. We will not be drawn on this. Mr. deBrum, describing the horrors of a sky turned blood red, sought to tarnish us with the assertion that we were claiming that these were "political matters" and that it is for this reason that the Court had no jurisdiction[3]. That is not our case. Nowhere in our pleading is there a political exception argument. It is the Marshall Islands that is seeking a latitude from the Court. Our case rests on the law, and that is what we commend to the Court, on the basis of equality with the Marshall Islands.

III. There is no justiciable dispute over which the Court has jurisdiction

7. Mr. President, Members of the Court, I turn to the issue of the dispute that the Marshall Islands asserts, and its justiciability. This was addressed by Professor Condorelli. His case rests on two pillars; *first*, that the conduct subsequent to the filing of an application can properly be relied upon to crystallize a dispute in circumstances in which the existence of a dispute may not be evident on the date of the filing of the application; and, *second*, that nowhere in the Charter or the Statute is there a requirement for prior notice. Along the way, he asserted that an injured State was entitled to invoke the responsibility of another by the method of filing an application, in other words, that the filing of an application itself amounted both to notice and the crystallization of the dispute[4]. This argument is significant as it is a departure from the argument that the Marshall Islands had been advancing up until that point, namely, that they had indeed given

[3]CR 2016/5, p. 12, para. 25 (deBrum).

[4]*Ibid.*, pp. 23–24, paras. 11–12 (Condorelli).

us prior notice; that the United Kingdom must be deemed to have been aware of the Marshall Islands claim before the Application was filed, in reliance on the February 2014 Nayarit conference statement. I say no more about this aspect and address now the case as it has been reformulated.

8. There are a number of features that are striking about Professor Condorelli's argument that go to the shortcomings of the Marshall Islands' case. We do not hold him to account for them. His sagacity took the points as far as they could go. But they do not go far enough.

9. He addressed *Croatia* v. *Serbia*, but only for the purposes of saying that it was not relevant. He did not say why not, but rested simply on the proposition that conduct subsequent to the filing of an application may be taken into account for purposes of determining the existence of a dispute. Other than the filing of the application itself, however, he could point to no subsequent conduct in support of his case.

10. The Court, in *Croatia* v. *Serbia*, addressed exceptions to the requirement that the existence of a dispute, and hence jurisdiction, must be assessed on the date of the filing of the Application. None of the exceptions apply here. And, as the Court pointed out in its Judgment, there are good reasons of judicial policy to require such a rule. Absent such a requirement, no question could ever arise about the jurisdiction of the Court on the ground of the absence of a dispute. States would be encouraged to file applications prematurely. There would be no filter to collusive actions. The contentious jurisdiction of the Court would become an advisory jurisdiction. What then would stop the Marshall Islands bringing a collusive claim "against" some sympathetic third State precisely for purposes of obtaining a declaratory judgment of the kind that it now seeks against the United Kingdom with a view to laying down the law for wider effect. Mr. President, Members of the Court, in their zeal to pursue their case on the merits, the Marshall Islands is playing fast and loose with the procedure and jurisdiction of the Court.

11. The same is true for the issue of prior notice. Counsel for the Marshall Islands referred to Article 43 of the ILC State Responsibility Articles but he then repeated the quotation from the ILC Commentaries made in the Marshall Islands written statement that the Article was not concerned with jurisdiction and admissibility. He failed, however, even in his footnote citation to the written transcript, to identify that the quotation he relied upon was from the Commentaries to

Article 44, not Article 43[5]. He also failed to engage at all, in any way, with the argument on this very issue that we had advanced in our submissions on Wednesday[6]. There was no mention of *Nauru* v. *Australia*. There was no mention of the Third Report of the ILC Special Rapporteur. There was no engagement with the analysis of Georges Abi Saab.

12. The Marshall Islands' failure to engage on the law extended further. Still on the issue of prior notice, Professor Condorelli made no mention on Friday of the Court's Judgments in *Georgia* v. *Russia* and *Belgium* v. *Senegal*. Not a word. Both Judgments upheld, and in important respects turned on, a requirement of prior notice. Instead, the Marshall Islands repeated what they had said in their written statement, namely, that the Court in *Cameroon* v. *Nigeria* had rejected a requirement of prior notification of the institution of proceedings. Shabtai Rosenne was prayed in aid of this point as well. But, as the United Kingdom pointed out in our opening submissions, there is a fundamental difference between prior notification *of the institution of proceedings* and the prior notice of a claim as a constitutive part of the condition of the existence of a dispute. *Cameroon* v. *Nigeria*, and Shabtai Rosenne, addressed the former issue, holding that the principle of good faith could not be relied upon to found a requirement of prior notification of the institution of proceedings. *Nauru* v. *Australia*, ILC Article 43, *Georgia* v. *Russia*, *Belgium* v. *Senegal*, Georges Abi Saab, and others, all address the latter issue, holding that the law requires the prior notice of a claim as a constitutive part of the condition of the existence of a dispute. And, absent the existence of a dispute at the point of the filing of the application, the Court lacks jurisdiction.

13. Now, we anticipate that, in its rejoinder on Wednesday, the Marshall Islands may be drawn to refer to *Belgium* v. *Senegal* and to proffer the suggestion that it is irrelevant as it turns on the terms of the optional clause declarations of the parties which required prior negotiation. We understand that counsel for the Marshall Islands has such a point in mind. Were he to advance it, however, he would be wrong, as even a basic reading of the Judgment will show.

14. In that case, Belgium advanced two bases of jurisdiction, Article 30, paragraph 1, of the Convention against Torture and, separately, the parties' optional clause declarations. The optional clause declarations were unqualified, however, as regards any requirement of prior negotiation.

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[5]CR 2016/5, p. 23, para. 10 (Condorelli).

[6]CR 2016/3, pp. 24–25, para. 37. Also, pp. 20–21, paras. 27–28 (Bethlehem).

The Court therefore, in assessing its jurisdiction, was *not* constrained by, and did *not* address, any prior notice text in the optional clause declarations. There was none.

15. The Court rejected Belgium's claim of jurisdiction in respect of its allegations of a breach of customary international law — allegations that did not engage the terms of the Convention against Torture. In so doing, the Court said as follows, at paragraph 54 of its Judgment:

> "In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties . . . the Court considers that such a dispute did not exist on that date."

16. Were counsel to the Marshall Islands to make the suggestion on Wednesday that the Judgment in *Belgium* v. *Senegal* is irrelevant, he would be wrong. The Judgment is plainly relevant and, indeed, we say it is controlling. That was our understanding and expectation of the law on 24 April 2014, the date on which the Marshall Islands filed its Application in these proceedings.

17. Having failed to engage on the jurisprudence, counsel for the Marshall Islands, on Friday, fell back on the argument that there is nothing in the Charter or the Statute that requires prior notice. That may well be the case. But nor does the Charter or the Statute define what is meant by the term "dispute". These issues are the purview of the Court, and its jurisprudence, and the law, with roots going back at least to 1992, was reasonably settled for some years before the Marshall Islands' filed its Application in this case.

18. And, Mr. President, Members of the Court, let us be clear what the law required of the Marshall Islands. It required that the Marshall Islands inform the United Kingdom that they considered the United Kingdom to be in breach of its obligations under Article VI of the NPT, and the claimed parallel obligation of customary international law, for purposes of affording the United Kingdom an opportunity to address the claim. Had we failed to do so, a dispute would have crystallized and an application seising the Court could have followed without fear of challenge on the grounds now in issue. This is hardly an onerous requirement, but it is an important ***one***.

19. Mr. President, Members of the Court, I turn to the question put to the Parties by Judge Bennouna. Judge Bennouna, you asked that we clarify our position, on 24 April 2014, on the interpretation and application of Article VI and in what context we implicitly or explicitly adopted that position.

20. The obligation in Article VI is a cornerstone of the NPT. We have repeatedly acknowledged not simply that we, alongside other NPT States parties, are subject to this obligation but also that we, as an NPT nuclear-weapon State, have a special responsibility in this regard. In pursuit of the imperative of nuclear disarmament, we have acted unilaterally, significantly reducing not only our own stockpile of weapons but also their delivery systems. We have acted with others, both NPT nuclear-weapon States and non-nuclear-weapon States to advance the cause of nuclear disarmament. The document at Annex 2 of our written submissions bears reading, as well as other reports, documents and statements by the United Kingdom, either alone or jointly with other States, that are readily available on the United Nations website devoted to successive NPT Review Conferences and their Preparatory Committees[7], citations to which will be provided in a footnote to the written transcript of these observations[8].

21. In operative paragraph 8 of Security Council resolution 984 of 1995, the Security Council, with the affirmative vote of the United Kingdom,

> "[u]rges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal"[9].

This goal and imperative was restated in operative paragraph 5 of Security Council resolution 1887 of 2009, unanimously adopted at the level of Heads of State or Government, in the following terms: The Security Council

> "*[c]alls upon* the Parties to the NPT, pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament, and on a Treaty on general and complete disarmament

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[7] http://www.un.org/disarmament/WMD/Nuclear/NPT_Review_Conferences.shtml

[8] *Inter alia*: General Statement by Ambassador Jo Adamson to the 2012 Prep Comm for the NPT, 30 April 2012: http://www.un.org/disarmament/WMD/Nuclear/NPT2015/PrepCom2012/statements/20120430/PM/United_Kingdom.pdf NPT/CONF.2015/PC.I/12, 9 May 2012; http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2015/PC.I/12; NPT/CONF.2015/PC.III/15, 30 April 2014: http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2015/PC.III/15; NPT/CONF.2015/29: http://www.un.org/en/ga/search/view_doc.asp?symbol=NPT/CONF.2015/29

[9] http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/984(1995).

> under strict and effective international control, and *calls on* all other States to join in this endeavor"[10].

Under the headline "Historic Summit of Security Council Pledges Support for Progress on Stalled Efforts to End Nuclear Weapons Proliferation", the United Nations press release recording the resolution summarized the statement by then Prime Minister Gordon Brown on the adoption of the resolution in the following terms:

> "by adopting today's resolution", he said, "nuclear-weapon States as well as non-nuclear-weapon States were making a commitment to ridding the world of the danger of nuclear weapons. The global bargain underlying the Nuclear Non-Proliferation Treaty — based on the obligations of both categories — must be strengthened through a renewed commitment to ensuring compliance and seeking solutions to technical and policy problems."[11]

22. As I have already noted, as an NPT nuclear-weapon State, we recognize, and have recalled expressly, including in our statements and reports in the Preparatory Committees leading up to the 2015 NPT Review Conference, that we have a particular responsibility to fulfil when it comes to efforts to secure nuclear disarmament[12]. In a joint statement with the other NPT nuclear-weapon States on 3 May 2012, we reaffirmed

> "our enduring commitment to the fulfilment of our obligations under article VI of the Non-Proliferation Treaty" and noted our "determination to work together in pursuit of our shared goal of nuclear disarmament under article VI, including engagement on the steps outlined in action 5 of the 2010 Review Conference action plan, as well as other efforts called for in the action plan"[13].

23. In our national report published by the United Nations on 30 April 2014 the United Kingdom addressed, *inter alia*, a UK–Norway initiative on effective measures for verifying the dismantlement of nuclear warheads, noting that it was "an important precondition for fulfilling the goals of article VI of the Non-Proliferation Treaty" and that it was an "example of the world-leading research the United Kingdom is undertaking to address some of the technical and procedural challenges posed by effective verification of warhead dismantlement"[14].

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[10] http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1887(2009).

[11] http://www.un.org/press/en/2009/sc9746.doc.htm.

[12] http://www.un.org/disarmament/WMD/Nuclear/NPT2015/PrepCom2012/statements/20120430/PM/United_Kingdom.pdf, at paras. 8 *et seq*.

[13] http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2015/PC.I/12, para. 4.

[14] http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2015/PC.III/15, para. 13.

24. In the extract that I cited in my submissions last Wednesday from the 22 April 2015 Report on the implementation of the action plan of the 2010 NPT Review Conference[15], the United Kingdom reaffirmed its commitment to a world without nuclear weapons "in line with our obligations under article VI of the [NPT]"[16].

25. The United Kingdom has repeatedly, without hesitation, without caveat, expressly reaffirmed our obligations and special responsibilities pursuant to and under Article VI. We have reported on the steps that we have taken in pursuit of its implementation. We have acted and continue to act towards the end that it mandates. We have addressed, in our reports and statements, the complexities that we see in the achievement of the objective that it identifies.

Le PRESIDENT : Sir Daniel, puis-je vous demander de ralentir légèrement votre débit. Cela rendrait plus facile le travail des interprètes. Excusez-moi. Je vous en prie.

Sir Daniel BETHLEHEM :

26. Mr. President, Members of the Court, Judge Bennouna, there is no neat summary to which I can refer you that encapsulates the UK's position on the detail of the interpretation and application of Article VI. Questions of interpretation and application are issue-specific. The reports, documents and statements to which I have referred make plain our commitment to Article VI, identify challenges that lie in its path, and identify the incremental but important steps that we and others have taken and are taking towards this end. This is the position as it was on 24 April 2014, the date the Marshall Islands filed their Application instituting proceedings.

27. Judge Bennouna asked that each party identify "for its own part" its position on interpretation and application. We will hear the Marshall Islands on this issue on Wednesday. I cannot leave the point, however, without a harbinger of what we anticipate from the Marshall Islands and a word of caution about how this should be construed.

28. The Marshall Islands has failed to engage at all with the Court's jurisprudence on *Georgia* v. *Russia* and *Belgium* v. *Senegal*. It has not engaged in any meaningful way on *Nauru* v. *Australia* or on ILC Article 43. The reason for this is plain. There is little that it can say

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[15]CR 2016/3, p. 12, para. 3.

[16]http://www.un.org/en/ga/search/view_doc.asp?symbol=NPT/CONF.2015/29, para. 4.

beyond contesting the settled quality of the principle of the prior notice of a claim. Similarly, the Marshall Islands has not engaged in any meaningful way with the principle expressed by the Court in *Croatia* v. *Serbia*, and the long line of cases before it, in which the Court stated that the existence of a dispute must be assessed at the point of the filing of the Application. And again, the reason for this is plain. There is little that the Marshall Islands can say beyond asserting the proposition that the filing of the Application can itself constitute the crystallization of the dispute. But jurisprudence and commentary are both against them on this.

29. They will, we anticipate, seize Judge Bennouna's question as a lifeline insofar as it presents them with an opportunity to do two things which they have not done so far in four rounds of submissions that they have made to date — in their Application, in their Memorial, in their Statement of Observations, and in their first round of oral submissions. In the first place, the Marshall Islands will have the opportunity on Wednesday to say, *we have heard what the United Kingdom said on Monday about its views on the interpretation and application on Article VI on 24 April 2014 and we disagree, and our disagreement is evidenced by this or that statement of position. The fact that we were not addressing the United Kingdom when we were expressing our views matters not*, so would go their argument. *It is enough that there is a public record of views that are not the same.*

30. Such an approach cannot form the basis of the crystallization of a dispute or the constitutive part of the condition of existence of a dispute. The essential requirement for the existence of a dispute is that there must be, to quote Abi Saab, an exchange or negotiation *between the contenders*. In *Georgia* v. *Russia*, the juxtaposition of the parties was plain. The Court was only prepared to find the existence of a justiciable dispute, however, by reference to the clearly identified and direct contestation between the parties on the matter in issue before the Court.

31. The same goes for *Belgium* v. *Senegal*. Notwithstanding that the Court had already found a dispute to exist between the parties on some issues within the same overarching claim that Belgium had brought before the Court, it was not prepared to find that a dispute existed between the parties on a matter that had not been the subject of expressly identified and direct contestation between the parties on a matter that Belgium sought to bring to the Court.

32. As I indicated in my submissions on Wednesday, we have found nothing in our files of any statement addressed to the United Kingdom by the Marshall Islands alleging a breach of Article VI, whether in a bilateral or a multilateral context. We have searched to see whether we can find any record of a statement or a report or a document by the Marshall Islands of which we might fairly be presumed to have been aware. We can find nothing. A review of the lists of participants at the Preparatory Committee meetings of the 2015 NPT Conference disclose no Marshall Islands participation at the meetings in 2012 or 2013. We are not aware of any statement or report by the Marshall Islands submitted to the Preparatory Committees. The first NPT Preparatory Committee meeting at which we can find Marshallese participation is the meeting from 28 April to 9 May 2014, when the delegation was led by Mr. deBrum. That meeting took place after the Marshall Islands had filed its Application in these proceedings.

33. There can be no basis for the Court to say that a dispute between the Marshall Islands and the United Kingdom had crystallized on or before 24 April 2014 in the absence of a clear and direct contestation of views between the Parties. That would be rewriting the law. And, I add, that the Marshall Islands cannot come before you on Wednesday, with a flourish, and burnish some text or other that they have not put before the Court to this point, leaving the United Kingdom no opportunity to comment.

34. The second opportunity that we anticipate the Marshall Islands will seize by reference to Judge Bennouna's question will be to say that it is not possible to address the question of the Parties' views on the interpretation and application of Article VI at this jurisdictional stage. The issues of jurisdiction, they would say, ought therefore to be joined to the merits.

35. With respect to such a contention, we reject it utterly. It would be a device to artificially avoid grappling with the issue that is now before the Court and requires an answer in these proceedings. The United Kingdom learned through the press, on the filing of the Application in this case, that the Marshall Islands claims that we are in breach of our disarmament obligation. This had never once been raised with us before, despite ample opportunity for the Marshall Islands to have done so. At the point of the filing of the Application on 24 April 2014, there was no dispute between the Marshall Islands and the United Kingdom on this issue. Not only was there not a crystallization of opposing views but the Marshall Islands had not expressed any view to the

United Kingdom on this matter and the United Kingdom had expressed no view to the Marshall Islands. This is not a case for the joining of jurisdiction to the merits. The Marshall Islands claim must stand or fall where it is — and it must fall. There is no basis for any other conclusion.

IV. The judicial function of the Court

36. Mr. President, Members of the Court, I turn to the issue of the judicial function of the Court. I will come, in a moment, to address what the Marshall Islands has characterized as a threat by the United Kingdom. Before doing so, it is useful to step back a moment and survey the broader picture.

37. Quite apart from the position of the United Kingdom and the interests of third States affected by this claim, the case that the Marshall Islands would bring on the merits engages two systemic issues that go far beyond the confines of the case. It engages with the complexity of nuclear disarmament and the multilateral process that is being pursued through the United Nations Disarmament Commission, the First Committee of the General Assembly, the Conference on Disarmament, the NPT Review Conferences and Preparatory Committees, and various *ad hoc* disarmament negotiations. Even a passing glance at the small number of documents to which I have referred you today will show that there are complex issues that intrude into this mix, ranging from the instability caused by North Korean nuclear testing and military posturing to the risk of decommissioned warheads falling into rogue hands, to the challenges posed by effective verification of warhead dismantlement, and everything else in between.

38. Into this mix the Marshall Islands would intrude declarations of breach and orders of performance by the Court directed at one NPT nuclear-weapon State alone.

39. The second systemic issue engaged by this case is the procedure of the Court and its jurisdiction. However it is cast, the Marshall Islands is seeking a judgment from the Court on the merits on the interpretation and application of, and compliance, with Article VI for the purposes of a wider political campaign of nuclear disarmament. It does not hide its intent. The case is cast as a bilateral dispute impugning the compliance by the UK with its Article VI obligations, but the object of the case, plainly stated, goes wider. The Marshall Islands took umbrage at our characterization

of their claim last Wednesday as "artificial", given their history and special interest. We do not question their history and special interest but that does not detract from the appreciation that the case that they bring against the United Kingdom is artificial. We do not resile from that description.

40. In pursuit of their public policy objective, the Marshall Islands seeks to persuade the Court that it should not be required to show the crystallization of, the existence of, a dispute with the United Kingdom on the date of the filing of its Application. It seeks to persuade the Court that it is exempt from the requirement to notify the United Kingdom that its responsibility is invoked and to afford the United Kingdom an opportunity to address the complaint. It seeks to impugn the conduct of the United Kingdom over decades, including by reference to UK conduct with other States, but it says, implicitly, that the Court can shade its eyes when it comes to conduct beyond its temporal jurisdiction or involving States other than the United Kingdom and reach a judgment that addresses the conduct of the United Kingdom alone. It seeks a judgment that would declare the United Kingdom in breach and would order the United Kingdom to take specified action, but in a realm in which the United Kingdom could not have alone secured the cause for which the Marshall Islands contends and could not do so in the future, whatever the Court might say.

41. Mr. President, Members of the Court, a case can always be made in favour of the virtue of declaratory relief, of a judgment of a court that simply declares the law. Courts the world over, however, resist entreaties to declare the law absent a crystallized dispute and an outcome that is commensurate with their judicial function. There would never be any questions about the jurisdiction of the Court, or indeed of any court, if a request for a declaration of the law was all that was necessary to seise the Court and found its jurisdiction.

42. Mr. President, Members of the Court, we maintain our objection to admissibility on the grounds of the integrity of the judicial function. All that you heard from Mr. Grief, counsel for the Marshall Islands, on Friday on this issue of relief, falls into one of two camps. The relief requested either raises questions that go to meaningful effectiveness, given the absence of other essential parties before the Court whose participation would be fundamental to a negotiation process, or it goes to the heart of the integrity of the judicial function and the fundamental propriety of ordering what the Marshall Islands seeks. I used the word "astonishing" in my submissions on Wednesday

to describe the relief sought by the Marshall Islands and the possibility that the Court might consider it appropriate to go down this road[17]. The Marshall Islands sought to make much of this, characterizing it as a threat to the Court. But "astonishing" is the right word. Amongst the arguments that we heard from Mr. Grief on Friday was that a finding of the Court would require the United Kingdom to cease any action to qualitatively improve its nuclear weapons system[18]. A judgment that sought to have such an effect would be fundamentally at odds with the very conclusions of the Court's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons* in which the Court held that it could not declare the policy of deterrence to be unlawful, nor indeed the use of nuclear weapons in circumstances of extremis in which the very life of a nation was at risk.

43. The Marshall Islands says that it is not asking you to reopen the issues of the legality of deterrence, or of possession, or of use. But that is exactly what they are asking you to do. The relief that they seek, in every detail, would have the purpose of curtailing the sovereign political judgement of the United Kingdom on the question of nuclear disarmament. Whatever they say, the Marshall Islands *is* revisiting the substance of the Court's Advisory Opinion in what they claim is a bilateral contentious dispute. That is not the function of the Court.

44. Mr. President, Members of the Court, let me address, finally, the Marshall Islands characterization of the United Kingdom's position on this aspect as a threat to the Court. It is not. It is the responsibility of counsel to draw to the Court's attention the wider ramifications of the course of action that is urged upon it by the other side. This case is not taking place in a bubble. It is a source of discussion amongst governments around the world. While a judgment along the lines of that requested by the Marshall Islands may indeed attract support in some quarters, it would without doubt raise searching questions about the judicial function, about the equality of law in proceedings before the Court, about the consistency of the Court's judgments, and about the wisdom of optional clause declarations.

45. The United Kingdom has had an optional clause declaration in place since 1930. It is alone amongst the P5 to have such a declaration. Amongst all the cases entered on the General List

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[17]CR 2016/3, p. 31, para. 55 (Bethlehem).

[18]CR 2016/5, p. 48, para. 10 (Grief).

of the Court since 1946, the United Kingdom has been a party to 14, second only in number behind the United States. We have been applicant in seven cases, respondent in six cases, in one case there was a *compromis*. We have participated actively in 13 of the 26 advisory proceedings that have come before the Court. We have taken active steps over the years to encourage States to make optional clause declarations and would claim some credit for the creeping up of these numbers to the 72 declarations that are now in place. The form of our declaration is often used as a template. We are a supporter of the judicial process.

46. This is the wider context of our contention on judicial function. It is our perception, fairly held and forcefully held, that the Marshall Islands claim is playing fast and loose with the procedure of the Court and with its jurisdiction. We are not alone in that appreciation. The case on the merits of which the Marshall Islands would seek to seise the Court is not a bilateral dispute. The Court's decision on jurisdiction and admissibility will not rest behind a veil of privacy. A finding of jurisdiction would raise serious questions about the judicial function.

47. Mr. President, Members of the Court, that concludes my submissions on behalf of the United Kingdom. Mr. President, may I request that you invite Professor Verdirame to the Bar.

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

Mr. VERDIRAME:

I. INTRODUCTION

1. Mr. President, Members of the Court, I will reply to the oral submissions made by Ms Ashton and Professor Chinkin on behalf of the Marshall Islands on two of the United Kingdom's preliminary objections: first, the preliminary objection based on the words "for the purpose of" in the United Kingdom's optional clause declaration; and, second, the objection based on the limitation *ratione temporis* to the scope of the Court's jurisdiction. I will need about 15 minutes to make my points.

Preliminary objection based on the words "for the purpose of"

2. Mr. President, I will begin with the proper interpretation to be given to the words "for the purpose of". It will be recalled that the terms of the relevant reservation in the UK declaration

exclude the jurisdiction of the Court in any dispute where another party has accepted the compulsory jurisdiction of the Court "only in relation to *or* for the purpose of the dispute"; (emphasis added).

3. One novelty in the submissions made by counsel for the Marshall Islands on Friday is that, in her view, the Court should characterize the difference between "in relation to" and "for the purpose of" as "a distinction with no difference"[19].

4. Mr. President, I will make only three brief points in reply.

5. First, there is no basis for the proposition that these two locutions present "a distinction with no difference". As a matter of plain language, relation and purpose indicate different types of connection. One thing can relate to another without, however, being its purpose.

6. An acceptance of the compulsory jurisdiction of the Court "only in relation to" a particular dispute is one where the material scope of the acceptance is designed to fit only that particular dispute. But acceptance of the compulsory jurisdiction of the Court "for the purpose of" a particular dispute is a different matter.

7. Mr. President, the principles that govern the interpretation of optional clause declarations, which I summarized in the first round of oral pleadings[20], require this Court to pay close attention to the text of the declaration and give effect to all its terms in line with the intention of the declarant State.

8. In sharp contrast with these principles, the Marshall Islands are inviting the Court to ignore the text of the declaration, and proceed on the basis that the words "for the purpose of" add nothing. This approach is wrong. We ask you to reject it and to proceed on the basis that, as the terms of the declaration unequivocally indicate, it was the United Kingdom's intention that the jurisdiction of the Court should be excluded in the event of any dispute where the compulsory jurisdiction of the Court was accepted "for the purpose of the dispute".

9. Secondly, citing *Cameroon* v. *Nigeria*, counsel for the Marshall Islands said on Friday that the UK's declaration is a "standing offer to the other States which have not yet deposited a

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[19]See CR 2016/5, p. 29, para. 11 (Ashton).

[20]See CR 2016/3, p. 42, para. 39 (Verdirame).

declaration of acceptance"[21]. But the crucial consideration, Mr. President, is that the "standing offer" is subject to the reservations in the UK declaration. And, under one of those reservations, the standing offer is expressly *not* extended to States which accept the compulsory jurisdiction of the Court only for the purpose of the dispute — as is the case here.

10. Thirdly, and finally, Mr. President, in her submissions on Friday, counsel for the Marshall Islands said that climate change litigation was also one of the purposes of the Marshall Islands' acceptance of the Court's jurisdiction. Yet, nearly three years on, there is no sign of such litigation. Contrast that with the present litigation which was filed on the earliest arguable opportunity. Counsel for the Marshall Islands accepted that the timing of the filing of the Application was not a coincidence[22]. Indeed, it clearly was not. To paraphrase the dictionary definition of the term "purpose" which I mentioned in my first speech[23]: the admittedly non-coincidental timing of the Application gives this Court a sufficient basis for finding that the filing of this dispute was what the Marshall Islands "set out to do or attain" with its acceptance of the Court's jurisdiction; and that the filing of this dispute was the "object it had in view" upon the making of that acceptance.

Preliminary objection *ratione temporis*

11. Mr. President, Members of the Court, I will now move to the limitation *ratione temporis*, the effect of which is to exclude from the jurisdiction of the Court any dispute with regard to situations or facts prior to the material date.

12. In her submissions on Friday, counsel for the Marshall Islands said that "the source or real cause of the Marshall Islands' dispute with the UK . . . cannot pre-date the moment at which the legal relationship between the two States under that Treaty was established"[24]. But the question is: *does* it pre-date that moment? Does the situation with regard to which the Marshall Islands brought its complaint against the United Kingdom precede 1995 or not? It is not good enough for the Marshall Islands to *say* that it does not. They have to show that the complaint they submitted to

[21]See CR 2016/5, p. 32, paras. 23-24 (Ashton).

[22]*Ibid.*, p. 30, para. 14 (Ashton).

[23]See CR 2016/3, p. 43, para. 42 (Verdirame).

[24]See CR 2016/5, p. 35, para. 13 (Chinkin).

the Court does in fact relate to a situation that arose *after* 1995. But this — Mr. President — is precisely what they failed to do again on Friday.

13. Mr. President, in the Chapter of the Marshall Islands' Memorial entitled "UK Breaches", the Marshall Islands submitted that the UK's alleged delay in fulfilling its obligations under Article VI is "manifestly unreasonable"[25] and I quote "[f]orty-five years after entry into force of the NPT". The question that frames their complaint is this: was UK conduct over the last 45 years "manifestly unreasonable" in terms of the obligations under Article VI? It is evident, Mr. President, that the Court lacks the necessary temporal jurisdiction for addressing this question.

14. The Marshall Islands now seek to recast the terms of their complaint, and suggest that their claim is entirely in relation to post-1995 conduct. There are three reasons, Mr. President and Members of the Court, why this attempt by the Marshall Islands to solve their *ratione temporis* difficulties must fail.

15. *First*, the case was pleaded as relating to a course of conduct spanning over at least 45 years. It is this continuing situation, defined by those temporal co-ordinates, which gave rise, according to the Marshall Islands, to the continuing breaches[26]. Even the instances of post-1995 conduct which the Marshall Islands now seek to extract from the case are — on their own analysis — a continuation of a course of conduct that began prior to 1995. When they refer to the UK statements in 1998 about continuing to maintain continuous-at-sea nuclear-armed patrols, they accept that the "Royal Navy has maintained unbroken nuclear weapon patrols since 1968"[27]. And where they refer to the Mutual Defence Agreement with the United States, they also admit that it "was originally concluded in 1958 and has been extended several times throughout its history, most recently in 2014"[28].

16. Mr. President, Members of the Court, it is to the case as pleaded by the Marshall Islands in its Application and Memorial that the *ratione temporis* limitation must be applied. Not to their case as recast in response to our Preliminary Objections in October, in their submissions on Friday,

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[25]Memorial of the Marshall Islands (MMI), paras. 213 and 221.

[26]Application of the Marshall Islands (AMI), para. 7.

[27]MMI, para. 35.

[28]*Ibid.*, para. 61.

or as that they may yet attempt to further recast in their closing submissions on Wednesday. And the case they brought to the Court was not based on distinct situations, but on a whole continuing situation dating back to 1970 and, in some cases, beyond.

17. *Secondly*, in three of its Orders on *Legality of Use of Force*, the Court found that the dispute in that case concerned the legality of a situation "taken as a whole"[29]. Mr. President, the position is even clearer here, as the Court does not even need to ascertain whether the situation should be "taken as a whole" or as a plurality of situations. For here it is the applicant State itself which expressly characterized the situation as having to be taken as a whole — as a continuing situation running over at least 45 years.

18. The Marshall Islands relied in their oral submissions on Friday on the Order of the Court on Italy's Counter-Claim in *Jurisdictional Immunities of the State*[30]. But for the purposes of the present case, the crucial point in that Order is this: the Court found that while a whole string of conduct — including the conclusion and entry into force of two treaties which might have afforded a legal basis for a potential dispute — was within its temporal jurisdiction, that still failed to create a "new situation"; and that was so because the situation that gave rise to the dispute remained "inextricably linked to an appreciation of the scope and effect"[31] of a prior treaty provision and of prior State practice thereupon.

19. Mr. President, Members of the Court, if — for the sake of argument — there is a dispute in this case, the entry into force of the NPT between the UK and the Marshall Islands in 1995 might offer the legal basis for such a dispute; but the source of the dispute would still be "inextricably linked to an appreciation of" pre-1995 conduct. It is a single interconnected and inextricably linked situation which is not susceptible to being ***parsed*** up.

20. The *third* reason why there cannot be jurisdiction over only a portion of the situation follows from the very logic of the Marshall Islands' initial plea that the UK's alleged delay was

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[29] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I),* p. 134, para. 28; *Legality of Use of Force (Yugoslavia* v. *Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I),* p. 269, para. 27; *Legality of Use of Force (Yugoslavia* v. *Portugal), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II),* p. 667, para. 27.

[30] See CR 2016/5, p. 35, para. 13 (Chinkin).

[31] *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; and joint declaration of Judges Keith and Greenwood, pp. 326-328, paras. 10-15.

"manifestly unreasonable" when assessed over 45 years. If we take the case as pleaded by the Marshall Islands, the Court would need to look at 45 years to appreciate whether the conduct of the UK in respect of Article VI has been "manifestly unreasonable" or not. It may however well be the case that crucial factors demonstrating the *reasonableness* of the UK's conduct can only be appreciated over that period of time.

21. Mr. President, Members of the Court, the Marshall Islands are now seeking to extract the post-1995 conduct to bring their case into the temporal jurisdiction of the Court. They cannot do so. The situation with regard to which their alleged dispute arose is one which their pleadings characterized as having to be taken as a whole continuing situation which began ***well*** before 1995. And, no less importantly, it is one that would also have to be viewed objectively as interconnected and indivisible.

22. Mr. President**,** this characterization of the situation as inseparable and indivisible also explains why the Marshall Islands are not assisted by the distinction, in *Electricity Company of Sofia and Bulgaria*, between prior situations or facts the existence of which is merely "presupposed", and situations or facts in regard to which a dispute arises. In that case, the Court found jurisdiction because it determined that "[t]he complaints made in this connection by the Belgian Government relate to" decisions of the Bulgarian authorities "subsequent to the material date"[32]. By contrast, the complaints made here by the Marshall Islands related to an indivisible situation, treated as such by the Applicant and pre-dating the material date.

23. Mr. President, there is another reason why the post-1995 conduct would in in any event fall outside the jurisdiction of the Court. But this aspect is for my colleague, Mrs. Wells, to address.

24. Mr. President, Members of the Court, I have come to the end of my submissions today. I thank you for your attention and would now ask you to give the floor to Mrs. Wells.

Le PRESIDENT : Merci. Je donne la parole à Mme Jessica Wells.

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

Mrs. WELLS:

1. Mr. President, Members of the Court, in my reply submissions on the "essential parties" objection, I wish to deal briefly with three authorities which were addressed by Professor Palchetti on Friday afternoon — and one which was not.

2. On Friday afternoon, Professor Palchetti suggested that I "had attempted to introduce a new test in order to determine the applicability of the *Monetary Gold* principle" — namely that "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'"[33].

3. Mr. President, Members of the Court, this is not a formulation which the United Kingdom has conjured up out of thin air: it is taken directly from the Court's Judgment in the *East Timor* case, at paragraph 29, a statement which I will repeat for the Court's convenience. The Court in *East Timor* said:

> "Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case."[34]

4. This is a passage which the United Kingdom quoted in both its written Preliminary Objections[35] and in oral submissions last Wednesday[36]. Significantly, however, Professor Palchetti did not *once* refer to the *East Timor* case in his presentation. Mr. President, Members of the Court, that was not an oversight on Professor Palchetti's part but rather an eloquent admission that the *East Timor* Judgment is against him.

5. I will now turn to the three new cases which Professor Palchetti introduced into his analysis of the "essential parties" principle.

6. *First*, Professor Palchetti emphasized[37] that in the *Obligation to Negotiate Access to the Pacific Ocean* case, the Court observed that: "[t]o identify the subject-matter of the dispute, the

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[33]CR 2016/5, p. 42.

[34]*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

[35]POUK, para. 102 *(b)*.

[36]CR 2016/3, p. 53.

[37]CR 2016/5, p. 39, para. 4.

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."

7. Mr. President, Members of the Court, the *Bolivia* v. *Chile* case is not an "essential parties" case, nor, as Sir Daniel Bethlehem explained last Wednesday, is it a case which concerned the existence of a dispute *per se*[38]. Nonetheless, it is perhaps of some relevance to the present issue. The contention in *Bolivia* v. *Chile* was that the dispute was not as it had been characterized by the applicant in that case[39]. It could be said that there is a similar issue of characterization between the parties in this case. Professor Palchetti asserted that "[t]he Application does not ask the Court to adjudge that States possessing nuclear weapons are jointly responsible"[40]. The United Kingdom takes issue with this characterization and, in the United Kingdom's submission, if one applies the *Bolivia* v. *Chile* observation and looks at the *facts* which the Marshall Islands have identified as the basis for their claim, it is clear that the claim is, in reality, founded on the bilateral and/or shared conduct of States which are not party to these proceedings. If anything, therefore, the *Bolivia* v. *Chile* approach serves to reinforce the fourth guiding principle which I drew from my analysis of the *East Timor* case last Wednesday — namely that the Court must consider whether *in substance* the Application affects the interests of third States[41].

8. *Secondly*, Professor Palchetti cited the Court's Judgment in the *Pulp Mills* case and, in particular, the conclusion that Uruguay, by authorizing the construction of the mills and port terminal at Fray Bentos, had failed to comply with the obligation to negotiate contained in the 1975 Statute between itself and Argentina. In the present case, Professor Palchetti suggested, the Marshall Islands are simply asking the Court to do the same — that is, to focus on the conduct of the United Kingdom in order to establish whether that conduct is compatible with the United Kingdom's obligations under Article VI of the NPT[42].

9. Mr. President, Members of the Court, the *Pulp Mills* case is not an "essential parties" case. There are two key distinctions:

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

[39]*Ibid.*

[40]CR 2016/5, p. 39.

[41]CR 2016/3, p. 54.

[42]CR 2016/5, p. 40.

— One: the *obligation* at issue in the *Pulp Mills* case was an obligation to conduct bilateral negotiations which was contained in a bilateral treaty between Argentina and Uruguay; and

— Two: the *conduct* relied upon in *Pulp Mills* as giving rise to the breach of the obligation to negotiate was the conduct of Uruguay alone.

10. In the *Pulp Mills* case, therefore, there was simply no question that the Court's Judgment would involve any express or implied evaluation of the lawfulness of the conduct of any third State. It therefore has nothing to say on the application or scope of the "essential parties" principle in this case, or indeed at all.

11. *Thirdly*, Professor Palchetti referred to the *Application of the Interim Accord* case, in support of his proposition that the Court can consider the United Kingdom's voting record in the General Assembly without considering the legal position of third States[43].

12. Mr. President, Members of the Court, before I address the relevance — or, more accurately, the irrelevance — of the *Interim Accord* case, I would note that Professor Palchetti described the United Kingdom's submission as being that "the Court cannot assess the lawfulness of its voting records because this would have implications for the legal positions of third States"[44]. This is a mischaracterization of the United Kingdom's position. The issue is not whether the United Kingdom's voting pattern is unlawful *per se*, but whether its conduct in that respect constitutes or evidences a breach of the United Kingdom's Article VI obligation to negotiate. The United Kingdom contends that the Court cannot decide this without inevitably also evaluating whether the same conduct of third States constitutes a breach of their Article VI obligation.

13. Returning to the *Interim Accord* case, Greece had agreed, under the Interim Accord, not to object to the membership by the former Yugoslav Republic of Macedonia of international, multilateral or regional organizations, unless its objection related to the name by which Macedonia would be referred in such an organization. Macedonia contended that Greece had breached this obligation by objecting to its admission to NATO. The issue of Macedonia's admission had been considered at a meeting of NATO States, but NATO had deferred any invitation to join until a mutually acceptable solution to the name issue had been reached.

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[43] CR 2016/5, p. 43.

[44] *Ibid.*

14. Greece, citing the *Monetary Gold* case law, objected to the Court's jurisdiction, *inter alia*, on the basis that the decision to defer the invitation to Macedonia to join NATO was a collective and unanimous decision and that consequently, even if NATO's decision could be attributed to Greece, the Court could not decide this point without also deciding on the responsibility of NATO and its member States[45]. The Court rejected this objection[46].

15. Mr. President, Members of the Court, it is entirely unsurprising that the Court rejected Greece's attempt to squeeze its objection into the "essential parties" principle. The only obligation at issue was Greece's obligation, under the Interim Accord, not to object to Macedonia's membership of organizations. The Court's decision as to whether Greece had breached that obligation therefore would not and could not have involved any express or implied evaluation of the lawfulness of the conduct of NATO or its member States — for the simple reason that neither NATO nor its member States were bound by the obligation. There was simply no suggestion that NATO or its constituent States were bound by**,** or in breach of**,** any obligation not to object to Macedonia's application to join NATO, whether arising under the Interim Accord or elsewhere.

16. By contrast, the obligation at issue in the present case does bind the other NPT States and the Court's decision will, for the reasons which I explained last Wednesday[47], inevitably constitute an evaluation of the lawfulness of the conduct of States which are not parties to these proceedings.

17. For these reasons and for the reasons which have been outlined in the United Kingdom's written submissions and earlier oral submissions, the subject-matter of the Marshall Islands' case does indeed engage the "essential parties" principle.

18. Mr. President, Members of the Court, Professor Verdirame has explained why the Court cannot separate those allegations that arise after 1995 from those that arise before 1995 and decide the case on that basis. Similarly, if there should be any suggestion that the Court should select only those allegations that might be said to be directed at the United Kingdom alone, and decide the case on that basis, I would repeat that the Court cannot separate out the Marshall Islands' case in this way.

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[45]*Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 659, para. 39.

[46]*Ibid.*, p. 660, para. 42.

[47]CR 2016/3, pp. 55-57.

— *first*: the Marshall Islands have pleaded their case carefully in their three written submissions. It is not the function of the Court to refine or redefine the case as pleaded;

— *secondly*: there is an inextricable link between the conduct of the United Kingdom and conduct of third States both in terms of putting in context the allegations that the United Kingdom has failed to perform its obligations in good faith and in terms of the specific allegations made against the United Kingdom; and

— *thirdly*: The Marshall Islands cannot now try to resolve their "essential parties" problem by resiling from any allegations which might implicate the conduct of third States. The Marshall Islands have alleged that the United Kingdom has failed to perform its obligations in good faith. If, contrary to the United Kingdom's objections, the Court were to find that it does have jurisdiction, the United Kingdom would be entitled to address its conduct within the full sweep of its participation in the NPT and other fora and to address the full detail of the allegations made against it. The United Kingdom's response on the merits may necessarily and legitimately, therefore, have to rely upon the conduct of third States and require the Court to evaluate the lawfulness of that conduct.

19. Mr. President, Members of the Court, that concludes my reply submissions on the "essential parties" objection. I thank you for your attention and I would ask you now to give the floor to the United Kingdom's Agent, Mr. Iain Macleod, to conclude the United Kingdom's oral submissions.

Le PRESIDENT : Je vous remercie. Je donne la parole à l'agent du Royaume-Uni, M. Macleod.

Mr. MACLEOD:

1. Thank you Mr. President, Members of the Court. That concludes the oral argument for the United Kingdom for this afternoon and we are grateful to you for listening patiently to us. It remains for me — in accordance with Article 60 of the Rules of Court — to confirm the final submissions of the United Kingdom.

2. Mr. President, Members of the Court, for the reasons given in our written preliminary objections and at these oral hearings:

"The United Kingdom requests the Court to adjudge and declare that:

— it lacks jurisdiction over the claim brought against the United Kingdom by the Marshall Islands

or that

— the claim brought against the United Kingdom by the Marshall Islands is inadmissible or, indeed, to make both findings."

3. I thank you, Mr. President.

Le PRESIDENT : La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom du Royaume-Uni.

La Cour se réunira de nouveau en cette affaire le mercredi 16 mars, à 15 heures, pour entendre le second tour de plaidoiries des Iles Marshall.

Je vous remercie. L'audience est levée.

L'audience est levée à 16 h 10.