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CR 2016/9

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Wednesday 16 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 mercredi 16 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,

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

as Co-Agents;

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

as Member of the Delegation;

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

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel;

Ms Amanda Richter, member of the English Bar,

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

Mr. J. Dylan van Houke, 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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Mr. Nick Ritchie, Lecturer in International Security, University of York, United Kingdom,

as Technical Adviser.

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

S. Exc. M. Tony deBrum,

M. Phon van den Biesen, avocat, van den Biesen Kloostra Advocaten, Amsterdam,

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

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

comme conseils et avocats ;

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

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

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

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Mme Amanda Richter, membre du barreau d'Angleterre,

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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,

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

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

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

comme assistants ;

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

comme conseiller technique.

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

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

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

as Agent;

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 des Iles Marshall en l'affaire des *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni)*.

Je donne la parole à M. Phon van den Biesen, coagent des Iles Marshall.

Mr. van den BIESEN: Thank you, Mr. President.

GENERAL OBSERVATIONS

1. Mr. President, Members of the Court, I shall start out with the Marshall Islands' response to Judge Bennouna's question.

2. At the time of filing its Application on 24 April 2014, the Marshall Islands understood the interpretation of Article VI of the NPT to be that set out in this Court's Advisory Opinion of 8 July 1996, holding that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control". So far as the application of Article VI of the NPT is concerned, the Marshall Islands believed that each one of the nuclear-weapon States, including the United Kingdom, were and, indeed, continued to be in breach of those obligations. At the same time, all States possessing nuclear weapons were in breach of the parallel rule of international customary law. The Marshall Islands explicitly or implicitly adopted this position at the following instances (all texts are public and readily available; many are in the annexes of earlier written pleadings, indicated in the footnotes):

(1) On 22 November 2012, the RMI President Christopher J. Loeak sent a message to the Hiroshima Youth Committee saying: "I stand with you, through your project, to reinforce the views that have been expressed by representatives of over 140 countries in support of concluding a nuclear-weapons convention . . . The [RMI] pledges its full support for this

important cause in further advancing this message as a signatory party to the Nuclear [Non-]Proliferation Treaty."[1]

(2) At the first-ever United Nations General Assembly High-Level Meeting on Nuclear Disarmament, on 26 September 2013, the RMI's Minister for Foreign Affairs stated: "It should be our collective goal as the United Nations to not only stop the spread of nuclear weapons, but also to pursue the peace and security of a world without [nuclear weapons] . . . [T]he Marshall Islands urges all NPT members to achieve the treaty's obligations . . . We urge all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament."[2]

(3) In the First Committee later that fall, the Marshall Islands joined 124 other States in a "Joint Statement on the Humanitarian Consequences of Nuclear Weapons" saying: "The only way to guarantee that nuclear weapons will never be used again is through their total elimination. All States share the responsibility to prevent the use of nuclear weapons, to prevent their vertical and horizontal proliferation and to achieve nuclear disarmament, including through fulfilling the objectives of the NPT and achieving its universality."[3]

(4) On 5 December 2013, the Marshall Islands voted for the General Assembly resolution[4] following up on that high-level meeting. The resolution "[c]alls for the urgent commencement of negotiations in the Conference on Disarmament for the early conclusion of a comprehensive convention".

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[1]Message by H.E. Mr. Christopher J. Loeak, President of the Republic of the Marshall Islands, to the Hiroshima Youth Committee of the International Campaign to Abolish Nuclear Weapons, 22 Nov. 2012, www.es.icanw.org/wp-content/uploads/2012/12/Response-PaperCranes-MarshallIslands.pdf; http://www.icanw.org/projects/paper-crane-project/letter-from-the-president-of-the-marshall-islands; judges' folder, tab 1.1.

[2]Statement by Hon. Mr. Phillip Muller, Minister for Foreign Affairs of the Republic of the Marshall Islands, UN High-Level Meeting on Nuclear Disarmament, 26 Sept. 2013, http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf, cited in WSMI, p. 15, para. 32.; judges' folder, tab 1.2.

[3]Joint Statement on the Humanitarian Impact of Nuclear Weapons, delivered by Ambassador Dell Higgie, New Zealand, 21 Oct. 2013 (on behalf of 125 States), http://papersmart.unmeetings.org/media2/703026/joint-new-zealand.pdf; judges' folder, tab 1.3.

[4]A/RES/68/32, Follow-up to the 2013 High-Level Meeting of the General Assembly on Nuclear Disarmament, 5 Dec. 2013 (137-28-20); Application of the Marshall Islands (AMI), para. 80; Memorial of the Marshall Islands (MMI), para. 30, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/32; judges' folder, tab 1.4.

(5) On the same date, the Marshall Islands voted for the General Assembly resolution following up to this Court's 1996 Advisory Opinion[5]. Its first operative paragraph cites and welcomes the Court's unanimous conclusion. Its second operative paragraph "[c]alls once again upon all States immediately to fulfil that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention".

(6) Also on that date, the Marshall Islands voted for the General Assembly resolution, "Nuclear Disarmament"[6]. The resolution recalls the Advisory Opinion and refers to the NPT as a cornerstone of nuclear non-proliferation and nuclear disarmament. It calls for the Conference on Disarmament "to commence negotiations on a phased programme of nuclear disarmament leading to the total elimination of nuclear weapons within a specified framework of time", and calls "for the convening of an international conference on nuclear disarmament in all its aspects"[7].

(7) At the Second Conference on the Humanitarian Impact of Nuclear Weapons, held in Nayarit, Mexico, on 13 and 14 February 2014, the Marshall Islands made a statement that said:

> "the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that states possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every state under Article VI of the Non-Proliferation Treaty and customary international law. It would also achieve the objective of nuclear disarmament long and consistently set by the United Nations, and fulfil our responsibilities to present and future generations while honouring the past ones."[8]

3. Mr. President, there can be no doubt that on 24 April 2014 the Marshall Islands' position was that the United Kingdom, one of the States possessing nuclear weapons failed, and continued to fail, to fulfil the obligations of Article VI of the NPT as analysed and spelled out in

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[5]A/RES/68/42, Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, 5 Dec. 2013 (133-24-25); AMI, para. 71; MMI, para. 200, fn. 323; http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/42; judges' folder, tab 1.5.

[6]A/RES/68/47, Nuclear disarmament, 5 December 2013 (122-44-17); MMI, para. 201, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/47; judges' folder, tab 1.6.

[7]*Ibid*., paras. 21, 22; judge's folder, tab 1.7.

[8]Marshall Islands Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 Feb. 2014; MMI, para. 99 ; WSMI, para. 45; judges' folder, tab 1.8. http://reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf.

paragraph 105 (2) F of the Court's Advisory Opinion. This, Mr. President, is our response to Judge Bennouna's question.

4. Then, I have some additional comments to make. The introductory observations of our colleague Sir Daniel Bethlehem during last Monday's pleadings were not short of opinion, not short of characterizations, not short of qualifications of the Marshall Islands' position. Just some examples, he mentioned, "collusive actions"[9], and "playing fast and loose"[10], the Marshall Islands "rewriting the law"[11], "artificial"[12], and the like. Mr. President, all of this may be evidence of the United Kingdom's being unhappy about its being put on the spot by the Marshall Islands for its failure to live up to its crucial obligations, but it certainly does not provide any evidence that the Marshall Islands is wrong in any of its allegations.

5. Because this unfriendly fire does not relate to questions of jurisdiction or admissibility we will leave all these qualifications aside, except for one. Mr. President, after shedding some tears to the enormously moving and impressive statement by Mrs. Lijon Eknilang during the 1995 advisory proceedings, counsel for the United Kingdom did not waste a second before referring to the moving introduction to this case by my colleague Tony deBrum last Friday, but now he was stating that "[t]he 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"[13].

6. This was not really a show of respect for Mr. Tony deBrum and, for that matter, for the judges of this Court, since clearly *anyone* who heard Tony deBrum's introduction must have understood that he was not arguing why the Marshall Islands has standing before this Court, but was merely providing an insight into certain elements of the Marshall Islands' motivation for filing these cases. From the litigating perspective the Marshall Islands simply brings this case because it has good reasons to believe it is entitled to the fulfilment by the United Kingdom of a long promised endeavour that is of existential importance. Nothing else, nothing more, nothing less.

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[9]CR 2016/7, p. 11, para. 10.

[10]*Ibid.*, p. 11, para. 10.

[11]*Ibid.*, p. 18, para. 33.

[12]*Ibid.*, p. 20, para. 39.

[13]*Ibid.*, p. 10, para. 5.

7. Mr. President, I now turn to another matter. On 31 December 2014 the United Kingdom deposited at the office of the United Nations Secretary-General an amendment to its declaration under Article 36, paragraph 2 of the Statute. The amendment adds a new exception to Article 1 of the declaration and excludes "any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another party". It appears from the UK's pleadings of last Wednesday that the amendment is directly inspired by the current case. The purpose of the amendment was, as Sir Daniel stated, to prevent the Marshall Islands from filing "abusive resubmissions" of its Application, presumably, in case the Marshall Islands would want to repair some alleged defect in the previous one[14]. Mr. President, no such thing has been considered by the Marshall Islands, but it is remarkable that the United Kingdom readily changed its declaration in order to prevent the Marshall Islands from ever going back to this Court with respect to the current dispute.

8. We note that the amendment does two things: first, it prevents the Marshall Islands from reintroducing a revised Application, but it also blocks any other State that would find itself in substantially the same dispute with the United Kingdom from considering to follow the Marshall Islands' example and to submit its own application. The amendment is revealing since it is designed to only have effect when the initial application is based on an existing *dispute*, which confirms what the Marshall Islands' Application is about. This amendment, Mr. President, has ensured that this case against the United Kingdom is — and will be — totally unique, which also means that we find ourselves in a "now or never" situation.

9. The amendment not only reveals that the United Kingdom from day one onwards considered this case to involve a *dispute*, but it also puts the discussion as to the presumed necessity of a — in the words of the United Kingdom — "hardly onerous"[15] prior notification in a completely different light. Given the flexibility demonstrated by the United Kingdom in modifying its declaration under Article 36 (2) as to prevent certain cases being brought against it, any future prior notification by any State in any dispute, will — implicitly — trigger a "hardly onerous" modification of the standing offer expressed by a 36 (2) declaration.

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[14]CR 2016/3, p. 18, para. 19.

[15]CR/2016/7, p. 13, para. 18.

10. Mr. President, before I reach my final points I will briefly revisit the Respondent's position with respect to the central question in this case, which — obviously — will be discussed at length at the merits stage of these proceedings but which has also substantial relevance to questions at stake in this preliminary stage.

11. Not at any point in time since 8 July 1996 has the United Kingdom expressed that it accepts the advisory opinion as the law, let alone as the focal point of its conduct in realizing the result required by the obligation spelled out in paragraph 105 (2) F. The contrary is the case, as we have demonstrated in the Application, in our Memorial and in our Statement of 15 October 2015. A summary of the relevant documents reads as follows:

(1) On 19 October 2010, Prime Minister Cameron, in Parliament, answered a question on whether the replacement of the Trident system was to be regarded as illegal under the terms of the NPT; he said: "Our proposals are within the spirit and the letter of the non-proliferation treaty."[16]

(2) In December 2012, 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[17]. The United Kingdom voted against[18] and did not attend any of its meetings[19]. The UK, with France and the United States, had declared in the First Committee in November 2012 that it was "unable to support this resolution . . . and *any outcome [the Open-ended Working Group] may produce*"[20].

(3) On 26 September 2013, at the United Nations High-Level Meeting on Nuclear Disarmament, the UK welcomed "the increased energy and enthusiasm around the nuclear disarmament debate" but, the quote goes on, the UK "regrets that this energy is being directed toward initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the

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[16]HC Deb 16 Oct. 2010, cl 814 (http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101019/debtext/101019-0001.htm), cited in WSMI, para. 30.

[17]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), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/56, cited in MMI, para. 76.

[18]UN doc. A/67/PV.48, pp. 20-21, cited MMI, para. 76.

[19]Hansard, HL Deb, 15 July 2013, col. WA93, cited in MMI, para. 76.

[20]*Available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/eov/L46_France-UK-US.pdf, cited in MMI, para. 77; emphasis added.

Open-Ended Working Group *and the push for a Nuclear Weapons Convention*"[21]. So, the position is: No! No! No! and No! The UK subsequently voted No! against the follow-up High-Level General Assembly resolution calling for commencement of negotiations on a nuclear weapons convention[22].

(4) On 27 September 2013, the UK Ministry of Defence stated that "[t]he renewal of our nuclear deterrent is fully consistent with our obligations under [the NPT]"[23].

Besides this, the UK voted against the Unites Nations resolutions that I just discussed when I listed the Marshall Islands position.

In two rounds of oral pleadings the United Kingdom has failed to put forward any evidence that would undo these public statements.

12. Mr. President, permit me one observation with respect to the evidence that the UK presented in support of its response to Judge Bennouna's question. The United Kingdom included references to several statements that are post-dated 24 April 2014. That is remarkable for several reasons, but it also, and again, places the expanded discussion on the alleged necessity of prior notification in a new perspective. The documents show that, obviously not unexpectedly, the UK's position after 24 April 2014 is in no way different than its position before that date. The United Kingdom has not given any reasons to believe that this would have been different if only the Marshall Islands would have sent the UK a prior notification of the existence of a dispute.

13. This, Mr. President, brings us to my final observation. The Marshall Islands argued emphatically in its presentation last Friday[24] that the Court does not have some residual discretion to decline to address the issues raised in contentious proceedings because of a fear of the potential political implications of its judgments. Nor should it decline to answer because of speculation that the optional clause system might be undermined. Participation in the optional clause system has always been numerically disappointing. Withdrawals from the system or a reduction of the number

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[21] Http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf, Ann. 69 to Memorial, cited in MMI, para. 90; emphasis added.

[22] UNGA Resolution A/RES/68/32, 5 December 2013, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/32, cited in MMI, para. 91.

[23] Letter sent by the Minister for State for the Armed Forces, Andrew Robathan, 27 Sep. 2013 (https://www.gov.uk/government/publications/mod-response-about-the-uks-nuclear-deterrent), cited in WSMI, para. 39.

[24] CR/2016/5, p. 49, para. 15 (Grief).

of those joining in the future would be unfortunate, but so would be the alternative, an understanding of the optional clause that means that no politically significant cases will ever be decided by this Court. That, too, might be a disincentive for States to join the system. Major powers like the United Kingdom, as well as small States like the Marshall Islands, all have an investment in the rule of law and the possibility that the law can be applied even in the most politically fraught situations. As the principal judicial organ of the United Nations, the Court has its own opportunity to contribute to the lofty purposes of the Charter, including the peaceful settlement of disputes and the maintenance of international peace and security.

14. I should add, Mr. President, that, contrary to what the United Kingdom suggests[25], the Marshall Islands is, in this case, not involved in an attempt to obtain a "new" advisory opinion. On the contrary, it takes the 1996 Advisory Opinion as a given and seeks to give effect to the obligations under Article VI of the NPT and customary international law that are explained therein. There is a radical difference between the kind of abstract questions that may be asked in advisory proceedings and the very concrete questions of fact and law which the Marshall Islands asserts in its plea for relief on the merits. Answering those questions is a matter for the merits stage of these proceedings, so the Marshall Islands will withstand the temptation to deal with these issues right away.

15. The Marshall Islands notes that since 8 July 1996 the Advisory Opinion has been at the centre of efforts by the majority of States to get the States possessing nuclear weapons to the negotiating table to negotiate the conclusion of a Nuclear Weapons Convention. The request of the majority of States in the resolution calling for the "Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons" has not been honoured by the Respondent or any other of the States possessing nuclear weapons. It is only natural for a State to bring a case before this Court if certain conduct and certain acts to which it is legally entitled are not provided on a voluntary basis.

[25]CR 2016/7, p. 21, para. 43 (Bethlehem).

16. That, Mr. President, Members of the Court, ends my presentation. I sincerely thank the Court for the attention it is giving to the views of both Parties to this case and I kindly request you, Mr. President, to give the floor to Professor Condorelli.

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

M. CONDORELLI :

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

1. Monsieur le président, Mesdames et Messieurs les juges, la charge qui m'incombe est de revenir sur la question de l'existence du différend qui oppose les Iles Marshall au Royaume-Uni dans la présente affaire en répondant aux critiques et objections qui nous ont été adressées lundi dernier par sir Daniel Bethlehem. L'existence du différend est — nous le savons bien — la condition première de l'exercice de la fonction judiciaire de la Cour. Or, d'après nos contradicteurs on ne saurait alléguer dans notre cas l'existence du différend (qui doit «en principe» se manifester «au moment où la requête est soumise à la Cour») pour deux raisons : *primo*, parce que les éléments constitutifs du différend doivent être tous réunis justement «au moment où la requête est soumise à la Cour», ce qui comporterait qu'on ne saurait prendre en considération rien de postérieur audit moment afin de vérifier que le différend existe ; et, *secundo*, parce que le différend ne saurait exister tant que l'Etat qui entend le soumettre au juge n'a pas porté préalablement son grief à l'encontre d'un autre Etat à la connaissance de celui-ci en le lui notifiant.

2. Monsieur le président, il est à vrai dire quelque peu paradoxal de devoir discuter de la question de savoir s'il existe ou non un différend entre les Iles Marshall et le Royaume-Uni au sujet du respect de l'obligation de poursuivre de bonne foi et de mener à terme des négociations sur des mesures efficaces conduisant au désarmement nucléaire dans tous ses aspects, sous un contrôle strict et efficace. C'est paradoxal parce que le différend en question est là, indéniablement là, sous les yeux de la Cour. Il s'agit d'une réalité — comment dirais-je — parfaitement visible, sauf peut-être si l'on porte de trop épaisses lunettes de juriste. Vous voyez, de ce côté-ci, les Iles Marshall soutenant que le Royaume-Uni a violé et viole les obligations qui lui incombent en vertu de l'article VI du traité de non-prolifération (TNP). De l'autre côté de la barre, vous entendez le

Royaume-Uni déclarer «the United Kingdom considers the allegations to be manifestly unfounded on the merits». Il est difficile de nier qu'un différend existe bel et bien ! Qu'existe bel et bien la réclamation d'une partie se heurtant à l'opposition manifeste de l'autre ! Qu'existe indiscutablement un désaccord sur un point de droit ou de fait, une opposition de thèses juridiques ou d'intérêt entre deux personnes !

3. De toute façon, le différend dont nous discutons n'est pas du tout une apparition soudaine et inattendue, dont rien ne pouvait laisser prévoir qu'elle pourrait se manifester. Ses racines sont parfaitement perceptibles dans les relations internationales et dans les relations entre les deux Etats en particulier.

4. Tant les Iles Marshall que le Royaume-Uni sont liés par le TNP, en en étant parties. Tant le Royaume-Uni que les Iles Marshall se considèrent, en particulier, liés par les obligations établies en son article VI. Le Royaume-Uni a tenu à confirmer solennellement cela au cours de la présente procédure. Ainsi, par exemple, lundi dernier vous avez pu entendre sir Daniel Bethlehem affirmer : «the UK has repeatedly, without hesitation, without caveat, expressly reaffirmed our obligation and special responsibility pursuant to and under Article VI» ; un peu plus tôt il avait dit : «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».

5. Toutefois, l'interprétation que le Royaume-Uni a donnée et donne de ses obligations découlant de l'article VI est bien particulière. En effet, en s'opposant à des allégations répétées, venant de sources diverses, d'après lesquelles sa conduite violerait l'article VI du TNP, le Royaume-Uni a incessamment fait valoir que non, qu'il agissait et qu'il agit en pleine conformité avec celui-ci. Les écritures marshallaises ont offert de nombreux exemples de positions officielles prises par le Royaume-Uni à ce sujet, et le coagent des Iles Marshall, M. van den Biesen vient lui aussi de les rappeler à la Cour.

6. Ainsi en est-il des débats concernant le remplacement et la modernisation du programme d'armement nucléaire britannique Trident, au sujet duquel des avis juridiques de haut niveau ont fait valoir qu'il constituerait une violation du droit international coutumier et de l'article VI du TNP. En réponse à ces allégations, de hautes autorités gouvernementales du Royaume-Uni ont assuré que non, que «la dissuasion nucléaire actuelle est conforme aux obligations juridiques du

gouvernement». Vous avez entendu que le premier ministre Cameron dira, au sujet du renouvellement de la dissuasion nucléaire britannique, que «nos propositions sont conformes à l'esprit et à la lettre du traité de non-prolifération»[26].

7. Mais c'est surtout le rejet constant et radical par le Royaume-Uni (et par d'autres puissances nucléaires d'ailleurs) de toute proposition ou demande visant à initier des négociations multilatérales pour le désarmement nucléaire, ainsi que le refus renouvelé de participer à de telles négociations dans quelque enceinte que ce soit, qui a engendré des réactions, notamment de la part des Iles Marshall. Ceci en particulier suite au vote négatif du Royaume-Uni aux trois résolutions de l'Assemblée générale du 5 décembre 2013 en faveur desquelles les Iles Marshall s'étaient en revanche prononcées : M. van den Biesen les a énumérées, y compris celle concernant la suite donnée à l'avis consultatif. Par ces votes négatifs le Royaume-Uni confirmait qu'il donnait de l'article VI une interprétation contredisant en substance ce que l'article VI prescrit (aux yeux bien sûr des Iles Marshall, mais sans doute aussi aux yeux d'autres), à savoir l'obligation de poursuivre de bonne foi et de mener à terme des négociations sur des mesures efficaces conduisant au désarmement nucléaire dans tous ses aspects, sous un contrôle international strict et efficace[27].

8. La réaction des Iles Marshall, n'intervenant que quelques semaines après les votes contraires du Royaume-Uni à l'Assemblée générale, c'est la déclaration de Nayarit de février 2014. La Cour la connaît bien. Par cette déclaration (à laquelle les Iles Marshall ont toujours accordé et continuent d'accorder une importance considérable, n'en déplaise à sir Daniel Bethlehem qui n'en a pas parlé du tout dans sa dernière intervention) les Iles Marshall ont entendu s'adresser à tous les Etats possédant des arsenaux nucléaires, y compris le Royaume-Uni bien évidemment, en les accusant de manquement à leurs obligations relatives aux négociations devant aboutir à la cessation de la course aux armements nucléaires et au désarmement nucléaire.

9. Il est vrai que le Royaume-Uni n'a pas participé à la conférence de Nayarit, mais ceci n'exclut certes pas qu'il ait eu connaissance des débats et des propos qui s'y sont tenus, d'autant plus que la conférence a eu une large couverture médiatique qui en a répandu les résultats à

[26] Pour les références, voir les notes figurant dans le compte rendu de la précédente intervention du coagent des Iles Marshall, M. Phon van den Biesen.

[27] Voir la note précédente.

l'échelle mondiale. Sir Daniel Bethlehem a vigoureusement assuré qu'il n'existe pas dans les archives britanniques une quelconque trace de contacts bilatéraux directs entre le Royaume-Uni et les Iles Marshall au cours desquels la question aurait été soulevée, et on se gardera bien-sûr de douter de la véracité de ses dires. Mais les Iles Marshall ne prétendent d'ailleurs nullement que des échanges diplomatiques bilatéraux aient eu lieu. Nous pensons seulement, de ce côté-ci de la barre, qu'il est hautement improbable qu'au Royaume-Uni on n'ait rien su des accusations graves adressées publiquement et officiellement par les Iles Marshall au Royaume-Uni dans un cadre multilatéral important. Des accusations qu'on a sans doute préféré ignorer en décidant de ne pas y réagir. Comment ne pas songer à ce propos à la remarque de votre Cour en l'arrêt de 2011 *Géorgie c. Fédération de Russie* : «l'existence d'un différend peut être déduite de l'absence de réaction d'un Etat à une accusation dans des circonstances où une telle réaction s'imposait».

10. Il vaut la peine d'ailleurs de réfléchir dans ce contexte à l'enseignement de Georges Abi-Saab, dont on fait grand cas du côté britannique, et qu'on nous demande de prendre en considération. Voilà qui est fait. Abi-Saab explique comment un différend naît à son avis et soutient que cela ne peut arriver qu'au moyen d'un échange d'une quelconque sorte, voire d'une forme de négociation amenant à la cristallisation du litige. Toutefois, aucun formalisme, aucune «notification» n'est exigée. Ce qui importe pour lui est que les parties «however they communicate, put forward contradictory contentions and claims they reciprocally reject … They don't have to negociate directly. They can make their position publicly known through the media or in the General Assembly of the United Nations…» Et encore : «some kind of exchange or negotiation between the contenders, be they within a multilateral forum or even by proxy, is a necessary prelude to adjudication».

11. Monsieur le président, si l'on est d'accord, ainsi que Georges Abi-Saab le suggère, que tout formalisme est à bannir s'agissant de vérifier qu'il y a bien un différend du fait même d'une réclamation qui se heurte à une opposition, il apparaît alors indéniable que la déclaration de Nayarit a joué le rôle de catalyseur du présent différend. En effet, au moyen de la déclaration de Nayarit les Iles Marshall ont ouvertement protesté contre la conduite des puissances nucléaires (dont le Royaume-Uni), faisant valoir qu'une telle conduite se prolongeant dans le temps constitue la violation des obligations internationales qui leur incombent en vertu de l'article VI du TNP (et du

droit international coutumier). Un différend peut alors être défini comme déjà existant dans une situation où l'on est confronté, en premier lieu, à une conduite attribuable à une partie dont, ensuite, une autre partie conteste la légalité. C'est le point de vue qu'avait exprimé, comme on le sait, le juge Morelli dans son opinion dissidente jointe à l'arrêt de la Cour de 1962 en l'affaire du *Sud-Ouest Africain*[28] ; et le juge Fitzmaurice l'avait par la suite partagé en faisant valoir que, pour qu'un différend mettant en jeu la fonction judiciaire de la Cour existe,

> «peu importe … que la demande vienne d'abord et le rejet (exprès ou résultant d'un certain comportement) ensuite, ou que le comportement soit le premier à apparaître et soit suivi d'une plainte, d'une protestation ou d'une prétention à laquelle il n'est pas fait droit»[29].

12. Monsieur le président, j'ai parlé jusqu'ici de la prise en compte du passé par rapport à la saisine de la Cour afin de vérifier l'existence du différend. Qu'en est-il de la possibilité de prendre en considération, toujours afin de vérifier l'existence du différend, les échanges de vues entre les parties ayant lieu au cours de la procédure (donc après la date de la requête) ? Impossible !, s'insurge sir Daniel Bethlehem, puisque — nous dit-il — tous les éléments constitutifs de cette existence doivent être réunis à la date de l'introduction de l'instance. Soutenir le contraire serait ignorer l'enseignement de votre jurisprudence, qui est net et précis, les conditions nécessaires à la compétence de la Cour devant être remplies à la date à laquelle l'instance est introduite.

13. Monsieur le président, le précédent *Croatie c. Serbie*, auquel mon contradicteur se réfère, n'est pas ignoré. Il n'est pas pertinent, et ce pour une simple raison : la question que la Cour avait à aborder ne concernait pas l'existence du différend entre les parties. La question était autre, à savoir celle concernant la réalisation des conditions prévues à l'article 35 du Statut, qui doivent sans aucun doute être présentes lors de la saisine de la Cour. Mais il y a davantage. Aucun des précédents cités par la Cour au paragraphe 79 de l'arrêt ne se réfère à la question de l'existence du différend. L'affaire *Bosnie c. Yougoslavie* concernait encore une fois la question de la compétence de la Cour *rationae personae*. Dans les affaires de *Lockerbie* la question à décider portait sur l'exception d'irrecevabilité tirée de deux résolutions du Conseil de sécurité tombées après la date

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[28] *Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, opinion dissidente du juge Morelli, p. 567.

[29] *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, opinion individuelle du juge Fitzmaurice, p. 110.

de la requête. Par rapport à ce genre de questions, les échanges de vues entre les parties sous les yeux de la Cour n'ont rien à apporter afin d'évaluer la compétence de la Cour ou la recevabilité de la requête. Mais il en va tout autrement s'agissant d'apprécier l'existence du différend. Dans ce cas, en effet, les échanges entre les parties peuvent jouer un rôle important, puisqu'ils peuvent permettre d'inférer ou de confirmer qu'à la date de la requête un différend entre les parties existait effectivement.

14. Il me reste, Monsieur le président, à dire un mot concernant la question de savoir s'il est vrai que le différend ne saurait exister tant que l'Etat qui entend le soumettre au juge n'a pas porté préalablement son grief à l'encontre de l'autre Etat à la connaissance de celui-ci en le lui «notifiant». En fait, ainsi que je l'ai signalé, rien n'interdit de concevoir que la saisine de la Cour puisse être un mode approprié et parfaitement légitime par lequel l'Etat lésé «notifie sa demande» à l'Etat dont la responsabilité internationale est invoquée. L'important est que la saisine de la Cour se fasse dans des conditions idoines à faire apparaître, de la part de l'Etat attaqué en justice, une opposition manifeste clairement étayée, axée à l'encontre de la réclamation du demandeur, une telle opposition de thèses juridiques étant à qualifier alors comme un différend suffisamment cristallisé. Ni les Articles sur la responsabilité de l'Etat, ni le commentaire de la Commission du droit international y relatif ne s'y opposent, contrairement à ce que prétendent nos contradicteurs. La «notification par l'Etat lésé» ne saurait de toute façon être conçue comme une condition supplémentaire de recevabilité des instances à introduire devant la Cour ou de compétence de celle-ci : une condition que ni le Statut, ni le Règlement de la Cour ne prévoient. Le commentaire des Articles, j'y insiste, est explicite à ce sujet lorsqu'il indique que : «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.»[30] Autrement dit, les Articles en question ne concernent pas l'accès au règlement judiciaire des différends internationaux en matière de responsabilité internationale, ni ne prescrivent de condition spéciale à laquelle un tel accès serait subordonné. Il est absolument vrai que la phrase du commentaire que je viens de citer encore une fois figure en tant que commentaire à l'Article 44, et non pas à l'Article 43, mais il est indéniable

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

au vu de sa formulation au pluriel (*les* articles, et non pas *l'*article) qu'elle doit être référée à l'ensemble des Articles en question.

15. Il s'agit là d'une possibilité qu'on ne peut certes pas considérer comme courante, étant donné que normalement des communications et des contacts entre les parties précèdent la saisine du juge, qui peut alors s'y référer afin d'identifier précisément les éléments constitutifs du différend. On ne saurait pas exclure cependant qu'il y ait des situations dans lesquelles le différend peut être identifié sans besoin d'étudier les événements antérieurs à la saisine du juge, ceci lorsque la réclamation d'une partie et l'opposition de l'autre partie se révèlent précisément au même moment où la requête est soumise à la Cour. D'ailleurs cette possibilité est admise par nos contradicteurs, quoique pour des cas exceptionnels par rapport auxquels il serait admis qu'aucune notification préalable n'est requise.

16. Monsieur le président, Mesdames et Messieurs de la Cour, je vous remercie beaucoup de votre attention et de votre patience et je voudrais vous prier, Monsieur le président, de bien vouloir donner la parole à mon collègue et ami le professeur Nick Grief.

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

Mr. GRIEF:

"ONLY FOR THE PURPOSE OF" AND *RATIONE TEMPORIS*

1. Thank you, Mr. President, Members of the Court: I will begin by addressing briefly the United Kingdom's preliminary objection based on the words "only for the purpose of" in reservation 1 (III). On Monday the United Kingdom maintained its allegation that this reservation precludes jurisdiction because, according to the United Kingdom, the Marshall Islands accepted jurisdiction only in relation to or for the purpose of this particular dispute. The United Kingdom remains mistaken, for all the reasons stated by Ms Ashton in our first round pleadings.

2. The United Kingdom simply did not engage the Court on the meaning of the word "only" in the reservation, or on the fact that the United Kingdom's position in these proceedings is contradicted by its only cited history as to the intent of the reservation[31].

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

3. Instead, the United Kingdom is guilty of double standards when it argues that the intent behind its own reservation is demonstrated by the breadth of the language, but that the breadth of the identical language in the Marshall Islands' reservation does not demonstrate the Marshall Islands' intent. That cannot be right.

4. Finally, the United Kingdom took time to re-argue that "in relation to" has a different meaning than "for the purpose of" — but, again, that argument misses the point. What the Marshall Islands demonstrated last Friday was that, in the present circumstances, the two phrases represent a distinction without a difference.

5. Mr. President, Members of the Court, I turn now to the *ratione temporis* limitation. The subject-matter of this dispute is the United Kingdom's conduct (acts and omissions) after 30 January 1995 when the Marshall Islands became a party to the NPT. A little over 18 months later, on 8 July 1996, this Court through its Advisory Opinion clarified what Article VI requires of States parties and unanimously recognized an equivalent rule of customary international law.

6. This dispute is not about situations or facts prior to 17 September 1991, the date on which the Marshall Islands became a Member of the United Nations, a party to the Statute of this Court and fully integrated into the international community. On Monday it was telling that the United Kingdom did not challenge our assertion that 17 September 1991 was when, for the purposes of the Marshall Islands' temporal limitation, the clock started ticking and a "new situation" was created. Nor did the United Kingdom dispute our contention that the Marshall Islands' accession to the NPT in 1995 constituted another "new situation". Members of the Court, this goes directly to the question of the source or real cause of this dispute because it contradicts the United Kingdom's characterization of the situation as inseparable and indivisible.

7. In that regard, let me make an observation in response to the United Kingdom's remarks about the *Jurisdictional Immunities* case. The Court's Order in the counter-claim makes it clear that the 1947 Peace Treaty was part of the "legal régime" which "determined the status of Italian property in Germany and dealt with the restoration and restitution of property of Italy and its nationals". Other agreements and measures after that date did not constitute a "new situation"[32]. In

[32] *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I),* p. 320, paras. 27-30.

our case, however, upon its entry into force for the Marshall Islands in January 1995, the NPT became the controlling "legal régime". There was nothing before it; it constituted a "new situation", so only conduct after that date can be relevant as the source or real cause of this dispute.

8. 17 September this year, 2016, will mark the 25th anniversary of the Marshall Islands' membership of the United Nations. It is a young State — it has not yet existed long enough to need to consider advancing its critical date. The United Kingdom has updated the critical date in its own optional clause declaration three times. In 2004, when it amended the date from 24 October 1945 to 1 January 1974, a government minister told Parliament that this was to update "the cut-off date for the acceptance of the court's jurisdiction, thus excluding stale claims"[33]. And that statement is in tab 3, Members of the Court.

9. Mr. President, this is not a stale claim. It is a claim in respect of a breach that has persisted from 30 January 1995, when the Marshall Islands became a party to the NPT, to the present day. On Monday, on behalf of the United Kingdom, Professor Verdirame conceded that, if there is a dispute, "the entry into force of the NPT between the UK and the Marshall Islands might offer the legal basis for such a dispute"[34]. He went on to repeat what he had said in the first round: that the source of the dispute is inextricably linked to pre-1995 situations; that the case is based on "a whole continuing situation dating back to 1970 and, in some cases, beyond"[35].

10. But the Marshall Islands has never framed the case in such terms. Those five words "and, in some cases, beyond" are revealing. How could there possibly be continuing breaches of the NPT going back beyond 1970 — before the NPT entered into force, including for the United Kingdom, and even before the Treaty was signed in 1968? There cannot be. In its Application, the Marshall Islands traced the history of the United Kingdom's nuclear weapons policy and practice, not just back to 1970 but right back to its origins in the early 1950s[36] — nearly 20 years before the NPT came into force. The chronology did not stop, or should I say start, at 1970. The "back story" is not all or only about NPT-related conduct. This demonstrates that the

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[33]Hansard, House of Lords, 7 July 2004, Column WS35 (tab 3).

[34]CR 2016/7, p. 26, para. 19 (Verdirame).

[35]CR 2016/7, p. 26, para. 16 (Verdirame).

[36]Application of the Marshall Islands (AMI), para. 24.

United Kingdom's pre-1995 conduct is documented solely in order to provide historical background, and thus dispels the myth that the source or real cause of this dispute between the Marshall Islands and the United Kingdom concerning the United Kingdom's conduct under Article VI and the equivalent customary rule lies in situations or facts prior to 1991.

11. Professor Verdirame made much of the Marshall Islands' claim that, 45 (now 46) years after the NPT's entry into force, the United Kingdom's delay in fulfilling its obligations under Article VI is manifestly unreasonable[37]. He stated that this demonstrated the Court's lack of temporal jurisdiction. But again, Mr. President, Members of the Court, this misconstrues the subject-matter of the dispute and ignores the fact that the Marshall Islands' accession to the NPT in January 1995 constituted a "new situation". The Marshall Islands is not basing its case on a continuing situation going back to 1970.

12. The two specific instances which Professor Verdirame cited to try and substantiate his contention that the Marshall Islands is thwarted by the *ratione temporis* reservation also illustrate this point. The Mutual Defence Agreement (MDA) dates back to 1958 and continuous-at-sea nuclear-armed patrols date back to 1968[38] — both prior to the NPT's entry into force. Without them, however, the chronology would have been incomplete and situations or facts which the dispute presupposes would have been missing. They are not part of the source or real cause of the dispute. There is a continuing situation but, for the reasons already given, it runs from 1995 to the present day: 21 years and counting.

13. The United Kingdom said that the Marshall Islands must show that the complaint relates to a post-1995 situation[39]. The Application and the Memorial do show this. They document that since 1995 the United Kingdom has taken and continues to take steps to qualitatively improve its nuclear arsenal; has consistently opposed the commencement of negotiations on a nuclear weapons convention in the Conference on Disarmament; has refused to participate in the Open-ended Working Group and pre-emptively declared that it will not support any outcome the Working Group may produce; and has given the clearest possible indications that it intends to go on relying

[37]CR 2016/7, p. 25, para. 13 (Verdirame).

[38]*Ibid.*, para. 15 (Verdirame).

[39]*Ibid.*, pp. 24-25, para. 12 (Verdirame).

on its nuclear arsenal for decades to come[40]. These are all specific instances of post-1995 conduct, indeed, post-Advisory Opinion conduct — and these are the facts and situations that constitute the source or real cause of this dispute.

14. Mr. President, Members of the Court, there is another reason why Professor Verdirame has insisted that your frame of reference should be the last 45 years or so rather than the last 21 years. He said: "It may . . . well be that crucial factors demonstrating the *reasonableness* of the United Kingdom's conduct can only be appreciated over that period of time."[41] What Professor Verdirame seems to be suggesting is that conduct that is unreasonable and thus a breach of Article VI, when viewed in the context of the last 21 years, may not be unreasonable and a breach if placed in the context of the last 45 years. He is obviously hedging his bets, Members of the Court. But in any event, that is an issue for the merits, not for this stage of the proceedings.

15. Mr. President, Members of the Court, that concludes my submissions. I thank you for your kind attention and ask you, Mr. President, to invite Professor Palchetti to the podium. Thank you.

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

Mr. PALCHETTI:

ABSENT THIRD PARTIES

1. Mr. President, Members of the Court, after last Monday's hearings it is clear that there is still one fundamental issue that divides the Parties with regard to the absent third parties objection. This central issue concerns the test to be used in order to determine the applicability of the *Monetary Gold* principle. According to the United Kingdom the principle applies whenever a judgment of the Court may lead by implication to an evaluation of the conduct of a third State. The Marshall Islands has a much more restrictive view. According to the Marshall Islands, it applies only when the Court, in order to determine the responsibility of the respondent, has necessarily to determine, as a preliminary matter, the responsibility of a third State.

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[40]AMI, Part IV; Memorial of the Marshall Islands (MMI), Part 7.

[41]CR 2016/7, p. 27, para. 20 (Verdirame).

2. On Monday, Ms. Wells said that the United Kingdom's view is taken directly from the Court's Judgment in the *East Timor* case and noted that I had forgotten to refer to that Judgment[42]. In fact the Marshall Islands had referred to that Judgment in its Written Observations[43]. But since the United Kingdom gives so much weight to that Judgment, it is convenient that I come back to it again.

3. I will first examine the Judgment in *East Timor*. Then I will briefly respond to some other points made by the United Kingdom on Monday.

I. The Judgment in the *East Timor* case

4. Mr. President, the Court's reasoning in *East Timor* is structured as follows. In paragraphs 23 to 28, the Court addresses Australia's objection relating to the *Monetary Gold* principle. In paragraphs 29 to 33 the Court addresses some additional arguments advanced by Portugal. Finally, in paragraphs 34 and 35 the Court makes some final observations.

5. Paragraph 28 is of central importance in the Court's reasoning. It provides the rationale on which the Court relies for justifying the application of the *Monetary Gold* principle. There the Court said: "in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so"[44]. "Without first entering": the test applied by the Court is clear. The *Monetary Gold* principle applies because the determination of the lawfulness of Indonesia's conduct is a prerequisite for the determination of the responsibility of Australia. This is precisely the test which the Marshall Islands asks the Court to apply in the present case.

6. The United Kingdom does not rely on paragraph 28 but on paragraph 29. In paragraph 29 the Court does not address the question whether Indonesia was to be considered as an indispensable party. It addresses an additional argument advanced by Portugal, which is based on the *erga omnes* character of the obligation allegedly breached. In this context the Court observes that it "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the

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[42]CR 2016/7, p. 28, para. 3 (Wells).

[43]Written Statement of Observations and Submissions of the Marshall Islands (WSMI), p. 19.

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

lawfulness of the conduct of another State which is not a party to the case"[45]. This sentence must be read in context. In particular, it must be interpreted in the light of what the Court had just said in the previous paragraph. It simply makes no sense to see in paragraphs 28 and 29 two different tests. There can only be one, single test. It is the one on which the Court relied for finding that Indonesia was an indispensable party.

7. If there are still any possible doubts, I invite the Members of the Court to read the conclusive part of the Judgment. In summing up its position the Court stated:

> "The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent."[46]

8. I am pretty sure that at this stage the last thing you would like to hear is me repeating the relevant passages in the *Nauru* Judgment and I can understand you and will not inflict upon you these passages once again. Let me simply emphasize that the test applied in *East Timor* is the same test as in *Nauru*. It is not the test identified by the United Kingdom. It is the test that the Marshall Islands asks the Court to apply in the present case.

9. Once it is clarified that the *Monetary Gold* principle only applies when the determination of the responsibility of the respondent State requires the prior determination of the responsibility of a third State, the entire edifice carefully built up by the United Kingdom comes down. It cannot seriously be argued that the determination of the responsibility of the Marshall Islands requires a prior determination of the responsibility of the other States possessing nuclear weapons. What can be said, at most, is that the Court's determination of the responsibility of the United Kingdom may have some implication for the legal position of these States. If one applies to the present case the test used by the Court in *East Timor*, it becomes immediately apparent that there are no indispensable third parties. They have all disappeared, like in Shakespeare's *The Tempest*, they "were all spirits, and are melted into air, into thin air"[47].

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[45] *I.C.J. Reports 1995*, p. 102, para. 29.

[46] *Ibid.*, p. 105, para. 35.

[47] W. Shakespeare, *The Tempest*, Act. IV, scene 1, 149-150.

II. The case law of the Court supports the Marshall Islands' position

10. Mr. President, I will now briefly address some other points made by the United Kingdom on Monday.

11. The United Kingdom argued that the Judgment in *Obligation to Negotiate Access to the Pacific Ocean* is not relevant because it is not an "essential parties" case[48]. It is hard to understand why this circumstance should matter at all. The Court has to rely on something in order to determine the subject-matter of a dispute. This can only be the application, as well as the written and oral pleadings of the parties, as the Court indicated in *Bolivia* v. *Chile*[49]. Obviously, it is substance, not only form, that counts. But in the present case, substance and form coincide. 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.

12. My colleague on the other side also argued that the Judgment in the *Pulp Mills* case is not relevant, once again because it is not an "essential parties" case[50]. In particular she noted that this Judgment has nothing to say on the application or scope of the *Monetary Gold* principle[51]. But the Marshall Islands does not argue that the *Pulp Mills* case is relevant for determining the scope of the *Monetary Gold* principle. The importance of this Judgment lies elsewhere. It shows that this Court can determine whether a State has breached its obligation to negotiate by focusing exclusively on the unilateral conduct of that State.

13. The United Kingdom also distinguished the present case from the *Application of the Interim Accord* case on the argument that, unlike in the present case, neither NATO nor its member States were bound by the obligation incumbent upon Greece. This, however, was not the reason relied upon by the Court. The reason was that there was no need for a prior determination of the responsibility of absent parties: "the Court does not need to determine the responsibility of NATO

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[48]CR 2016/7, p. 29, para. 7 (Wells).

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

[50]CR 2016/7, p. 29, para. 9 (Wells).

[51]*Ibid.*, p. 30, para. 10 (Wells).

or of its member States in order to assess the conduct of the Respondent"[52]. This test is the same as in *Nauru* and in *East Timor*. It also controls the present case.

14. My last point concerns the possibility for the Court to separate the allegations made by a party and to apply the *Monetary Gold* principle only to certain allegations. Last week I noted that the United Kingdom made reference only to a limited set of specific acts in order to support its argument concerning absent third States. I also noted that eventually the Court does not need to rely on such acts in order to determine the United Kingdom's responsibility. The United Kingdom took issue with this statement. It argued that the Court cannot decide a case by focusing only on certain allegations[53].

15. This view is mistaken. The Court can separate out a specific claim or a specific aspect of a claim and refuse to exercise its jurisdiction only on that claim or part of a claim. At this stage, however, this issue is only theoretical. The United Kingdom has not been able to refer to a single act the assessment of which justifies the application of the *Monetary Gold* principle. There are none.

16. This, Mr. President, concludes my presentation. I thank the Members of the Court for their kind attention and would ask the Court to give the floor to the Co-Agent of the Marshall Islands, Mr. Tony deBrum, for his concluding remarks.

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

Mr. deBRUM:

CONCLUDING REMARKS

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

2. Since 2013, the Marshall Islands has voted in favour of resolutions:

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[52] *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.

[53] CR 2016/7, p. 31, para. 18 (Wells).

(a) calling for immediate commencement of negotiations for a Nuclear Weapons Convention[54]; and

(b) calling for "Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons"[55].

The UK, on the other hand, has opposed these resolutions and voted "no".

The latter resolution — the Follow-up to the Advisory Opinion resolution — provides that the United Nations General Assembly:

> "1. *Underlines once again* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; and
>
> 2. *Calls once again upon* all States immediately to fulfil that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination."

3. Mr. President, Members of the Court, as we stated in our official Statement to this Court back in 1995, we joined the NPT for very serious reasons. Those reasons include NPT Article VI, on which this case against the UK is based, and also the Preamble of the NPT, which we quoted in our 1995 Statement[56]. The Preamble provides, in pertinent part, as follows:

> "The States concluding this Treaty . . .
>
> Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples;
>
> . . . . . .
>
> Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament . . .
>
> Desiring to . . . facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control . . .

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[54]E.g., UNGA res. A/RES/68/32, 5 Dec. 2013, 137-28-20.

[55]E.g., UNGA res. A/RES/70/56, 7 Dec. 2015, 137-24-25.

[56]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.

Have agreed as follows . . .”[57]

4. Mr. President, Members of the Court, the States possessing nuclear weapons that joined the NPT made a legally binding promise, in accordance with the goals they expressly adopted in the NPT Preamble, to pursue in good faith negotiations leading to nuclear disarmament and cessation of the nuclear arms race, pursuant to Article VI. The dispute in this case is over whether the UK is in breach of that bargained-for, legal obligation.

5. Put simply, it has been over 21 years since the Marshall Islands became a party to the NPT and entered into that legal relationship with the United Kingdom. In spite of the United Kingdom’s solemn promise in NPT Article VI, little or no progress has been made toward nuclear disarmament since the RMI joined the NPT. Indeed, *reverse progress* is occurring, with the UK modernizing, upgrading and enhancing its nuclear arsenal to last for many decades. At the end of the day, the UK position boils down to an assertion that the RMI has no legally enforceable rights under NPT Article VI. If that were true, the strategic bargain of the NPT is illusory.

6. In its Advisory Opinion, this Court acknowledged “the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come”[58].

7. The Court also observed that nuclear weapons “have the potential to destroy all civilization and the entire ecosystem of the planet”[59]. In making that observation, the Court was certainly not expressing a political statement. So once again, the observation of this Court in its 1996 Advisory opinion was that nuclear weapons *“have the potential to destroy all civilization and the entire ecosystem of the planet”* (emphasis added).

8. Mr. President, Members of the Court, our goal in this proceeding 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. The Marshall Islands’ commitment to seek judicial settlement of this very real dispute is unqualified.

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

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[57]Preamble, 1968 Treaty on the Non-Proliferation of Nuclear Weapons, 729 United Nations, *Treaty Series*, 161.

[58]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, para. 36.

[59]*Ibid.*, para. 35.

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

SUBMISSIONS

"The Marshall Islands respectfully requests the Court:

(a) to reject the preliminary objections to its jurisdiction and to the admissibility of the Marshall Islands' claims, as submitted by the United Kingdom of Great Britain and Northern Ireland in its Preliminary Objections of 15 June 2015; and

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

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

With great respect and gratefulness, thank you, Mr. President and Members of the Court.

Le PRESIDENT : Je vous remercie, Excellence. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République des Iles Marshall, comme elle l'a fait lundi pour les conclusions finales présentées par le Royaume-Uni.

Deux juges souhaitent poser des questions. La première s'adresse aux deux Parties. Je donne la parole à cette fin à M. le juge Cançado Trindade.

Judge CANÇADO TRINDADE: Merci, Monsieur le président. I have questions to put to both contending Parties, the Marshall Islands and the United Kingdom. My questions are the following:

The Marshall Islands, in the course of the written submissions and oral arguments, and the United Kingdom, in its document on Preliminary Objections (of 15 June 2015), have both referred to U.N. General Assembly resolutions on nuclear disarmament. Parallel to the resolutions on the matter which go back to the early 70's (First Disarmament Decade), there have been two more recent series of General Assembly resolutions, namely: those condemning nuclear weapons, extending from 1982 to date, and those adopted as a follow-up to the 1996 I.C.J. Advisory Opinion on *Nuclear Weapons*, extending so far from 1997 to 2015. In relation to this last series of General Assembly resolutions, — referred to by the contending Parties, — I would like to ask both the Marshall Islands and the United Kingdom whether, in their understanding, such

General Assembly resolutions are constitutive of an expression of *opinio juris*, and, if so, what in their view is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament, and what is their incidence upon the question of the existence of a dispute between the Parties.

Thank you, Mr. President.

Le PRESIDENT : Merci. Le texte de la question sera communiqué aux Parties sous forme écrite dès que possible. Les Parties sont invitées à fournir leur réponse par écrit. Ces réponses devront être communiquées le mercredi 23 mars à 18 heures au plus tard. Des observations écrites sur les réponses de l'autre Partie pourront être présentées le 30 mars à 18 heures au plus tard. La seconde question s'adresse au Royaume-Uni, je donne la parole à cet effet à M. le juge Greenwood.

Judge GREENWOOD: Thank you, Mr. President.

Mr. President, during the course of its response this afternoon to Judge Bennouna's question, the Marshall Islands referred to certain documents not previously put before the Court. Does the United Kingdom consider that these documents bear upon the existence of a dispute, in the sense in which that term is used in the jurisprudence of the Court?

Thank you.

Le PRESIDENT : Merci. Le texte de la question sera communiqué aux Parties sous forme écrite dès que possible. Le Royaume-Uni est invité à fournir sa réponse par écrit au plus tard le mercredi 23 mars à 18 heures. Les Iles Marshall pourront présenter des observations écrites sur la réponse du Royaume-Uni le 30 mars à 18 heures au plus tard.

Cela nous amène à la fin des audiences consacrées aux plaidoiries des Parties sur les exceptions préliminaires soulevées par le Royaume-Uni en l'affaire des *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni)*. Je tiens à remercier les agents, conseils et avocats des deux Parties pour l'assistance qu'ils ont apportée à la Cour par leurs exposés oraux. Je demande aux agents de rester à la disposition de la Cour pour toutes informations ou renseignements dont la Cour pourrait avoir besoin.

Sous cette réserve, je déclare close la procédure orale sur les exceptions préliminaires soulevées par le Royaume-Uni en la présente affaire. La Cour se retirera à présent pour délibérer. Les Parties seront informées en temps utile par le greffier de la date à laquelle la Cour rendra son arrêt en séance publique.

Je vous remercie. L'audience est levée.

L'audience est levée à 16 h 40.

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