INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT

(MARSHALL ISLANDS *v.* UNITED KINGDOM)

PRELIMINARY OBJECTIONS

JUDGMENT OF 5 OCTOBER 2016

2016

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

OBLIGATIONS RELATIVES À DES NÉGOCIATIONS CONCERNANT LA CESSATION DE LA COURSE AUX ARMES NUCLÉAIRES ET LE DÉSARMEMENT NUCLÉAIRE

(ÎLES MARSHALL c. ROYAUME-UNI)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 5 OCTOBRE 2016

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Historical background — Disarmament activities of the United Nations — Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 — Court's 8 July 1996 Advisory Opinion on nuclear weapons.

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JUDGMENT

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.

In the case regarding obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament,

between

the Republic of the Marshall Islands,

represented by

H.E. Mr. Tony A. deBrum, Minister for Foreign Affairs of the Republic of the Marshall Islands,

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,
Mr. Nicholas Grief, Professor of Law, University of Kent, member of the English Bar,
Mr. Luigi Condorelli, Professor of International Law, University of Florence, Honorary Professor of International Law, University of Geneva,
Mr. Paolo Palchetti, Professor of International Law, University of Macerata,
Mr. John Burroughs, New York,
Ms Christine Chinkin, Emerita Professor of International Law, London School of Economics, member of the English Bar,
Mr. Roger S. Clark, Board of Governors Professor, Rutgers Law School, New Jersey,

as Counsel and Advocates;

Mr. David Krieger, Santa Barbara,
Mr. Peter Weiss, New York,
Mr. Lynn Sarko, Attorney, Seattle,

as Counsel;

Ms Amanda Richter, member of the English Bar,
Ms Sophie Elizabeth Bones, LL.B., LL.M.,
Mr. J. Dylan van Houcke, LL.B., LL.M., Ph.D. Candidate, Birkbeck, University of London,
Mr. Loris Marotti, Ph.D. Candidate, University of Macerata,
Mr. Lucas Lima, Ph.D. Candidate, University of Macerata,
Mr. Rob van Riet, London,
Ms Alison E. Chase, Attorney, Santa Barbara,

as Assistants;

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

as Technical Adviser,

and

the United Kingdom of Great Britain and Northern Ireland,

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 to the Foreign and Commonwealth Office,

as Agent;

Ms Catherine Adams, Legal Director at the Foreign and Commonwealth Office,

as Deputy Agent (until 29 September 2016);

Mr. Douglas Wilson, Legal Director at the Foreign and Commonwealth Office,

as Deputy Agent (from 29 September 2016);

Mr. Shehzad Charania, Legal Adviser at the Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands,

as Deputy Agent (until 15 August 2016);

Mr. Philip Dixon, Legal Adviser at the Embassy of the United Kingdom of Great Britain and Northern Ireland in the Kingdom of the Netherlands,

as Deputy Agent (from 15 August 2016);

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,
Ms Jessica Wells, member of the English Bar,

as Counsel and Advocates,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 24 April 2014, the Government of the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland (hereinafter the "United Kingdom" or the "Respondent"), in which it claimed that the Respondent has breached treaty and customary obligations in the following manner:

> "15. The United Kingdom has not pursued in good faith negotiations to cease the nuclear arms race at an early date through comprehensive nuclear disarmament or other measures, and instead is taking actions to improve its nuclear weapons system and to maintain it for the indefinite future.
>
> 16. Similarly, the United Kingdom has not fulfilled its obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control and instead has opposed the efforts of the great majority of States to initiate such negotiations."

In its Application, the Marshall Islands seeks to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by the United Kingdom on 5 July 2004 (deposited with the Secretary-General of the United Nations also on 5 July 2004) and by the Marshall Islands on 15 March 2013 (deposited with the Secretary-General on 24 April 2013).

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of the United Kingdom; and, under paragraph 3 of that Article, he notified all other States entitled to appear before the Court of the Application.

3. On the instructions of the Court, pursuant to Article 43 of the Rules of Court, the Registrar addressed to States parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter the "NPT") the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute of the Court.

4. Since the Court included upon the Bench no judge of the nationality of the Marshall Islands, the latter proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Mohammed Bedjaoui.

5. By an Order of 16 June 2014, the Court fixed 16 March 2015 as the time-limit for the filing of the Memorial of the Marshall Islands and 16 December 2015 for the filing of the Counter-Memorial of the United Kingdom. The Marshall Islands filed its Memorial within the time-limit so prescribed.

6. On 15 June 2015, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, the United Kingdom raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 19 June 2015, the President of the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 15 October 2015 as the time-limit for the presentation by the Marshall Islands of a written statement of its observations and submissions on the preliminary objections raised by the United Kingdom. The Marshall Islands filed such a statement within the time-limit so prescribed, and the case became ready for hearing in respect of the preliminary objections.

7. By a letter dated 26 November 2015, the Government of the Republic of India, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant this request. By letters dated 10 December 2015, the Registrar duly communicated that decision to the Government of India and to the Parties.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objections raised by the United Kingdom were held from Wednesday 9 to Wednesday 16 March 2016, at which the Court heard the oral arguments and replies of:

For the United Kingdom: Mr. Iain Macleod,
Sir Daniel Bethlehem,
Mr. Guglielmo Verdirame,
Ms Jessica Wells.

For the Marshall Islands: H.E. Mr. Tony deBrum,
Mr. Phon van den Biesen,
Mr. Luigi Condorelli,
Ms Laurie B. Ashton,
Ms Christine Chinkin,
Mr. Paolo Palchetti,
Mr. Nicholas Grief.

10. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Each of the Parties submitted comments on the written replies provided by the other, pursuant to Article 72 of the Rules of Court.

*

11. In the Application, the following claims were made by the Marshall Islands:

> "On the basis of the foregoing statement of facts and law, the Republic of the Marshall Islands requests the Court
>
> *to adjudge and declare*
>
> *(a)* that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by failing 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;
>
> *(b)* that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end nuclear arms racing through comprehensive nuclear disarmament or other measures;
>
> *(c)* that the United Kingdom has violated and continues to violate its international obligations under customary international law, by failing 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;
>
> *(d)* that the United Kingdom has violated and continues to violate its international obligations under customary international law, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end nuclear arms racing through comprehensive nuclear disarmament or other measures;
>
> *(e)* that the United Kingdom has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by modernizing, updating and upgrading its nuclear weapons capacity and maintaining its declared nuclear weapons policy for an unlimited period of time, while at the same time failing to pursue negotiations as set out in the four preceding counts; and
>
> *(f)* that the United Kingdom has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by effectively preventing the great majority of non-nuclear-weapon States parties to the Treaty from fulfilling their part of the obligations under Article VI of the Treaty and under customary international law with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.

In addition, the Republic of the Marshall Islands requests the Court

to order

the United Kingdom to take all steps necessary to comply with its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control."

12. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of the Marshall Islands in its Memorial:

"On the basis of the foregoing statement of facts and law, the Republic of the Marshall Islands requests the Court

to adjudge and declare

(a) that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by failing 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;

(b) that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end the nuclear arms race through comprehensive nuclear disarmament or other measures;

(c) that the United Kingdom has violated and continues to violate its international obligations under customary international law, by failing 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;

(d) that the United Kingdom has violated and continues to violate its international obligations under customary international law, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end the nuclear arms race through comprehensive nuclear disarmament or other measures;

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

(f) that the United Kingdom has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by effectively preventing the great majority of non-nuclear-weapon States parties to the Treaty from fulfilling their part of the obligations under Article VI of the Treaty and under customary

international law with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.

In addition, the Republic of the Marshall Islands requests the Court

to order

the United Kingdom to take all steps necessary to comply with its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control."

13. In the preliminary objections, the following submissions were presented on behalf of the Government of the United Kingdom:

"For the reasons set out in this pleading, the United Kingdom requests the Court to adjudge and declare that the claim brought by the Marshall Islands is inadmissible and/or that the Court lacks jurisdiction to address the claim."

In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of the Marshall Islands:

"In consideration of the foregoing, the Republic of the Marshall Islands requests the Court:

— to reject and dismiss the preliminary objections of the United Kingdom; and
— to adjudge and declare:
  (i) that the Court has jurisdiction in respect of the claims presented by the Marshall Islands; and
  (ii) that the Marshall Islands' claims are admissible."

14. In the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the United Kingdom,

at the hearing of 14 March 2016:

"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; and/or
— the claim brought against the United Kingdom by the Marshall Islands is inadmissible."

On behalf of the Government of the Marshall Islands,

at the hearing of 16 March 2016:

"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;

(*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."

* * *

I. Introduction

A. Historical Background

15. Since the creation of the United Nations, and in line with its purposes under Article 1 of the Charter, the issue of disarmament has been central to the Organization's concerns. In this regard, the Charter gives three separate bodies a role in international disarmament efforts: the General Assembly (Art. 11, para. 1), the Security Council (Art. 26) and the Military Staff Committee (Art. 47, para. 1). The General Assembly has been active in the field of international disarmament generally and nuclear disarmament in particular. With respect to international disarmament generally, the General Assembly created the first United Nations Disarmament Commission under the Security Council in 1952 (resolution 502 (VI) of 11 January 1952). In 1978, it held a Special Session on disarmament, at which it established the current United Nations disarmament mechanisms consisting of: the First Committee of the General Assembly, the mandate of which was redefined to deal exclusively with questions of disarmament and related international security questions; a new Disarmament Commission as a subsidiary organ of the General Assembly, composed of all Member States of the United Nations (replacing the United Nations Disarmament Commission created in 1952); and a Committee on Disarmament devoted to negotiations (resolution S-10/2 of 30 June 1978, paras. 117, 118 and 120). The latter was redesignated the Conference on Disarmament with effect from 1984 (General Assembly resolution 37/99 K, Part II, of 13 December 1982; Report of the Committee on Disarmament to the United Nations General Assembly, 1 September 1983, doc. CD/421, para. 21) and now consists of 65 members.

With respect to nuclear disarmament efforts in particular, it may be recalled that, in its very first resolution, unanimously adopted on 24 January 1946, the General Assembly established a Commission to deal with "the problems raised by the discovery of atomic energy" (resolution 1 (I) of 24 January 1946; this Commission was dissolved in 1952 when the first United Nations Disarmament Commission, mentioned above, was established). As early as 1954, the General Assembly also called for a convention on nuclear disarmament (resolution 808 (IX) A of 4 November 1954) and has repeated this call in many subsequent resolutions. In addition, the mechanisms set out above, created by the General Assembly in view

of general international disarmament efforts, have also dealt specifically with questions of nuclear disarmament.

16. By resolution 21 of 2 April 1947, the United Nations Security Council placed a group of Pacific Islands, including those making up the present-day Marshall Islands, under the trusteeship system established by the United Nations Charter, and designated the United States of America as the Administering Authority. From 1946 to 1958, while under this trusteeship, the Marshall Islands was the location of repeated nuclear weapons testing. By resolution 683 of 22 December 1990, the Security Council terminated the Trusteeship Agreement concerning the Marshall Islands. By General Assembly resolution 46/3 of 17 September 1991, the Marshall Islands was admitted to membership in the United Nations.

17. The Respondent is one of the founding Members of the United Nations and a permanent member of the Security Council. The United Kingdom first detonated an atomic device in the Monte Bello Islands off north-western Australia on 3 October 1952 and possesses nuclear weapons.

18. Following extensive negotiations in the 1960s, in which both nuclear-weapon States and non-nuclear-weapon States participated, the NPT was opened for signature on 1 July 1968. It entered into force on 5 March 1970 and was extended indefinitely in 1995. Review conferences have been held every five years since its entry into force, pursuant to Article VIII, paragraph 3, of the NPT. One hundred and ninety-one States have become parties to the NPT; on 10 January 2003, the Democratic People's Republic of Korea announced its withdrawal. The Marshall Islands acceded to the NPT on 30 January 1995. The United Kingdom is a party to the NPT and is one of three Depositary Governments for the Treaty under Article IX; it signed the Treaty on 1 July 1968 and deposited instruments of ratification on 27 November 1968 in London and Washington and on 29 November 1968 in Moscow.

19. The NPT seeks to limit the proliferation of nuclear weapons and provides certain rights and obligations for parties designated as "nuclear-weapon State Part[ies]" and "non-nuclear-weapon State Part[ies]" (including, *inter alia*, the right of all States to develop and use nuclear energy for peaceful purposes, the obligation of nuclear-weapon States parties not to transfer nuclear weapons to any recipient, and the obligation of non-nuclear-weapon States parties not to receive such a transfer). The Preamble to the NPT also declares the intention of the parties "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". In this connection, Article VI of the NPT provides:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the

> nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

For the purposes of the NPT, a "nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967" (Article IX.3). There are five nuclear-weapon States under the NPT: China, France, the Russian Federation, the United Kingdom and the United States of America. In addition, certain other States possess, or are believed to possess nuclear weapons.

20. By resolution 49/75 K of 15 December 1994, the General Assembly requested the International Court of Justice to give an advisory opinion on whether the threat or use of nuclear weapons is permitted in any circumstance under international law. In the reasoning of its Advisory Opinion of 8 July 1996, the Court appreciated "the full importance of the recognition by Article VI of the [NPT] of an obligation to negotiate in good faith a nuclear disarmament" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 99). It added that this obligation went "beyond . . . a mere obligation of conduct" and was an "obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith" (*ibid.*, p. 264, para. 99). The Court stated that "[t]his twofold obligation to pursue and to conclude negotiations formally concerns [all] States parties to the [NPT], or, in other words, the vast majority of the international community", adding that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" (*ibid.*, para. 100). In the conclusions of the Advisory Opinion, the Court unanimously declared 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" (*ibid.*, p. 267, para. 105 (2) F).

21. In its resolution 51/45 M of 10 December 1996, the General Assembly "[u]nderline[d] the unanimous conclusion of the Court 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

> "[c]all[ed] upon all States to fulfil that obligation immediately by commencing multilateral negotiations in 1997 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".

The General Assembly has passed a similar resolution on the follow-up to the Court's Advisory Opinion every year since then. It has also passed numerous other resolutions encouraging nuclear disarmament.

B. Proceedings Brought before the Court

22. On 24 April 2014, the Marshall Islands filed, in addition to the present Application (see paragraph 1 above), separate applications against the eight other States which, according to the Marshall Islands, possess nuclear weapons (China, the Democratic People's Republic of Korea, France, India, Israel, Pakistan, the Russian Federation and the United States of America), also alleging a failure to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. The cases against India, Pakistan and the United Kingdom were entered in the Court's General List, as the Applicant had invoked these States' declarations recognizing the compulsory jurisdiction of the Court (pursuant to Article 36, paragraph 2, of the Statute of the Court) as a basis for jurisdiction. In the applications against China, the Democratic People's Republic of Korea, France, Israel, the Russian Federation and the United States of America, the Marshall Islands invited these States to accept the jurisdiction of the Court, as contemplated in Article 38, paragraph 5, of the Rules of Court, for the purposes of the case. None of these States has done so. Accordingly, these applications were not entered in the Court's General List.

23. The United Kingdom has raised five preliminary objections to the jurisdiction of the Court or the admissibility of the Application. According to the first preliminary objection, the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a justiciable dispute between the Parties with respect to an alleged failure to pursue negotiations in good faith towards the cessation of the nuclear arms race at an early date and nuclear disarmament. In its second and third preliminary objections, the United Kingdom argues that the Court's jurisdiction is precluded by reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute. The fourth preliminary objection is based on the absence from the proceedings of third parties, in particular the other States possessing nuclear weapons, whose essential interests are said to be engaged in the proceedings. According to the fifth preliminary objection, the Court should decline to exercise its jurisdiction because a judgment on the merits in the present case would have no practical consequence.

24. In its written observations and its final submissions presented during the oral proceedings, the Marshall Islands requested the Court to reject the preliminary objections of the United Kingdom in their entirety, and accordingly to find that it has jurisdiction and that the Application is admissible (see paragraphs 13 and 14 above).

25. The Court will first consider the preliminary objection based on the absence of a dispute.

* * *

II. First Preliminary Objection: Absence of a Dispute

26. In its first preliminary objection, the United Kingdom argues that, on the date of the filing of the Marshall Islands' Application, there was no "justiciable dispute" between the Marshall Islands and the United Kingdom. Consequently, it considers that the Court lacks jurisdiction to address all of the Marshall Islands' claims and/or that those claims are inadmissible.

27. The United Kingdom contends that there is a principle of customary international law which requires that a State intending to invoke the responsibility of another State must give notice of its claim to that State, such notice being a condition of the existence of a dispute. It asserts that this principle is reflected in Article 43 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles on State Responsibility") and provisions to that effect can be found in various compulsory dispute settlement arrangements under international law. The United Kingdom argues that prior notification of claims was also held by the Court to be a precondition to the existence of a dispute in both the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* and the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*.

28. The United Kingdom asserts that these requirements have not been satisfied in the present case. With regard to the two statements particularly relied upon by the Marshall Islands, the United Kingdom maintains that neither the content of these statements nor the circumstances in which they were made provide any evidence that a dispute existed between the Parties at the date on which the Application was filed. The first statement was made on 26 September 2013 at the High-Level Meeting of the General Assembly on Nuclear Disarmament, when the Minister for Foreign Affairs of the Marshall Islands "urge[d] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". The Respondent observes that the statement did not specifically mention the United Kingdom, and argues that it could not in any way be viewed as invoking the latter's responsibility under international law for any breach of the NPT or of customary international law. The second statement, also of a general nature, was made on 13 February 2014, just over two months before the filing of the Application before the Court, at the Second Conference on the Humanitarian Impact of Nuclear Weapons held in Nayarit, Mexico, and reads as follows:

> "[T]he 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."

The United Kingdom observes that it was not present at this conference, and contends that the Marshall Islands took no steps to bring this statement to its attention. The United Kingdom adds that the Marshall Islands has had other opportunities to notify it of the alleged dispute but did not do so.

29. The Respondent argues that, at the date of the filing of the Application, the Marshall Islands had not taken the most basic steps to notify the United Kingdom of its claim, or any aspect of the alleged dispute or even disagreement between them. Furthermore, the United Kingdom contends that it is not enough that there is a public record of views that are not the same; there needs to be an exchange between the parties to a dispute. Accordingly, it argues, there was no conflict of legal positions between the Marshall Islands and the United Kingdom, and thus no "justiciable dispute". The United Kingdom adds that the filing of an application cannot amount both to notice and the crystallization of an incipient dispute. Similarly, post-application conduct cannot on its own establish the existence of a "justiciable dispute" between the Parties at the time of the seisin of the Court; it may only be used to define the scope or subject-matter of the dispute.

*

30. The Marshall Islands contends that the first preliminary objection of the United Kingdom should be rejected.

31. The Marshall Islands asserts that there is no general principle imposing on a State that intends to institute proceedings the obligation to notify the other State of this intention or of its claims prior to seising the adjudicatory body. It argues that Article 43 of the ILC Articles on State Responsibility is irrelevant as that provision does not relate to the institution of proceedings before an international court or tribunal. In support of that argument, the Marshall Islands refers to the ILC's Commentary to Article 44, which indicates that the ILC Articles on State Responsibility "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases". It further submits that the United Kingdom's attempt to infer a principle of general application from specific provisions in various international instruments is untenable and does not find any support in the case law of international courts and tribunals.

32. The Marshall Islands adds that the Court has consistently denied the existence of a general requirement of prior notice of the intention to institute proceedings, and that the *Belgium* v. *Senegal* and *Georgia* v. *Rus-*

sian Federation cases do not support the United Kingdom's allegation of such a prior notification requirement. The Marshall Islands also avers that the Court has never recognized the existence of a general requirement of prior notification of claims, and that a perusal of its case law reveals that it has always avoided setting overly rigid parameters to determine the existence of a dispute, in particular allowing for the possibility that a dispute can "crystallize" as a consequence of the claim made by a State against the consistent course of conduct of another State (e.g., *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29).

33. In the Marshall Islands' view, the existence of a dispute is evidenced by the opposing attitudes of the Parties with respect to the question of the United Kingdom's compliance with Article VI of the NPT and the corresponding customary law obligations. First, the Marshall Islands avers that it clearly communicated its claim to all States possessing nuclear weapons — including the United Kingdom — through its 13 February 2014 statement at the Nayarit conference (see paragraph 28 above). According to the Marshall Islands, the United Kingdom must have been aware of this statement — even if it did not attend the relevant meeting — because all statements and records therefrom were publicly available and easily accessible, including on the Internet. Subsidiarily, the Marshall Islands contends that even if one were to accept the test of prior notice of the claim suggested by the United Kingdom (which the Applicant interprets as requiring that the Respondent "be aware of the claim of the other Party so as to be given the opportunity to respond to such claim"), this statement would fulfil that requirement.

34. The Marshall Islands further argues that it also gave notice of its claim by means of its Application.

35. For the Marshall Islands, the opposition of the United Kingdom to this claim is evidenced by the Respondent's own conduct. It adds that the statements made by the United Kingdom in the preliminary objections and during the hearings show that it continues to oppose the merits of the claim. Moreover, the Marshall Islands refers to the Parties' respective voting records in multilateral fora as demonstrating the opposition of views between them. Finally, according to the Marshall Islands, such opposition results from the fact that the United Kingdom has engaged, and continues to engage, in a course of conduct alleged to be in breach of international law, as well as from statements of the Government of the United Kingdom in parliamentary debates in 2006 and 2010, stating that the renewal of its nuclear deterrent was consistent with its obligations under the NPT.

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36. Under Article 38 of the Statute, the function of the Court is to decide in accordance with international law disputes that States submit to it. Under Article 36, paragraph 2, of the Statute, the Court has jurisdiction in all "legal disputes" that may arise between States parties to the Statute having made a declaration in accordance with that provision. The existence of a dispute between the Parties is thus a condition of the Court's jurisdiction.

37. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

38. The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure (cf. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) [Germany* v. *Poland], Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11). Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109). Moreover, "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition" for the existence of a dispute (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72). Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 297, para. 39).

39. Whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nica-*

ragua v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50). For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 443-445, paras. 50-55), as well as any exchanges made in multilateral settings (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 94, para. 51, p. 95, para. 53). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*, p. 100, para. 63).

40. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, paras. 71 and 73). As the Court has affirmed,

> "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* . . . [T]he position or the attitude of a party can be established by inference, whatever the professed view of that party." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.)

In particular, the Court has previously held that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30, citing *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

41. The evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court (see paragraph 37 above). As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objec-*

tions, Judgment, I.C.J. Reports 2011 (I), p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104).

42. In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). Indeed, when it is stated in Article 38, paragraph 1, of the Court's Statute that the Court's function is "to decide in accordance with international law such disputes as are submitted to it", this relates to disputes existing at the time of their submission.

43. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22 and p. 104, para. 32), to clarify its subject-matter (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26) or to determine whether the dispute has disappeared as of the time when the Court makes its decision (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58).

However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 444-445, paras. 53-55). If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

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44. The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament (see paragraph 16 above). But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists (*Border and Transborder Armed*

Actions (Nicaragua v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 75, para. 16).

45. As noted above at paragraphs 27-29, the United Kingdom relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. The United Kingdom lays particular emphasis on Article 43 of the ILC Articles on State Responsibility, which requires an injured State to "give notice of its claim" to the allegedly responsible State. Article 48, paragraph 3, applies that requirement *mutatis mutandis* to a State other than an injured State which invokes responsibility. However, the Court notes that the ILC's commentary specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals" (see ILC Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, United Nations doc. A/56/10, 2001, paragraph 1 of the Commentary on Article 44, pp. 120-121). Moreover, the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified (see paragraph 38 above).

46. The Marshall Islands seeks to demonstrate that it had a dispute with the United Kingdom in essentially four ways. First, it refers to its own statements, as formulated in multilateral fora. Secondly, it argues that the very filing of the Application, as well as the positions expressed by the Parties in the current proceedings, show the existence of a dispute between the Parties. Thirdly, it relies on the United Kingdom's voting records on nuclear disarmament in multilateral fora. Fourthly, it relies on the United Kingdom's conduct both before and after the filing of the Application.

47. The Marshall Islands accepts that no bilateral diplomatic exchanges have taken place on these issues. This is despite the fact that a number of bilateral exchanges, including visits by senior United Kingdom personnel to the Marshall Islands, took place in the period prior to the filing of the Application at which such issues could have been raised.

48. The Marshall Islands refers to a number of statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. As the Court has

already explained, the opposition of the Parties' views could also be demonstrated by exchanges made in multilateral settings (see paragraph 39 above). In such a setting, however, the Court must give particular attention, *inter alia*, to the content of a party's statement and to the identity of the intended addressees, in order to determine whether that statement, together with any reaction thereto, show that the parties before it held "clearly opposite views" (see paragraphs 37 and 39 above). The question in this case is therefore whether the statements invoked by the Marshall Islands are sufficient to demonstrate the existence of such opposition.

49. The Marshall Islands relies on the statement made at the High-Level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, this statement is formulated in hortatory terms and cannot be understood as an allegation that the United Kingdom (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. Moreover, a statement can give rise to a dispute only if it refers to the subject-matter of a claim "with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). While the Court reached that conclusion in the context of a compromissory clause, the same reasoning applies to a dispute over any obligation regardless of the underlying jurisdictional basis alleged, since the Court made clear that it was dealing with the requirements of a dispute in general (*ibid.*, p. 84, para. 29). The 2013 statement relied upon by the Marshall Islands does not meet these requirements.

50. The statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 (see paragraph 28 above) goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. However, the United Kingdom was not present at the Nayarit conference. Further, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons, and while this statement con-

tains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of the United Kingdom that gave rise to the alleged breach. Such a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was made, that statement did not call for a specific reaction by the United Kingdom. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and the United Kingdom, a specific dispute as to the scope of Article VI of the NPT and the asserted corresponding customary international law obligation, or as to the United Kingdom's compliance with such obligations.

51. None of the other more general statements relied on by the Marshall Islands in this case supports the existence of a dispute, since none articulates an alleged breach by the United Kingdom of the obligation enshrined in Article VI of the NPT or the corresponding customary international law obligation invoked by the Marshall Islands.

52. In all the circumstances, on the basis of those statements — whether taken individually or together — it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations.

53. Secondly, the Marshall Islands argues that the very filing of the Application could suffice to establish the existence of a dispute: "nothing excludes the possibility of conceiving the seisin of the Court as an appropriate and perfectly legitimate mode by which the injured State 'notifies its claim' to the State whose international responsibility is invoked". It also points to other statements made in the course of the proceedings by both Parties as evidence of their opposition of views.

54. The Marshall Islands relies on three cases in support of its contention that the statements made by the Parties during the proceedings may serve to evidence the existence of a dispute (see paragraph 32 above). However, these cases do not support this contention. In the case concerning *Certain Property*, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The reference to subsequent materials in the *Cameroon* v. *Nigeria* case related to the scope of the dispute, not to its existence (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its

Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27-29). Instead, the issues the Court focused on were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. As stated above, although statements made or claims advanced in or even subsequently to the application may be relevant for various purposes — notably in clarifying the scope of the dispute submitted — they cannot create a dispute *de novo*, one that does not already exist (see paragraph 43 above).

55. Thirdly, the Marshall Islands refers to the Parties' voting records in multilateral fora on nuclear disarmament (see paragraph 35 above). For example, in response to a question from a Member of the Court, it referred to General Assembly resolution 68/32 of 5 December 2013, entitled "Follow-up to the 2013 High-Level Meeting of the General Assembly on Nuclear Disarmament". Paragraph 2 of that resolution called for "urgent compliance with the legal obligations and the fulfilment of the commitments undertaken on nuclear disarmament". In paragraph 4, the General Assembly called for "the urgent commencement of negotiations in the Conference on Disarmament for the early conclusion of a comprehensive convention on nuclear weapons". The resolution was passed by 137 votes to 28 with 20 abstentions. The Marshall Islands voted in favour of the resolution; the United Kingdom voted against.

56. In the Court's view, considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution. The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute in some circumstances, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.

57. Fourthly, the Marshall Islands invokes the United Kingdom's conduct in declining to co-operate with certain diplomatic initiatives, in failing to initiate any disarmament negotiations, and in replacing and

modernizing its nuclear weapons, together with statements that its conduct is consistent with its treaty obligations. According to the Marshall Islands, this conduct and assertion of legality, juxtaposed with statements of the Marshall Islands containing a complaint aimed precisely at that conduct and the legal position of the United Kingdom, demonstrate the existence of a dispute as to the scope of and compliance with its obligations under Article VI of the NPT and a corresponding customary international law obligation.

The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views (see paragraphs 37, 39 and 40 above). In this regard, conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition (see paragraph 40 above). However, as the Court has previously concluded (see paragraphs 49-52 above), in the present case none of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding the United Kingdom's conduct. On the basis of such statements, it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations. In this context, the conduct of the United Kingdom does not provide a basis for finding a dispute between the two States before the Court.

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58. The Court therefore concludes that the first preliminary objection made by the United Kingdom must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. Consequently, it is not necessary for the Court to deal with the other objections raised by the United Kingdom.

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59. For these reasons,

THE COURT,

(1) By eight votes to eight, by the President's casting vote,

Upholds the first preliminary objection to jurisdiction raised by the United Kingdom of Great Britain and Northern Ireland, based on the absence of a dispute between the Parties;

IN FAVOUR: *President* Abraham; *Judges* Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

AGAINST: *Vice-President* Yusuf; *Judges* Tomka, Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; *Judge* ad hoc Bedjaoui;

(2) By nine votes to seven,

Finds that it cannot proceed to the merits of the case.

IN FAVOUR: *President* Abraham; *Judges* Owada, Tomka, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

AGAINST: *Vice-President* Yusuf; *Judges* Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; *Judge* ad hoc Bedjaoui.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of October, two thousand and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of the Marshall Islands and the Government of the United Kingdom of Great Britain and Northern Ireland, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

President ABRAHAM appends a declaration to the Judgment of the Court; Vice-President YUSUF appends a dissenting opinion to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges BENNOUNA and CANÇADO TRINDADE append dissenting opinions to the Judgment of the Court; Judges XUE, DONOGHUE and GAJA append declarations to the Judgment of the Court; Judges SEBUTINDE and BHANDARI append separate opinions to the Judgment of the Court; Judges ROBINSON and CRAWFORD append dissenting opinions to the Judgment of the Court; Judge *ad hoc* BEDJAOUI appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.

DECLARATION OF PRESIDENT ABRAHAM

[English Original Text]

1. I voted in favour of the present Judgment, in which the Court finds that it cannot examine the merits of the Marshall Islands' Application against the United Kingdom, because I believe such a finding to be fully consistent with the Court's jurisprudence relating to the requirement for a "dispute" to exist between the parties, as established by a series of Judgments handed down in recent years, in particular the Judgment of 1 April 2011 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* and the Judgment of 17 March 2016 in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*.

2. In my view, that jurisprudence is clearly and accurately set out in paragraphs 36 to 43 of the Judgment.

3. It could be summarized in the following three propositions.

First, the existence of a dispute between the parties to a case is not only a condition for the exercise of the Court's jurisdiction, but, more fundamentally, a condition for the very existence of that jurisdiction.

Second — and this proposition largely follows on from the previous one — in order to determine whether that condition has been met, the date to be referred to is not that on which the Court delivers its judgment, but the date of the institution of the proceedings, elements subsequent to this latter date possibly allowing to confirm the existence of the dispute, but not to establish it.

Finally, for the Court to find that a dispute exists between the parties on the relevant date, it is necessary for that dispute to have been revealed by exchanges between the parties — in whatever form — prior to that date, in circumstances such that each party was — or must have been — aware that the views of the other party were opposed to its own. In particular, the respondent must not discover the existence of a claim against it by the applicant in the document instituting proceedings; it has to have been informed of it beforehand.

4. In the past, it does not seem to me that the Court was always so rigorous as regards the condition relating to the existence of a dispute.

In truth, prior to 2011, the Court's jurisprudence was not completely unequivocal and it would certainly be possible to find decisions going in

fairly varied directions. Nevertheless, a number of precedents that reflect a more flexible and pragmatic approach could be cited: I myself mentioned them in my separate opinion in the *Georgia* v. *Russian Federation* case (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, separate opinion of Judge Abraham, p. 224).

5. That more flexible approach could be understood as being based on the idea that the existence of a dispute was not, strictly speaking, a condition for the Court's jurisdiction itself, but rather a condition for the Court's exercising of its jurisdiction; on the ensuing conclusion that it had to be determined whether that condition was met on the date of the Court's judgment and that the date of the institution of proceedings was not particularly relevant in this regard; and that, accordingly, since it was necessary and sufficient for the dispute to exist on the date of the Court's judgment, the positions expressed by the parties in the actual course of the proceedings had to be taken into account to the same extent as the exchanges that had taken place between them — if any — before the proceedings started.

6. In my view, the Court began to depart from this approach in its Judgment in the *Georgia* v. *Russian Federation* case, which marks a shift, albeit still an ambiguous one, with regard to the conditions that are necessary in order to establish that a dispute exists.

I expressed my concern, since I was not in favour of such a shift, in my separate opinion appended to that Judgment (cited above).

7. It was with its Judgment in the *Belgium* v. *Senegal* case (cited above) that the Court clearly set the new course of its jurisprudence, by declaring that it had no jurisdiction over one of Belgium's claims (the one relating to an alleged obligation of Senegal, under customary international law, to prosecute or extradite Hissène Habré for "international crimes" other than acts of torture). The reason given by the Court to justify its lack of jurisdiction was that Belgium, in the protests it addressed to Senegal prior to the institution of proceedings, had made no mention of any such legal claim. Yet the positions on the merits adopted by the parties before the Court made it clear that a dispute existed between them on the matter at issue; the Court, however, declined to take those into account.

8. I voted against the point in the operative part of the *Belgium* v. *Senegal* Judgment in which the Court found that it lacked jurisdiction to entertain the above-mentioned claim on the grounds that there was no dispute between the parties with regard to the subject-matter of that claim on the date the proceedings were instituted. In a separate opinion appended to the Judgment (*I.C.J. Reports 2012 (II)*, separate opinion of Judge Abraham, p. 471), I explained the reasons for that vote, regretting that the Court had not referred to the date of its own Judgment in order to determine whether the condition was met, which would have led it to form an opposite conclusion.

9. I nonetheless take the view that even if a judge has expressed reservations, or indeed his disagreement, at the time the Court established its

jurisprudence, once the Court has done so, he must consider himself to be bound by it thereafter (not legally, of course, but morally), just as much as if he had agreed with it.

10. It is indeed a judicial imperative which the Court has always recognized, and which in my view is incumbent upon all its Members, that it must be highly consistent in its jurisprudence, both in the interest of legal security and to avoid any suspicion of arbitrariness.

11. It is true that precedent is not inviolate, and that the Court always has the power to change course or overturn its jurisprudence if, exceptionally, it considers that there are compelling reasons to do so, for example because of a change in the general context surrounding some particular judicial solution.

12. I am not sure that the Court was right, with its *Georgia* v. *Russian Federation* and especially *Belgium* v. *Senegal* Judgments, to make a significant change to its earlier approach to the condition relating to the existence of a dispute. But given that it did so by adopting a clear and well-considered solution, there would be no justification, to my mind, for it to depart from that course now.

13. That is why, in the *Nicaragua* v. *Colombia* case (cited above), I joined with the majority (in that regard, the unanimity) in voting in favour of point (1) *(c)* of the operative clause, which applied the same criteria as in the *Belgium* v. *Senegal* Judgment.

And I also agree with the Judgment in the present case in that it is strictly applying those criteria.

14. As regards the application in this case of the — now settled — jurisprudence relating to the existence of a dispute on the date of the institution of proceedings, it is my view that, for the reasons set out in paragraphs 45 to 57 of the Judgment, it has not been demonstrated that a dispute had clearly manifested itself between the Parties, on the relevant date, on the question forming the subject-matter of the Application submitted to the Court by the Marshall Islands.

(Signed) Ronny Abraham.

DISSENTING OPINION OF VICE-PRESIDENT YUSUF

Judgment fails to distinguish three cases brought by the Marshall Islands — Different facts and arguments relevant to each case — Existence of a dispute — Matter for objective determination — Positively opposed juridical views required — Subjective criterion of "awareness" not a condition — "Awareness" has no basis in jurisprudence of Court — It also undermines sound administration of justice — Incipient dispute must exist prior to application to the Court — Dispute can crystallize during proceedings — Subject-matter of a dispute must be defined — At issue is the United Kingdom's compliance with its obligation under Article VI of the Nuclear Non-Proliferation Treaty — Evidence shows nascent dispute prior to application.

I. Introduction

1. I find myself unable to subscribe to the decision of the Court which upholds the first preliminary objection of the United Kingdom based on the absence of a dispute. The reasons for my dissent are succinctly set forth in the following paragraphs.

2. First, the Judgment fails to distinguish the objections raised by the United Kingdom, and its arguments regarding the inexistence of a dispute with the Republic of the Marshall Islands, from those in the two other cases of the *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*. The issues of fact and law underlying the objections raised were quite different in the three cases. But the Judgments treat the three cases as though they were almost identical and argued in the same manner by the respondent States. I will discuss in this opinion the distinctive features and the facts underlying the *Marshall Islands* v. *United Kingdom* case and the preliminary objections submitted by the United Kingdom.

3. Secondly, I disagree with the introduction by the majority of the subjective criterion of "awareness" in the determination of the existence or inexistence of a dispute. This is a clear — and undesirable — departure from the consistent jurisprudence of the Court on this matter.

4. Thirdly, it is difficult in my view to determine the existence or inexistence of a dispute without specifying its subject-matter. The Judgment does not clearly identify or circumscribe the subject-matter of the dispute which is claimed to exist between the Parties.

5. Finally, I am of the view that an incipient dispute existed between the Marshall Islands and the United Kingdom prior to the submission of the Application by the former, and that this dispute further crystallized during the proceedings before the Court. The evidence on which this conclusion is based is examined in Section VI below.

II. The Distinctive Features of the *Marshall Islands* v. *United Kingdom* Case with regard to the Existence of a Dispute

6. The first distinctive feature of this case, as compared to the other two cases submitted by the Marshall Islands against India and Pakistan respectively, which deserves to be noted is that both the Marshall Islands and the United Kingdom are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the former having acceded to it in 1995, while the latter ratified it in 1968. The proceedings instituted by the Marshall Islands against the United Kingdom are about the interpretation and application of this Treaty, and in particular Article VI thereof.

7. Article VI reads as follows:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

8. The Marshall Islands contends that the United Kingdom failed to pursue nuclear disarmament negotiations in good faith, and has consequently violated its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. It affirms that it made its views known to the United Kingdom through, among others, its statement at the Second Conference on the Humanitarian Impact of Nuclear Weapons held in Nayarit, Mexico, on 13 February 2014. At this conference, it expressed its belief that States possessing nuclear arsenals are failing to fulfil their legal obligations regarding nuclear disarmament negotiations, and declared that the "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" (Memorial of the Marshall Islands (MMI), para. 99). The Marshall Islands requests the Court to order the United Kingdom to take all steps necessary to comply with those obligations, including through "the pursuit, by initiation, if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control" (MMI, para. 240).

9. Other distinguishing features relate to the main arguments put forward by the United Kingdom in its preliminary objections to claim the inexistence of a dispute between the Parties. In the first place, the United Kingdom contended that:

> "on the date of the filing of the Marshall Islands' Application, there was no justiciable dispute between the United Kingdom and Marshall Islands in relation to the United Kingdom's obligations, whether arising under the NPT or under customary international law, to pursue negotiations in good faith on effective measures of nuclear disarmament" (Preliminary Objections of the United Kingdom (POUK), para. 26).

Secondly, the United Kingdom asserted that "no legal dispute can be said to exist where the State submitting the dispute has given no notice thereof to the other State" (POUK, para. 27).

10. These arguments are clearly distinguishable from those advanced by India and Pakistan in the two other cases under consideration by the Court with respect to the Applications by the Marshall Islands. The issues of fact and law relating to the existence of the dispute are also different, but I will deal with those below in paragraphs 48 to 60. Two elements of the first argument deserve to be highlighted here: the use of the old concept of "justiciable dispute", and the requirement that the dispute must have existed on the date of the filing of the Application by the Marshall Islands. The Judgment addresses the second element, which I will also deal with in paragraphs 33 to 41 below, but is totally silent on the unusual use by the United Kingdom of the old and controversial concept of "justiciable dispute", which had some currency in international law literature in the late nineteenth and early twentieth century.

11. At that time, "non-justiciable" disputes were used to denote either political disputes, as opposed to legal ones, or disputes generally unsuitable for juridical settlement either because adjudication would not provide a genuine settlement or because the dispute was not about the interpretation or application of existing international law. The United Kingdom has not explained, during the proceedings before the Court, why it had decided to unearth this legal relic for the specific purposes of this case, but it might be reasonable to assume that this has much to do with the subject-matter of the Application by the Marshall Islands, namely the obligation contained in the Treaty on the Non-Proliferation of Nuclear Weapons to pursue negotiations on nuclear disarmament.

12. Interestingly, it might be recalled that the Institute of International Law, at its meeting in Grenoble in 1922, adopted the following resolution:

> "1. All disputes, whatever their origin and character, are, as a general rule, and subject to the following reservations, susceptible to judicial settlement or arbitral decision.

2. At the same time, when in the opinion of the defendant State, the dispute is not susceptible of being settled judicially, the preliminary question, whether it is or is not justiciable, is to be submitted to the Permanent Court of international Justice, which will decide in accordance with its ordinary procedure."

13. If it was the intention of the respondent State in this case to signal to the Court that the dispute submitted to it by the applicant was not susceptible of being settled judicially, that signal went undetected by the Court, which has not at all taken up the issue of "non-justiciable" disputes in its analysis of the preliminary objection of the United Kingdom. It is indeed a pity that the Court missed the opportunity to say something about the use of this concept in proceedings before it in the twenty-first century. It could have at least referred in this context to its Statute, and in particular to Article 36, paragraph 2, which contains a list of categories of legal disputes in respect of which the Court may exercise its jurisdiction.

14. The other distinctive argument presented by the United Kingdom on the inexistence of a dispute with the Marshall Islands is the absence of notice by the latter to the United Kingdom authorities prior to the institution of judicial proceedings. Such notice is, in the view of the United Kingdom, a condition of the existence of a legal dispute over which the Court may exercise its jurisdiction. The Judgment of the Court correctly notes that "the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides" (Judgment, para. 45).

With regard to Article 43 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), the Judgment refers to the commentary on Article 44, paragraph 1, which specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals" *(ibid.)*.

15. Having rejected the requirement of notice for the existence of a dispute, the Judgment unfortunately raises "awareness" to a precondition for the existence of a dispute. This clearly contradicts the jurisprudence of the Court on the concept of a dispute and the objective determination of its existence by the Court.

III. The Concept of a Dispute and the New "Awareness" Test

16. The jurisdiction of the Court is to be exercised in contentious cases only in respect of legal disputes submitted to it by States. This case was

submitted to the Court on the basis of Article 36, paragraph 2, of the Statute. This provision does not define what is meant by a "legal dispute"; it therefore falls to the Court not only to define it, but also to determine its existence or inexistence in a case such as this one before proceeding to the merits.

17. The jurisprudence of the Court is replete with such definitions. The first one, which is still frequently cited by the Court, was in the *Mavrommatis Palestine Concessions* case, in which the Court stated that: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) It has since then, however, been further elaborated and enriched by subsequent jurisprudence.

18. The Court has clearly established in its jurisprudence that: "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). It has also observed, in elaborating further on the definition given by the PCIJ in the *Mavrommatis* case, that:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (*South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.)

19. More recently, the Court stated in *Georgia* v. *Russian Federation* that: "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30).

20. Notwithstanding this jurisprudence of the Court, it is stated in paragraph 41 of the Judgment that: "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant". The Judgment claims that this requirement is reflected "in previous decisions of the Court in which the existence of a dispute was under consideration", and invokes as authority for this statement two judgments, namely the Judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* and the *Application of the Inter-*

national Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation)* (Judgment, para. 41).

21. Neither of the two referenced Judgments provides support for a subjective requirement of "awareness" by the respondent in the determination of the existence of a dispute. In the *Alleged Violations* Judgment on preliminary objections, the Court determined that a dispute existed on the basis of statements made by the "highest representatives of the Parties" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73). The Court simply stated as a matter of fact that Colombia was aware that its actions were positively opposed by Nicaragua. "Awareness" was not identified as a criterion for the existence of a dispute, nor was it treated as such by the Court.

22. Similarly, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Court merely noted that Russia was or was not aware of the position taken by Georgia in certain documents or statements. It did not identify "awareness" as a requirement for the existence of a dispute at any point in the Judgment nor was this implicit in the Court's reasoning (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 117-120, paras. 106-113).

23. It is indeed the first time that such a subjective element has been introduced into the assessment by the Court of the existence of a dispute. As pointed out above, the Court's jurisprudence has always viewed the existence of a dispute as an objective matter. The Court has underlined on many occasions that the determination of the existence of a dispute is a "matter . . . of substance, not of form" (see, for example, *ibid.*, p. 84, para. 30). The function of the Court is to determine the existence of a conflict of legal views on the basis of the evidence placed before it and not to delve into the consciousness, perception and other mental processes of States (provided they do possess such cerebral qualities) in order to find out about their state of awareness. Moreover, I find it contradictory that the Court should reject notice and notification as a condition of the existence of a dispute, but then raise to a precondition of such existence the subjective element of awareness. How is such "awareness" to be created if not through notification or some sort of notice?

24. The introduction of an "awareness" test into the determination of the existence of a dispute would not only go against the consistent jurisprudence of the Court; it would also undermine judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute. If a subjective element or a formalistic requirement such as "awareness" is to be demanded as a condition for the

existence of a dispute, the applicant State may be able to fulfil such a condition at any time by instituting fresh proceedings before the Court. The respondent State would, of course, be aware of the existence of the dispute in the context of these new proceedings. It is to avoid exactly this kind of situation that the Permanent Court of International Justice observed in the *Polish Upper Silesia* case that: "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

25. More recently, in the *Military and Paramilitary Activities in and against Nicaragua* case *(Nicaragua* v. *United States of America)*, the Court stated that: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83.)

26. Thus, in those circumstances where an applicant State may be entitled to bring fresh proceedings to fulfil an initially unmet formal condition, it is not in the interests of the sound administration of justice to compel it to do so (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, para. 87). The introduction of a test of "awareness" constitutes an open invitation to the applicant State to institute such proceedings before the Court, having made the respondent State aware of its opposing views.

27. The existence of a dispute has to stand objectively by itself. What matters is that there is a positive opposition of juridical viewpoints, a disagreement on a point of law or fact. It is not for both parties to define or to circumscribe the dispute before it comes to the Court, except when drawing up a *compromis*. In all other instances it is the task of the Court to do so. Nor is it a legal requirement for the existence of a dispute that the applicant State provide prior notice or raise awareness of the respondent before coming to the Court.

28. The positively opposed legal viewpoints may consist of a claim by one party, which is contested or rejected by the other, or by a course of conduct of one party which is met by the protest or resistance of another party (see *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*; dissenting opinion of Judge Morelli, p. 567, para. 2). In the latter case, the dispute may be considered to be only at an incipient stage until such time as the State whose conduct is protested is afforded an opportunity either to reject the protest or to accede to the protesting States' demands and consequently change its conduct. The institution of proceedings before

the Court may, however, result in the subsequent crystallization of the nascent dispute if the juridical viewpoints of the parties in relation to the subject-matter of the dispute continue to be positively opposed (see paragraphs 39-40 below).

29. Thus, what matters is the presence of the constitutive elements of a legal dispute susceptible of adjudication by the Court in the form of two conflicting legal views, or legal positions positively opposed to each other, which are manifested by the parties with respect to the subject-matter of the dispute and which may be subsequently defined and argued by the parties before the Court. It is the function of the Court, as a judicial organ, to ascertain the existence of such conflicting legal views.

30. Nevertheless, as the Court stated in its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*:

> "where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty" (*I.C.J. Reports 1988*, p. 28, para. 38).

31. Similarly, the Court held previously that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). Thus, the absence of a reaction in the face of events, such as a protest or a complaint that call for a reaction, may be considered to give rise to an incipient dispute.

32. In the present case, it appears from the evidence on the record, which is examined in paragraphs 48 to 60 below, that there was the start of a dispute between the Marshall Islands and the United Kingdom resulting from the alleged course of conduct of the United Kingdom with respect to the obligation under Article VI of the Non-Proliferation Treaty to pursue and conclude negotiations on a general treaty on nuclear disarmament and the Marshall Islands' protest through statements in multilateral forums, in particular its statement at the Nayarit conference on 14 February 2014. This is another important feature which distinguishes this case from the two other cases in *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*.

IV. The Existence of a Dispute prior to the Filing of an Application

33. One of the important arguments put forward by the United Kingdom in support of its preliminary objections to jurisdiction and admissibility was that the dispute must have existed on the date of the filing of the Application by the Marshall Islands. The Court has recently stated in some of its Judgments that a dispute must "in principle" exist at the time of the Application (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). The term "in principle" clearly indicates that this does not always have to be the case, and that there are bound to be exceptions.

34. The use of the term "in principle" also suggests that it is not an absolute precondition for the Court's jurisdiction that a full-fledged dispute exist at the date of the application. Such a dispute may be in the process of taking shape or at an incipient stage at the time the application is submitted but may clearly manifest itself during the proceedings before the Court. The Court's insistence on the use of the term "in principle" evidences its desire to avoid excessive formalism in the determination of the existence of a dispute, which is a matter of substance, and not of form.

35. This flexible approach regarding the date for the determination of the existence of a dispute is borne out by the case law of the Court, in which it has occasionally founded the existence of a dispute on opposing statements of parties made during written and oral pleadings. For example, in the preliminary objections phase of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, the Court noted that:

> "While Yugoslavia has refrained from filing a Counter-Memorial on the merits and has raised preliminary objections, it has nevertheless wholly denied all of Bosnia and Herzegovina's allegations, *whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections*.
>
> In conformity with well-established jurisprudence, the Court accordingly notes that there persists
>
> 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations' [. . .]

> and that, by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between them." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 28-29; emphasis added, citation omitted.)

36. The Court in the above-mentioned case did not examine any evidence that demonstrated that the parties held positively opposed views prior to the date of application; it solely relied on the views expressed in written and oral proceedings before it.

37. A slightly different situation arose in the *Aerial Incident at Lockerbie* cases. In those cases, the Court established the existence of several disputes between the parties. The main dispute concerned the question of whether the destruction of the plane over Lockerbie was governed by the Montreal Convention. This dispute was evidenced by the assertion of the relevance of the Montreal Convention by Libya and the subsequent rejection of its applicability by the United Kingdom and the United States prior to the submission of the Application to the Court. More interesting for our purposes is that the Court determined that more specific disputes existed between the parties regarding the interpretation of Articles 7 and 11 of the Montreal Convention, which were evidenced by the parties' opposing positions advanced in written and oral pleadings (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, paras. 28, 32; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, paras. 29, 33). These disputes, according to the Court, fell within the compromissory clause of the Montreal Convention and were therefore subject to the jurisdiction of the Court.

38. More recently, the Court founded its holding in *Certain Property* on the ground that the parties' expressed positively opposed views in written and oral proceedings. In the paragraph in which the Court determined the existence of a dispute, it mentioned only the positions that the parties adopted in pleadings, concluding that "[t]he Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter", and hence that a dispute existed (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). Later in that paragraph, the Court went on to note that this conclusion was supported by the positions taken by parties in the course of bilateral negotiations and by letters exchanged by the parties prior to the submission of the Application.

39. Although these Judgments lend some support to the idea that a dispute can be evidenced by positions taken by the parties in the course of proceedings subsequent to the filing of an application, they do not overturn the basic position taken by the Court in previous cases that a dispute cannot solely arise from the institution of proceedings before the Court. There must be, as a minimum, the start or the onset of a dispute prior to the filing of an application, the continuation or crystallization of which may become more evident in the course of the proceedings. However, the seisin of the Court cannot by itself bring into being a dispute between the parties.

40. In other words, although the beginning of a dispute must have existed prior to the filing of the application (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, separate opinion of Sir Gerald Fitzmaurice, p. 109) the decisive factor is that the positively opposed viewpoints have continued to be evidenced by the position of the parties during the post-application period when the Court takes cognizance of the positions of the parties (see *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55)). Thus, there is a continuum between the pre-application and post-application state of the dispute in the sense that while it must have its beginning prior to the application, its persistence must be confirmed by the Court during the judicial proceedings.

41. The relevance of this to the present case is that it appears from the evidence placed before the Court, as discussed in paragraphs 48 to 60 below, that there was an incipient dispute arising from the alleged course of conduct of the Respondent in relation to the obligation, under Article VI of the Non-Proliferation Treaty, to pursue negotiations and conclude a general treaty on nuclear disarmament that was met by a protest of the Applicant prior to the filing of its Application, particularly through its statement at the Nayarit conference. This nascent opposition of legal viewpoints in relation to the Non-Proliferation Treaty further manifested itself during the proceedings as the Parties expressed positively opposed positions in relation to the interpretation and application of Article VI of the Non-Proliferation Treaty obligations, and the obligation to pursue and conclude negotiations on nuclear disarmament.

V. The Subject-Matter of the Dispute

42. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, that is, to "isolate the real issue in the case and to identify the object of the claim" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29;

Nuclear Tests (New Zealand v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30). However, in doing so, the Court examines the positions of both parties, while giving particular attention to the manner in which the subject-matter of the dispute is framed by the applicant State (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38).

43. In its Written Statement, the Marshall Islands describes the scope of its dispute with the United Kingdom in the following terms: the obligation "to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (Written Statement, para. 30).

44. This framing of the subject-matter of the dispute was further clarified during the oral proceedings when the Co-Agent of the Republic of the Marshall Islands stated that:

> "[a]t no time during these proceedings or — for that matter — outside of these proceedings, has the United Kingdom claimed that it entirely honours the obligation which is central to these proceedings. I will repeat this in order to clarify to the Respondent what precisely the case is about: 'There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'" (CR 2016/5, pp. 15-16, para. 5 (van den Biesen).)

45. Moreover, the Marshall Islands relies on its statement at the Nayarit conference, as evidence of the existence of a dispute with the United Kingdom. In that statement, the Marshall Islands declared that the immediate commencement and conclusion of negotiations on nuclear disarmament 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".

46. Thus, the subject-matter of the dispute in this case may be defined as whether the alleged opposition of the United Kingdom to various initiatives for the immediate commencement and conclusion of multilateral negotiations on nuclear disarmament constitutes a breach of the obligation to negotiate nuclear disarmament in good faith under Article VI of the Non-Proliferation Treaty.

47. This is confirmed by the fact that the main focus of the Marshall Islands' written and oral submissions, as well as its statement at the Nayarit conference on which it relies for the existence of the dispute, is on the alleged non-compliance of the United Kingdom with its obligation to pursue in good faith negotiations on nuclear disarmament and bring them to a conclusion. In this connection, the Marshall Islands refers to the statements of British officials and the United Kingdom's voting record in the United Nations General Assembly in support of its claim that the

United Kingdom has "opposed the efforts of the great majority of States to initiate such negotiations" (Application of the Marshall Islands, para. 104). We will examine those statements and voting record below in so far as they have been presented as evidence of the existence of a dispute between the Parties, since the issue of the alleged non-compliance of the United Kingdom with its Non-Proliferation Treaty obligations belongs to the merits and cannot be dealt with here.

VI. The Opposing Viewpoints of the Parties on the Interpretation and Application of Article VI of the Non-Proliferation Treaty

48. For the Marshall Islands, the dispute is about the interpretation and application of Article VI of the Non-Proliferation Treaty, and in particular the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. This was expressed prior to the submission of the Application by the representative of the Marshall Islands at the Nayarit conference and has been reiterated in these proceedings. In the words of the Co-Agent of the Marshall Islands, "[s]o far as the application of Article VI of the Non-Proliferation Treaty 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" (CR 2016/9, p. 8, para. 2 (van den Biesen)).

49. To support these allegations, the Marshall Islands refers to the opposition of the United Kingdom to all the attempts made in the context of resolutions adopted by the United Nations General Assembly to call for the immediate commencement of negotiations with a view to the conclusion of a convention on nuclear disarmament, to convene a working group to prepare the ground for such a convention, or to ensure concrete follow-up to the advisory opinion of the Court which underscored the existence of an obligation to pursue negotiations on nuclear disarmament.

50. According to the Marshall Islands, this opposition is also evidenced by the statements made by the United Kingdom's representatives to the United Nations organs following the adoption of resolutions by such organs, including the United Nations General Assembly, or to international conferences on nuclear disarmament as well as the statements made by the United Kingdom's politicians in parliamentary forums or in documents published by the United Kingdom's Government.

51. With regard to the United Nations resolutions, the Marshall Islands argues that the United Kingdom has consistently voted against all United Nations General Assembly resolutions on the follow-up to the Advisory Opinion of the International Court of Justice of 8 July 1996,

which have been adopted every year since December 1996. These resolutions called for immediate commencement of multilateral negotiations to fulfil the obligations underlined by the Court. The United Kingdom does not deny this consistent pattern of conduct vis-à-vis the fulfilment of the obligation underlined in the Advisory Opinion and the United Nations General Assembly's attempts to implement it, but it claims that various political and legal factors account for its position on these resolutions (see response dated 23 March 2016 of the United Kingdom to the questions by Judge Cançado Trindade, para. 2).

52. It is true that it is not always easy to infer from votes cast in the United Nations General Assembly the existence of a dispute on matters covered by the resolution. However, such votes are not devoid of evidentiary value, particularly where there is a consistent pattern of voting against a series of resolutions which call for the same type of action, in this case the immediate commencement of negotiations and conclusion of a general convention on nuclear disarmament, or where statements of explanation of vote were made by the party voting against the resolutions.

53. The Republic of the Marshall Islands provides several examples of explanation of vote made by the United Kingdom in conjunction with the casting of a negative vote on resolutions adopted by the United Nations General Assembly on commencement of immediate negotiations on nuclear disarmament or the establishment of mechanisms for such negotiations. Some of the statements were made on behalf of the United Kingdom only, while others were made by the United Kingdom jointly with other nuclear-weapons States (NWS)[1].

54. Some of these resolutions called for taking forward multilateral disarmament negotiations for the achievement of a world without nuclear weapons. The United Kingdom, after voting, for example, against one of these resolutions, stated in its explanation of vote that "we see little value in this initiative to take forward multilateral nuclear disarmament negotiations outside of the established fora"[2]. Other resolutions called for a "high-level meeting of the General Assembly on nuclear disarmament". Again, the United Kingdom voted against them and stated in explanation of its negative vote that: "we question the value of holding a high-level meeting of the General Assembly on nuclear disarmament when there are already sufficient venues for such discussion"[3].

[1] The resolutions cited included resolution 68/32 of 5 December 2013, resolution 68/46 of 5 December 2013, resolution 67/56 of 3 December 2012, and resolution 67/39 of 3 December 2012 (see CR 2016/9, pp. 13-14, para. 11 (van den Biesen)).

[2] See resolution 67/56 and the explanation of vote by the United Kingdom of 6 November 2012 (UN doc. A/C.1/67/PV.21).

[3] See resolution 67/39, and the explanation of vote by the United Kingdom of 7 November 2012 (UN doc. A/C.1/67/PV.22).

55. The statements on which the Republic of the Marshall Islands relies as evidence of the United Kingdom's opposition to the immediate commencement and conclusion of negotiations on nuclear disarmament also include statements made in the British House of Lords, or by the United Kingdom Prime Minister, in which the officials concerned explain the objections of their Government to such comprehensive negotiations and advocate a step-by-step approach to denuclearization.

56. For example, in a debate in the House of Lords, the Senior Minister of State for the Foreign and Commonwealth Office stated on 15 July 2013:

> "The United Kingdom voted against the resolution in the United Nations General Assembly First Committee that proposed the Open Ended Working Group (OEWG), has not attended past meetings of the OEWG, and does not intend to attend coming meetings . . . The Government considers that a practical step-by-step approach is needed, using existing mechanisms such as the Non Proliferation Treaty and the Conference on Disarmament."

57. Also, the Republic of the Marshall Islands refers to a statement of the United Kingdom Prime Minister David Cameron in August 2011, in which he declared, *inter alia*, that: "He did not agree that 'negotiations now on a nuclear weapons convention should be the immediate means of getting us to a world free of nuclear weapons'." However, he acknowledged that such a convention "could ultimately form the legal underpinning for this endpoint", but the prospects of reaching agreement on a convention "are remote at the moment" (MMI, para. 89).

58. The United Kingdom responded to the allegations made by the Republic of the Marshall Islands by declaring that:

> "the Marshall Islands at no stage, ever, at any time in the past raised with the United Kingdom its concerns, or allegations or claims, notwithstanding this apparent apprehension of long-term bad faith conduct by the United Kingdom. This goes to the United Kingdom's objection to jurisdiction . . . to the effect that there is no justiciable dispute between the Marshall Islands and the United Kingdom." (POUK, para. 20.)

59. The statement made by the Republic of the Marshall Islands at the Nayarit conference, as well as its other statements calling on nuclear powers, including the United Kingdom, to fulfil their obligation under Article VI of the Non-Proliferation Treaty, may be considered as a protest meant to contest the attitude of the United Kingdom towards the immediate commencement of negotiations on a comprehensive convention for the elimination of nuclear weapons. For the Marshall Islands this attitude

is evidenced by the course of conduct of the United Kingdom relating to the obligation to pursue and conclude such negotiations, evidenced by its voting record at the United Nations General Assembly, its statements in explanation of such votes, as well as statements made by United Kingdom leaders in parliamentary or diplomatic forums.

60. Thus, the Nayarit statement by the Marshall Islands, taken together with the statements made by the United Kingdom with regard to the calls by the United Nations General Assembly for the immediate commencement of nuclear disarmament negotiations appear, in my view, to have given rise to an incipient dispute prior to the submission of the Application by the Marshall Islands. The prior existence of the beginning of a dispute relating to the interpretation and application of Article VI of the Non-Proliferation Treaty, evidenced by the opposed positions of the Parties on negotiations on nuclear disarmament and their timely conclusion, distinguishes this case from the two other cases of *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*. This nascent dispute has fully crystallized during the proceedings before the Court where the Parties continued to manifest positively opposed views on the subject-matter of the dispute as defined in paragraph 46 above.

(*Signed*) Abdulqawi A. YUSUF.

SEPARATE OPINION OF JUDGE OWADA

1. I concur with the conclusions of the Judgment as contained in its operative part *(dispositif)* (para. 59). Yet I am particularly sensitive to the tragic history of the Republic of the Marshall Islands (hereinafter the "RMI"), which as a nation suffered as a consequence of the extensive nuclear testing that took place on its territory. As recognized in the present Judgment, this experience has created reasons for special concern about nuclear disarmament on the part of the RMI, including its compelling interest with respect to the obligation of nuclear-weapon States under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (para. 44). It is for this reason not too difficult to comprehend the position adopted by the RMI in the present case in relation to the duties of the nuclear-weapon States under Article VI of the NPT. And yet, when it comes to the question of whether this court of law is able to exercise jurisdiction in relation to the claim advanced by the Applicant, something more than a mere divergence of positions between the Applicant and the Respondent is required as a matter of law. More specifically, it has to be demonstrated that this factual divergence of positions between the Parties has crystallized into a concrete legal dispute capable of adjudication by this Court at the time of the filing of the Application.

2. The task of the Court in the present case is therefore to ascertain, not the existence *vel non* of a divergence of opinions between the Parties, but whether this divergence had developed into a concrete *legal dispute* by the time the Application was filed. The International Court of Justice, as a court of law, has to confine its role strictly to the legal examination of the claim submitted to it. It is for this reason that I feel it is incumbent upon me to elaborate upon a few key issues in the present Judgment, with a view to clarifying the reasoning of the Court in this legal, though politically charged, context.

I. The Criteria for Ascertaining the Existence of a Dispute

3. The first issue concerns the standard applied by the Court in determining whether or not a dispute existed at the time of the filing of the Application by the RMI. Relying on the established jurisprudence of the Court, the Judgment begins with the definition of a dispute as a disagreement on a point of law or fact, a conflict of legal views or of interests, and states that, for the purpose of establishing the existence of a dispute, it

must be shown that the claim of one party is positively opposed by the other (Judgment, para. 37). However, beyond this generally accepted statement of principle, which is an abstract and general formulation, the case law of the Court does not reveal much more in terms of the concrete legal standard to be applied in determining how this requirement of "positive opposition" could be established.

4. It is important to recognize in this context that, as stated by the Judgment, the "determination of the existence of a dispute is a matter of substance, and not a question of form or procedure" (*ibid.*, para. 38). Indeed this point is not a mere formality but a matter of cardinal significance as an *indispensable precondition* for the seisin of the Court by the Applicant. The filing of an application concerning a claimed dispute can stand only on the basis of *the consent of the parties*, particularly when carried out through the parties' declarations accepting the compulsory jurisdiction of the Court under the Optional Clause. In fact, these declarations endow the Court with jurisdiction to entertain only those disputes falling within the scope of the declarations of the parties (*ibid.*, para. 36). This means that a dispute must first of all be shown to exist between the parties in the sense of, and to the extent of, these declarations. It is for this reason that the Court has held that "[a] mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). In this way, the precondition of the existence of a dispute goes to the very heart of the exercise of jurisdiction by the Court. In this sense, this is not a mere technicality.

5. It may be recalled, on the other hand, that the Permanent Court of International Justice observed that the Court, as an international court, "is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). The Permanent Court in that case determined on that basis that "[e]ven if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit" inasmuch as "it would always have been possible for the applicant to re-submit his application in the same terms" *(ibid.)*. It is also true that this Court, as its successor institution, has from time to time accepted this approach (see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 438-440, paras. 81-82). Yet in the present case there is in my view no place for the application of this doctrine. The absence of the alleged dispute at the time of the filing of an application is an essential flaw that serves to invalidate the very cause of action which constitutes the legal basis on which the application is founded, and as such is not a mere pro-

cedural imperfection that could be cured by a subsequent supplementary act of perfection, as was the case with the *Mavrommatis Palestine Concessions* precedent. In finding that a dispute did not exist at the time of the filing of the Application, the Court is therefore bound to conclude that it cannot proceed to an examination of the merits of the case.

6. A legal dispute for this purpose must be clearly distinguished from a mere divergence or difference in the views or positions that could exist in fact between the respective parties on the subject-matter at issue. In international relations between States, as is so often the case between individuals, States frequently adopt different or divergent positions on a given issue. Such differences or divergences, even when they are well established, do not *ipso facto* represent a legal dispute of which a court of law can be seised for adjudication.

7. Judge Morelli cogently highlighted this important distinction between a divergence of views as a matter of fact and a conflict of legal interests as a matter of law in his opinion in the *South West Africa* cases, as follows:

> "a dispute consists, not of a conflict of interests as such, but rather in a contrast between the respective attitudes of the parties in relation to a certain conflict of interests. The opposing attitudes of the parties, in relation to a given conflict of interests, may respectively consist of the manifestations of the will by which each of the parties requires that its own interest be realized . . .
>
> It follows from what has been said that a manifestation of the will, at least of one of the parties, consisting in the making of a claim or of a protest is a necessary element for a dispute to be regarded as existing." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*; dissenting opinion of Judge Morelli, p. 567, para. 2.)

It is this positive opposition manifested between the parties which transforms a mere factual disagreement into a legal dispute susceptible of adjudication.

8. As the Court has repeatedly confirmed in its jurisprudence, the existence of a legal dispute in this sense is a matter for objective determination by the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50). In making this objective determination, the Court has always been led to consider whether the party claiming the existence of a dispute (i.e., the applicant) has established by credible evidence that its claim is positively opposed by the other party (i.e., the respondent).

9. It must be emphasized that the context in which this issue of the existence of a dispute *vel non* has arisen is unique in each case. By my calculation, there are 19 cases throughout the case history of the PCIJ

and the ICJ in which this issue has been raised. An analysis of the jurisprudence of the Court could create the impression that the Court has applied changing criteria in assessing whether there is a dispute for the purpose of its jurisdiction in these cases. In each of these cases, however, the Court has carefully considered the specific facts and unique circumstances of the case and assessed the evidence as presented by the parties, leading to a careful assessment of factors such as the existence *vel non* of any notification of the dispute through prior diplomatic exchanges, of an exhaustion of negotiations between the parties on the subject-matter at issue, and even of any reaction to certain statements of one party by the other party.

10. It might be tempting to conclude from these cases that the Court's reliance on each of these factors evidences a certain threshold that must be met in order to establish the existence of a dispute. Such an interpretation of the jurisprudence of the Court might appear to offer a neat legal standard deliberately developed over time by the Court and applicable to all cases, including the present one. Yet, in my view, the jurisprudence of the Court on this issue is not quite so linear. These cases, many of which are discussed in the present Judgment, simply represent case-specific instances in which the evidence presented by the parties was adjudged by the Court to be sufficient — or insufficient, as the case may be — to establish the existence of a dispute. There is thus an inherent danger in any attempt to formulate the Court's consideration of these case-specific types of evidence into a threshold capable of serving as a litmus test determinative of the existence of a legal dispute in each case.

11. This point must be borne in mind when appreciating the true meaning of the element of the respondent's awareness, as introduced by the present Judgment. The Judgment states that what is required is that the "evidence must show that . . . the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41). The Judgment could appear to introduce this element of "awareness" out of the blue, as if it were a new yardstick to be applied in the context of the present case. This could invite the criticism that the Court has conjured up yet another new criterion for judging whether or not there is a legal dispute. In my view, however, this aspect of the Judgment must be understood in the context of what has been stated above.

12. The reality, as stated earlier, is that the issue of the existence of a dispute has arisen in cases with diverse factual and legal claims. The evidence presented by the applicants in these cases includes direct diplomatic exchanges between the parties, statements made in multilateral fora, and inferential conduct. The Court has demonstrated its willingness to weigh each of these disparate factors in their respective contexts. In the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, for example, the Court examined statements made in multilateral

settings, but paid "primary attention" to statements made by the Executive because "it is the Executive of the State that represents the State in its international relations and speaks for it at the international level" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 87, para. 37). In other words, it was only those statements that could serve to make the respondent *aware* of the claims that were considered relevant; positive opposition could also be inferred from "the failure of a State to respond to a claim in circumstances *where a response is called for*" (*ibid.*, p. 84, para. 30; emphasis added). On the other hand, in considering the conduct of the parties in assessing the existence of a dispute, the Court has observed that "the position or the attitude of a party can be established by inference, whatever the professed view of that party" in order to establish the requisite positive opposition between the parties (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89). It should thus be clear that the Court has considered a wide array of multifarious factors in answering the question as to whether a dispute existed at the time of the filing of the application.

13. The crucial point is that the common denominator running through these diverse cases is the element of awareness; as stated in the Judgment, it is the awareness of the respondent which demonstrates the transformation of a mere disagreement into a true legal dispute between the parties. This principle requires the applicant to establish that the respondent "was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41). It may not strike one as a strict legal standard that is easy to establish in all concrete situations, but it nevertheless forms an essential common denominator underlying the reasoning of the Court in its analysis of the existence of a dispute throughout its case history.

14. I have tried to demonstrate that this element of awareness is not being introduced in the present Judgment as another new criterion that could be used as an alternative to other factors to establish the existence of a dispute. In my view, this element is critical, inasmuch as it is the "objective awareness" of the parties that transforms a disagreement into a legal dispute. The element of awareness therefore constitutes an essential minimum common to all cases where the existence of a dispute is at issue.

II. The Critical Date for Determining the Existence of the Dispute

15. Another important aspect of the present case is the time at which a dispute must be shown to exist. As stated in the Judgment, the Court has

made clear that "the date for determining the existence of a dispute is the date on which the application is submitted to the Court" (Judgment, para. 42). However, the RMI argued that the Judgments of the Court in several previous cases support its contention that statements made *during* the proceedings may serve as evidence to establish the existence of a dispute. In addition to the example of the *Certain Property (Liechtenstein* v. *Germany)* case, the RMI relies on the Judgment of the Court in the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (*ibid.*, para. 54). The Court cogently explained the correct meaning of these precedents in the Judgment, but the latter case would seem to require a more detailed account of the unique circumstances presented by that case in order to correct this understanding of the Applicant.

16. It is true that the Court in its 1996 Judgment in the *Genocide* case did not make an explicit reference to any evidence before the filing of the Application in affirming the existence of a dispute. However, it is important to highlight the two key elements unique to that case. They are both highly relevant and serve to distinguish this 1996 Judgment from the rest of the Court's jurisprudence on the issue of the existence of a dispute at the time of the filing of the application. The first is that, in that case, Bosnia and Herzegovina invoked the Convention on the Prevention and Punishment of the Crime of Genocide as the source of the Court's jurisdiction. Article IX of the Convention provides that:

> "'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 27.)

Yugoslavia, as the Respondent, argued that there was no "international dispute" falling under the terms of Article IX of the Genocide Convention. In other words, in this case Yugoslavia did not contest the "existence of a dispute" for the purposes of the seisin of the Court, but rather questioned the "existence of a dispute for the purposes of the compromissory clause of the Convention (i.e., Article IX)", as in its view this was not an *international* dispute for the purposes of the Convention. This clearly serves to distinguish that case from other cases, where the issue was purely "the existence of a legal dispute".

17. Furthermore, in weighing the statements made by the parties during the course of the proceedings, the Court "note[d] that there *persists*" a situation of opposing views, thus signifying that a dispute had been in existence

at the time of the filing of the Application (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 29; emphasis added). The use of this language could be taken as an indication of the position taken by the Judgment that the statements made after the filing of the Application were referred to only as an affirmation of the *continuation* of a pre-existing dispute.

18. In sum, the mixed questions of law and fact tied to the merits of that case made the question to be decided by the Court very different from the question at issue in the present proceedings. In light of these factors, the reference in that Judgment to statements made after the filing of the Application were due to the special circumstances of that case and therefore should not be understood as signalling a departure from the Court's consistent jurisprudence on this subject.

III. The Question of the Evidence Presented by the Marshall Islands

19. Finally, the Judgment of the Court in this case may appear to some to adopt a piecemeal approach with regard to the evidence presented by the Applicant. Specifically, some may feel that the Court considers and ultimately rejects as insufficient each individual category of evidence submitted by the RMI, but does not weigh the evidence in a comprehensive way. It may be recalled in this context that the Applicant argued that:

> "the RMI and the United Kingdom, by their opposing statements and conduct, have manifested the existence of a dispute over the United Kingdom's non-compliance with its Treaty and customary international law obligations 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" (Memorial of the Marshall Islands, para. 102).

In other words, the Applicant argued that the evidence when taken as a whole demonstrated the existence of a dispute.

20. It is my view, however, that the Court did examine all of the evidence presented and did correctly determine that the evidence — *even when taken as a whole* — was not sufficient to demonstrate the existence of a dispute.

21. Having stated this, however, it may be useful to add that a new legal situation might emerge as a result of the present proceedings in which the existence of a dispute could be said to have crystallized. A new Application could be filed on this basis, which might not be subject to the same

preliminary objection to jurisdiction as upheld in the present case. This would be the case to the extent that the present Judgment reflects the position of the Court with respect to the legal situation that existed at the time of the filing of the Application in the present case. In this sense, the present Judgment arguably might not automatically constitute a legal bar to the examination of a new claim on its merits in the future. The viability of such a new application would naturally remain an open question and its fate would depend upon the Court's examination of *all* of the objections to jurisdiction and to the admissibility of the claim. The Court would only be in a position to examine the merits if it were satisfied that it had jurisdiction and the claim was admissible with regard to such a new case.

(Signed) Hisashi OWADA.

SEPARATE OPINION OF JUDGE TOMKA

Jurisdiction of the Court under Article 36 (2) of Statute — Existence of a dispute — No prior negotiations or notice necessary before seising Court — Existence of a dispute a condition for exercise of jurisdiction — Dispute in principle to exist at date of Application — Court has applied condition flexibly and taken into account subsequent events — Proceedings clarified that a dispute between the Marshall Islands and the United Kingdom exists — Court should have considered other objections to jurisdiction.

Admissibility — Article VI of 1968 Treaty on the Non-Proliferation of Nuclear Weapons — Nature of obligations thereunder — Disarmament requires co-operation between all States, in particular nuclear States — Court cannot consider position of one nuclear State without considering and understanding positions of other nuclear States — Absence of other nuclear powers before Court prevents consideration of claims in proper multilateral context — Application inadmissible.

1. For the first time in almost a century of adjudication of inter-State disputes in the Peace Palace, the "World" Court (the Permanent Court of International Justice and the International Court of Justice) has dismissed a case on the ground that no dispute existed between the Applicant and the Respondent prior to the filing of the Application instituting proceedings[1]. The Court seems not to be interested in knowing whether a dispute between them exists now.

2. I am not convinced by the approach taken by the Court, despite many references to its case law. In my view, other decisions of the Court, and its predecessor, point in a different direction. Therefore, to my regret, I am unable to support the Court's upholding of the objection based on the absence of a dispute.

[1] This does not include requests for interpretation under Article 60 of the Court's Statute, which also — at least in the English version — uses the term "dispute" (the French text of the Statute uses the term "contestation") (see, e.g., *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 403). Where there is no disagreement between the parties about the meaning and scope of a Judgment, there is nothing to interpret (see *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 17, para. 45). Requests for interpretation cannot serve the purpose of seeking a decision of the Court on matters not brought before the Court in the original proceedings (see, e.g., *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Judgment, I.C.J. Reports 2013*, pp. 303-304, para. 56).

3. Is it really the case that the Marshall Islands and the United Kingdom did not, by April 2014, have a dispute relating to the latter's compliance with Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter the "NPT"), and that they do not have such a dispute now? Do the positions of the Marshall Islands and the United Kingdom on the latter's performance of its obligations under the provisions of the NPT coincide?

4. The Marshall Islands in its Application alleges, *inter alia*, that

> "[t]he United Kingdom has not pursued in good faith negotiations to cease the nuclear arms race at an early date through comprehensive nuclear disarmament or other measures, and instead is taking actions to improve its nuclear weapons system and to maintain it for the indefinite future.
>
> Similarly, the UK has not fulfilled its obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control and instead has opposed the efforts of the great majority of States to initiate such negotiations." (Application instituting proceedings, pp. 12 and 14, paras. 15-16.)

On the basis of these allegations, the Marshall Islands requests the Court to issue a declaratory judgment finding "that the United Kingdom has violated and *continues* to violate its international obligations under the NPT, more specifically under Article VI of the Treaty" through various acts and omissions (emphasis added)[2]. The Marshall Islands further requests the Court

> "to order the United Kingdom to take all steps necessary to comply with its obligations under Article VI of the [NPT] and under customary international law within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control." (*Ibid.*, p. 60, para. 116.)

5. The same submissions have been made by the Marshall Islands in its Memorial filed on 16 March 2015.

6. There can be no doubt that the United Kingdom denies that it is in breach of its obligations under the NPT. In its written pleading on preliminary objections, it made clear that "[t]he United Kingdom considers the allegations to be manifestly unfounded on the merits." Indeed, it was not only in the pleadings that the United Kingdom rejected the views of the Marshall Islands. While the Court was deliberating in this case, Her Majesty's Government took a decision to modernize the country's nuclear arsenal, through the replacement of four nuclear submarines, the

[2] For the full text of the request, see paragraph 11 of the Judgment.

decision having been approved by the Parliament at Westminster[3]. Such modernization appears to have been envisaged as being undertaken at great expense, with an apparent intention that the system be used for several decades to come[4]. While it is not appropriate at this stage for me to take a position on whether such a decision is in conformity with the United Kingdom's obligations under the NPT, there cannot, in my mind, be any doubt that it is in opposition to the view of the Marshall Islands, which is critical of the United Kingdom "taking actions to improve its nuclear weapons system and to maintain it for the indefinite future" (see paragraph 4 above).

I. Jurisdiction

7. The United Kingdom has raised five preliminary objections. According to the first one,

> "there is no justiciable 'dispute' between the Marshall Islands and the United Kingdom . . . within the meaning of this term in Articles 36 (2), 38 (1) and 40 (1) of the Court's Statute, Article 38 (1) of the Rules, and relevant applicable customary international law and jurisprudence".

The Respondent emphasizes that

> "[i]n particular, relying *inter alia* on the principle set out in Article 43 of the International Law Commission's Articles on State Responsibility . . . and addressed in the Court's recent judgments in *Georgia* v. *Russia* and *Belgium* v. *Senegal*, the United Kingdom contends that the failure by the Marshall Islands to give the United Kingdom any notice whatever of its claim renders the asserted dispute non-justiciable, with the effect of depriving the Court of jurisdiction to decide on the claims related thereto and/or making them inadmissible" (reference omitted).

8. The Court has concluded that it "does not have jurisdiction under Article 36, paragraph 2, of its Statute" (Judgment, para. 58).

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[3] See the decision of the United Kingdom Parliament reported in House of Commons, *Hansard*, Vol. 613, columns 656-660, https://hansard.parliament.uk/Commons/2016-07-18/debates/16071818000001/UKSNuclearDeterrent#division-4854 (18 July 2016).

[4] See the United Kingdom's *National Security Strategy and Strategic Defence and Security Review* (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478933/52309_Cm_9161_NSS_SD_Review_web_only.pdf, para. 4.76, which estimated the nuclear submarines' manufacturing cost at £31 billion, "with the first submarine entering service in the early 2030s". See also Claire Mills, *Replacing the UK's "Trident" Nuclear Deterrent*, House of Commons Briefing Paper No. 7353, http://researchbriefings.files.parliament.uk/documents/CBP-7353/CBP-7353.pdf (12 July 2016), pp. 47-48.

9. It is to be recalled that the basis of jurisdiction relied upon by the Marshall Islands is two declarations under Article 36, paragraph 2, of the Statute of the Court, one deposited by the Marshall Islands on 24 April 2013 and the other by the United Kingdom on 5 July 2004.

10. When analysing issues of jurisdiction, caution has to be taken in relying on different pronouncements of the Court, in particular, depending upon whether the basis invoked is Article 36 (2) declarations or a compromissory clause contained in a treaty. Both declarations and compromissory clauses may set certain preconditions for the seising of the Court. The Court's jurisprudence has to be viewed in light of the relevant provisions underpinning its jurisdiction in any given case.

11. The Court in the present Judgment (see paragraph 38) recalls its previous view, that when "[i]t has been seised on the basis of declarations made . . . which . . . do not contain any condition relating to prior negotiations to be conducted within a reasonable time" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109), no such negotiations are required prior to the filing of the Application. In the same Judgment, the Court clarified that a State is "not bound to inform [the other State] of its intention to bring proceedings before the Court" (*ibid.*, p. 297, para. 39).

12. The United Kingdom's reliance on the ILC Articles on State Responsibility for its argument that the Marshall Islands' failure to give it any notice of its claims "renders the asserted dispute non-justiciable, with the effect of depriving the Court of jurisdiction" (see paragraph 7 above), is of no assistance to the Respondent. As the Court notes (see paragraph 45 of the Judgment) the commentaries adopted by the Commission state *expressis verbis* that "[t]he present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals"[5].

13. The United Kingdom also argues that "the existence of a legal dispute" is one of "the conditions for the Court's jurisdiction" and "must be satisfied at the time of the Application". It presents the argument also in a modified form, stating that "[t]he existence of a dispute — a necessary condition *for the exercise* of the Court's jurisdiction in terms of Article 36 (2) of the Statute of the Court — must also be determined on [the] date [on which the act instituting proceedings is filed]" (emphasis added).

[5] *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 120, para 1, of the commentary to Article 44 entitled "Admissibility of claims"; see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 264.

14. Although the Court has, on a number of occasions, stated that the existence of a dispute is a condition for its jurisdiction, in my view, it is more properly characterized as a condition for the exercise of the Court's jurisdiction. The jurisdiction of this Court is based on the consent of States. If States make declarations under Article 36 (2) of the Statute "they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning [the matters specified in letters *(a)* to *(d)* of that paragraph]". The Court's jurisdiction in relation to a State which has made a declaration is established from the moment the declaration is deposited with the Secretary-General of the United Nations, and remains in force as long as it is either not withdrawn or has not lapsed if it has been made for a specified period of time. The Court has explained that

> "by the deposit of its Declaration of Acceptance [of the Court's jurisdiction under Article 36 (2) of the Statute] with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The *contractual relation* between the Parties and the *compulsory jurisdiction* of the Court resulting therefrom are *established*, '*ipso facto* and without special agreement', *by the fact of the making of the Declaration*." (*Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146; emphasis added.)

The Court further specified that it is on the date when the second declarant State deposits its Declaration of Acceptance "that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned" *(ibid.)*.

15. Thus, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. The emergence of a dispute is a necessary condition, in the event that one of the disputing parties which has accepted the Court's jurisdiction decides to bring an Application instituting proceedings before the Court against another State with an Article 36 declaration in force, for the Court to exercise that jurisdiction. The disappearance of the dispute during the proceedings, either because the parties have reached a settlement or because of intervening circumstances, does not deprive the Court of its jurisdiction. However, the Court in such a situation will not give any judgment on the merits, as there is nothing upon which to decide. It would limit itself either to taking note of the settlement in its Order and directing the Registrar "that the case be removed from the list" (see, e.g., *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 349) or concluding that a claim "no longer has any object and that the Court is therefore not called upon to give a decision thereon" (see, e.g., *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 62; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 478, para. 65).

16. The function of the Court "is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute). The Court does so as the principal judicial organ of the United Nations, thus contributing to the achievement of its purposes, one of them being "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes" (Article 1, paragraph 1, of the Charter of the United Nations). In order to discharge this function, the dispute must still exist when the Court decides on its merits, provided that it has jurisdiction and the Application is admissible. While the formulation of Article 38, paragraph 1, of the Statute implies that the dispute will already exist when proceedings before the Court are instituted, the phrase about the Court's function, added to the text of Article 38 at the Conference in San Francisco, was not intended to constitute a condition for the Court's jurisdiction. Article 38 concerns the law to be applied by the Court, while for its jurisdiction — in addition to Articles 34 and 35 — Articles 36 and 37 are particularly relevant. What the Court says in paragraph 42 of its present Judgment should thus be viewed as a mere observation and not as determinative for its jurisdiction.

17. As the Court has stated on a number of occasions the "dispute must *in principle* exist at the time the Application is submitted to the Court" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46, quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30 (emphasis added); see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80, quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26).

18. Despite repeating this general rule (see Judgment, paragraph 42), the Court has, however, adopted rather a very strict requirement that the dispute *must* have existed prior to the filing of the Marshall Islands' Application.

19. In some cases, circumstances will dictate that the dispute must indeed exist as at the date of the Application. Such was the situation in the recent case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for in that case Colombia's denunciation of the Pact of Bogotá took effect almost immediately after the Application was filed (see *Preliminary Objec-*

tions, Judgment, I.C.J. Reports 2016 (I), pp. 49-50, para. 17, pp. 52-53, para. 24, p. 56, para. 34, and p. 60, para. 48). As Colombia's acceptance of the jurisdiction of the Court under the Pact had thus been terminated upon the taking effect of its denunciation, Nicaragua could not have subsequently filed an Application and the Court thus considered whether a dispute had previously emerged (*ibid.*, paras. 52 *et seq.*). Likewise, in the *Georgia* v. *Russia* case, the Court was considering a specific compromissory clause contained in the International Convention on the Elimination of All Forms of Racial Discrimination that required that there be a "dispute . . . with respect to the interpretation or application of this Convention, *which is not settled by negotiation or by the procedures expressly provided for in this Convention* . . ." (Article 22, quoted in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 81, para. 20; emphasis added). There thus had to be a dispute that "is not settled by negotiation", a requirement which the Court characterized as among the "preconditions to be fulfilled before the seisin of the Court" (*ibid.*, p. 128, para. 141). If a compromissory clause requires prior negotiations before filing the Application as one of the "preconditions" for seising the Court, logically the dispute should have arisen prior to instituting the proceedings before the Court. Moreover, the dispute and the required negotiations should have been related to the subject-matter of the Convention which contains the compromissory clause — racial discrimination in the *Georgia* v. *Russia* case. Any kind of bilateral political talks would not satisfy that requirement. The Judgment in *Georgia* v. *Russia* should be viewed in this light. Therefore, I cannot agree with the view of those who consider that it indicates the beginning of a more formalistic approach to the existence of a dispute in the Court's jurisprudence.

20. Where there are no circumstances requiring that the dispute exist by a particular date, the Court has been rather more flexible in not limiting itself only to the period prior to the filing of the Application in order to ascertain whether a dispute existed between the parties before it.

21. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* case, that Court, when "verify[ing] whether there [was] a dispute between the Parties that falls within the scope of [the] provision [of Article IX of the Convention]" (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 27), observed that

> "[w]hile Yugoslavia has refrained from filing a Counter-Memorial on the merits and has raised preliminary objections, it has nevertheless wholly *denied* all of Bosnia and Herzegovina's *allegations*, whether at *the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections*" (*ibid.*, para. 28; emphasis added).

Manifestly, a very serious military conflict in Bosnia and Herzegovina had been going on already for a year prior to the filing of the Application on 20 March 1993. The war on the territory of Bosnia and Herzegovina broke out shortly after its declaration of independence on 6 March 1992. The Court, however, did not inquire whether any allegation or claim of a breach of the obligations under the Genocide Convention had been made prior to the submission of the case to the Court. It limited itself to noting that "the principal requests submitted by Bosnia and Herzegovina are for the Court to adjudge and declare that Yugoslavia has in several ways violated the Genocide Convention" (*I.C.J. Reports 1996 (II)*, p. 614, para. 28) and then noting, in the passage quoted above, the denial of these allegations by the Respondent in the course of the proceedings before the Court. The Court did not refer to a denial of such allegations prior to its seisin by the Applicant.

22. Moreover, from an early period of its adjudication the World Court has shown a reasonable amount of flexibility, not being overly formalistic, when it comes to the timing at which jurisdictional requirements are to be met (see similarly *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81).

23. In a case decided in 1925, the Respondent argued, *inter alia*, "that the Court has no jurisdiction because the existence of a difference of opinion in regard to the construction and application of the Geneva Convention had not been established *before* the filing of the Application" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13; emphasis added). The Court looked at the compromissory clause, and noticed that it "does not stipulate that diplomatic negotiations must first of all be tried" and that under that clause "recourse may be had to the Court as soon as one of the Parties considers that a difference of opinion arising out of the construction and application of [certain Articles of the Convention] exists" (*ibid.*, p. 14). In dismissing the objection the Court made a pronouncement which, in my view, is clearly apposite to the case at hand. It said:

> "Now a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views. Even if, under [the compromissory clause], the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." *(Ibid.)*[6]

[6] The force of this statement is strengthened by the fact that it seems all elected judges were in agreement with it; only a "National Judge", as judges *ad hoc* were at that time designated, chosen by the Respondent, dissented.

24. This dictum originated from the principle which the Permanent Court had enunciated a year earlier, in 1924, in the *Mavrommatis Palestine Concessions* case (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). In response to an argument that the proceedings were not validly instituted because "the application was filed before [the relevant protocol] had become applicable", the Permanent Court stated:

> "Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

25. The Court applied this principle in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26. As the Court there observed *(ibid.)*, it also did so in *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 28, and in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83. Indeed, in the former Judgment, the Court highlighted that "the Court, like its predecessor, the Permanent Court of International Justice, has *always* had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added).

26. More recently, the Court invoked this principle in 2008 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412. The Court "emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted" (*ibid.*, p. 438, para. 80). Nonetheless, the Court went on that it "has also shown realism and flexibility in certain situations in which the conditions governing the

Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81). It referred (*ibid.*, p. 439, para. 82) to the principle outlined in the *Mavrommatis* case, noted above, whereby the Court "is not bound to attach to matters of form the same degree of importance which they might possess in municipal law". The Court concluded that

> "what matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Ibid.*, p. 441, para. 85.)

It explained the rationale behind the principle as follows:

> "it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings." (*Ibid.*, p. 443, para. 89.)

27. If the existence of a dispute is considered necessary for the Court's jurisdiction (as stated above in paragraph 14, I consider it rather a condition for the exercise of the Court's jurisdiction), there is no compelling reason why the principle cannot be applied to such a condition. As I have already outlined, that was the position taken in the *Certain German Interests* case, which was cited by the Court in the more recent *Croatia* v. *Serbia* case (see *ibid.*, p. 439, para. 82). Indeed, the Court in the latter case highlighted that "it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently" (*ibid.*, p. 442, para. 87).

28. This is, as I understand it, the jurisprudence of the Court on the conditions to be met for its jurisdiction — not excessively formalistic, but rather reasonable, allowing it to exercise its function to resolve disputes between States brought before it. I cannot agree with the view that the Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*I.C.J. Reports 2012 (II)*, p. 422) represents a departure in the Court's jurisprudence. That case was about the failure of Senegal to bring to justice Hissène Habré to account for acts committed during his rule as President of Chad. In the diplomatic exchanges prior to

bringing the matter before the Court, Belgium always argued in terms of obligations under the Convention against Torture (*I.C.J. Reports 2012 (II)*, pp. 444-445, para. 54). It was only in the Application instituting proceedings that the alleged crimes against humanity under customary international law were mentioned. The Court concluded that there existed a dispute in regard to "the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention" (*ibid.*, p. 444, para. 52), but that it "did not relate to breaches of obligations under customary international law" (*ibid.*, p. 445, para. 55). The Court knew that it thus had jurisdiction, under the compromissory clause contained in Article 30, paragraph 1, of the Convention against Torture, to deal with the matter brought before it, and it could thus resolve the dispute. It was clear that Belgium would not contemplate re-submitting to the Court a dispute relating to obligations under customary international law. In fact, Belgium welcomed the Judgment and was among those States which, in addition to the African Union and the European Union, assisted Senegal — in particular financially — to comply with the Judgment. Senegal is to be commended for the measures it has taken in the implementation of its obligations. It charged Hissène Habré, who was found guilty of, *inter alia*, torture by a Judgment rendered on 30 May 2016 and sentenced to life imprisonment. The victims finally, after more than a quarter of a century, have seen justice delivered. In light of these facts, the Court's Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* should rather be seen as wise and not overly formalistic. The Court was certainly prudent not to foreclose any future developments in respect of obligations of States that might exist under customary international law to prosecute perpetrators of alleged crimes against humanity.

29. It is true that the Marshall Islands had, for some time, not taken a particularly active position on nuclear disarmament in multilateral fora, and its voting until 2012 in the United Nations on these issues, for reasons which do not need elaboration, did not indicate a disagreement with the United Kingdom. However, as it appears from the record, the Marshall Islands has, since 2010, and in particular since 2013, revisited its position and voiced its dissatisfaction about the compliance, or rather lack thereof, with obligations under Article VI of the NPT by nuclear powers, among them the United Kingdom. In September 2013, its Foreign Minister diplomatically "urge[d] *all* nuclear-weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament" (see Judgment, para. 49; emphasis added). I do not take issue with the Court's analysis of this statement, although it does indicate a shift in the Marshall Islands' approach.

30. In February 2014, the Marshall Islands, while renewing its call to all nuclear powers made in the United Nations in September 2013, expressed its views more openly, asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" regarding "multilateral negotiations on achieving and sustaining a world free of nuclear weapons [which] are long overdue" (Judgment, para. 28). The allegation is made against all nuclear-weapon States, without exception. This has been subsequently confirmed by the fact that the Marshall Islands filed, on 24 April 2014, nine Applications against the nine States which are known or believed to possess nuclear weapons.

31. The fact that the United Kingdom did not participate at the Conference in Nayarit is not, in my view, legally relevant, since under international law a State is not required to give notice to another State of its intention to institute proceedings before the Court. A State can formulate its claim in the Application seising the Court if it believes that it has a dispute with another State, or considers that the other State is in breach of international obligations owed to the Applicant. To require a State to give prior notice may entail, in the present optional clause system of the Court's compulsory jurisdiction, a risk that the Court will be deprived of its jurisdiction prior to receiving an Application instituting proceedings. A number of declarations made under Article 36, paragraph 2, of the Court's Statute may be modified or withdrawn with immediate effect by simple notification to the Secretary-General of the United Nations. And it is not unknown that some declarations have been modified in the past, including recently, in order to prevent another State from bringing before the Court a particular dispute or a particular category of disputes.

32. The proceedings before the Court in this case have clarified that there is a dispute between the Marshall Islands and the United Kingdom about the latter's performance of its obligations under Article VI of the NPT. Therefore, in my view, the conclusion that the Court has no jurisdiction in the absence of a dispute is not justified in the case at hand. In order to affirm its jurisdiction the Court would have to deal with the other objections of the United Kingdom to its jurisdiction. The Court did not consider it necessary to proceed that way in light of the conclusion it reached on the first objection.

II. Admissibility

33. Assuming that all objections to jurisdiction raised by the United Kingdom were to be rejected, the Court would proceed to the merits, provided that the Application and the claims formulated therein are admissible. In my view, however, the nature of the obligations in the field of nuclear disarmament, including of the obligations under Article VI of the NPT, renders the Application inadmissible under the present, rather

unsatisfactory, system of the Court's jurisdiction. Article VI of the NPT reads as follows:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

34. The Court in its advisory opinion analysed this provision and expressed its view in the following terms:

> "The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 99.)

The Court characterized the obligation as "twofold" — as an "obligation to pursue and to conclude negotiations" (*ibid.*, para. 100). It emphasized that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" *(ibid.)*.

35. Indeed, "disarmament treaties or treaties prohibiting the use of particular weapons" have been regarded as an instance of the kind of treaty, "the objective of which can only be achieved through the interdependent performance of obligations by all parties"[7]. One respected scholar, and now international judge, observes in this respect:

> "It is clear . . . in the context of a disarmament treaty, that each State reduces its military power because and to the extent that the other parties do likewise. Non-performance, or material breach, of the treaty by one of its parties would threaten the often fragile military balance brought by the agreement."[8]

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[7] Bruno Simma and Christian J. Tams, "1969 Vienna Convention, Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach", in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, Oxford University Press, 2011, p. 1365. See also *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 119, paragraph 13 of the commentary to Article 42, or James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 259.

[8] Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility" (2002) 13 (5) *European Journal of International Law*, p. 1134.

In other words, the performance of the obligation by a State is conditional on the performance of the same obligation by the other States[9]. In the field of nuclear disarmament, it is unrealistic to expect that a State will disarm unilaterally. International law does not impose such an obligation. It rather provides for achieving that goal through negotiations in good faith, through the co-operation of all States.

36. The most noble and important goal of getting the world rid of nuclear arms, to which the absolute majority — if not all — nations subscribe, can realistically be achieved only through balancing the security interests of the States concerned, in particular all nuclear powers and other countries with significant military capabilities.

37. It seems that the Marshall Islands is aware of this reality. It has filed Applications against all nuclear powers alleging that they are in breach of their obligations under the NPT and/or customary international law. Six of the nuclear powers are not before the Court as they have not accepted the Marshall Islands' invitation to accept the Court's jurisdiction under Article 38, paragraph 5, of the Rules of Court.

38. Enquiry into the compliance by one nuclear power with its obligations relating to nuclear disarmament, including any obligation to negotiate in good faith, invites consideration of the position taken by all other nuclear powers in relation to the same obligations which are or may be binding on them. It is only with an understanding of the positions taken by other States that the Court can stand on safe ground in considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that one State alone is open to achieving the goal set down in Article VI of the NPT through *bona fide* negotiations. This is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the *Monetary Gold* principle would apply. It is rather a question of whether it is possible for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

39. The issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and the United Kingdom. I am con-

[9] The nature of the obligation is well described in the commentary to the Articles on State Responsibility as referring to an obligation "where each party's performance is effectively conditioned upon and requires the performance of each of the others": *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 119, paragraph 13 of the commentary to Article 42; see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 259.

vinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States — whose conduct would necessarily also be at issue — are not present before the Court to explain their positions and actions.

40. This case illustrates the limits of the Court's function, resulting from the fact that it has evolved from international arbitration, which is traditionally focused on bilateral disputes. The Statute of the Court is expressly based on the Statute of its predecessor, the Permanent Court of International Justice. That Statute was drafted in 1920 and major powers opposed the idea of granting the Court compulsory jurisdiction. That approach did not change in 1945 when the International Court of Justice was conceived as the principal judicial organ of the United Nations. Had the founders of that Organization endowed the Court with universal compulsory jurisdiction, all Members of the United Nations would have been subject to its jurisdiction. There would not have then existed obstacles to the Court's exercising its jurisdiction fully and thus contributing to the achievement of the purposes and goals of the Organization.

41. To my sincere and profound regret, I have to conclude that the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context, which is also determined by the positions taken by those other powers, and thus renders the Application inadmissible. For this reason I have joined those of my colleagues who have concluded that the Court cannot proceed to the merits of the case.

(Signed) Peter TOMKA.

DISSENTING OPINION OF JUDGE BENNOUNA

[Original English Text]

Exercise in pure formalism — Introduction of a subjective criterion in determining the existence of the dispute — Sound administration of justice — Realism and flexibility of the case law of the Court — The existence of the dispute, a question to be objectively decided.

The Court has declared that it lacks jurisdiction in the three cases brought by the Marshall Islands against India, Pakistan and the United Kingdom respectively, on the same grounds: the non-existence of a dispute between the Parties. Consistently, I have voted against each of the three Judgments adopted by the Court, and for the same reasons set forth in this opinion.

Naturally, the Marshall Islands has invoked the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as well as customary international law in the proceedings against the United Kingdom, these two States being parties to the treaty. However, the Marshall Islands has referred only to customary international law regarding India and Pakistan, which are not parties to the NPT.

The reasoning of the Court, however, does not address the issue of the customary nature of Article VI of the NPT which goes to the merits of the case. The same applies to the Court's consideration of whether or not the Respondents have complied with the obligation to negotiate, which is the subject-matter of the proceedings brought by the Marshall Islands.

Yet, with regard to the existence of a dispute, the Court has followed the same approach to achieve a similar result in each of the three Judgments.

* * *

The Marshall Islands has brought before the Court a dispute between itself and nine countries which hold, or are presumed to hold, nuclear weapons, regardless of whether those countries are parties to the NPT. The Court listed three cases against India, Pakistan and the United Kingdom, which have made declarations recognizing the jurisdiction of the Court, pursuant to Article 36, paragraph 2, of the Statute. The Court has found that it lacks jurisdiction in these three cases, on the grounds that no disputes exist between each of the three States and the Marshall Islands.

This is the first time that the International Court of Justice has found that it has no jurisdiction on the sole basis of the non-existence of a dispute between the Parties. A reading of the Judgment of the Court reflects the fact that the majority came to this conclusion only by an exercise in pure

formalism, artificially stopping the time of law and analysis at the date of submission of the request by the Marshall Islands. And as if that were not enough, the majority has resorted to a "criterion" bearing no relation to the well-established case law whereby in order for a dispute to exist, the respondent must have been "aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41).

The introduction of this criterion, linked to the subjective views of the Respondent and of those conducting the analysis, clearly goes against the entire case law of the ICJ and PCIJ, according to which the existence of a dispute is determined objectively by the Court on the basis of the evidence available to it, when it adopts its judgment. The Court has thus been able to administer justice soundly and avoid the absurd situation in which it now finds itself after declaring that it lacks jurisdiction in the three Judgments on *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. Indeed, the Parties have disagreed clearly before the Court on points of fact and law, thereby demonstrating the existence of legal disputes on the questions submitted to it.

In other words, the disputes are indeed there — and it would be sufficient for the Marshall Islands to file fresh applications before the Court in order to prevent the ground of lack of jurisdiction on which it has based itself in handing down its Judgments from being invoked again!

The Court, when faced with such situations, has first noted that its jurisdiction must normally be ascertained at the time of the institution of the proceedings. But it has gone further and recalled that "like its predecessor, [it] has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81).

In particular, the Court refused to declare itself incompetent when it was sufficient for the Applicant to "file a new application, identical to the present one, which would be unassailable in this respect" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 26). Many more instances could be cited in which the PCIJ, and then the ICJ, have rejected resorting to a formalism that is excessive and contrary to the sound administration of justice.

In the relationship between international law and time, there is a rational element, namely the determination of a point in time beyond which, theoretically, one must stop the watch, and a pragmatic element in order to take into account the particular circumstances of the situation. The judge in exercising its art, has to strike the right balance between these elements, so that justice is done and seen to be done.

International judges had a duty to be even more vigilant in the present case, which concerns a question of crucial importance for security in the

world. That is another reason for the principal judicial organ of the United Nations to undertake its role fully. Indeed, how can it shelter behind purely formalistic considerations which both legal professionals and ordinary citizens would find difficult to understand, rather than contributing, as it should do, to peace through international law, which is the *raison d'être* of the Court.

The only issue here was the scope of the obligation to negotiate laid down in Article VI of the NPT, an obligation that is also part of customary international law according to the Marshall Islands:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

This obligation is well known to all those who have attended the meetings of States parties to the NPT, which have been held regularly for more than 40 years or so. It is also known to the Court, which, in its famous Advisory Opinion of 8 July 1996 on *Legality of the Threat or Use of Nuclear Weapons*, pronounced clearly on the subject as follows:

> "The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." (*I.C.J. Reports 1996 (I)*, p. 264, para. 99.)

For the background to the dispute in question, its human substance, we have to consider a small State, the Marshall Islands, whose population of a few tens of thousands of people has suffered terribly from the nuclear testing carried out in an area of its territory. This State has turned to the principal judicial organ of the United Nations to seek justice, so that such suffering does not occur again in future, through compliance with a conventional and/or customary obligation under international law. That, however, is a matter which the Court would have had to deal with when considering this case on the merits. And we have not reached that point, we are simply at the stage of jurisdiction.

But what is the Court doing? Something novel, by concluding that no dispute exists, so that it does not have to consider the merits of the case. In a sense, the Court is setting little store by its jurisprudence, which is nonetheless what ensures that it is both visible and credible.

Judge Abraham referred to the well-established approach of the Court, in his separate opinion appended to the Judgment in the *Georgia* v. *Russian Federation* case (Judgment on Preliminary Objections of 1 April 2011):

> "I shall first observe that until the present case the Court, whenever required to decide on a preliminary objection based on the respond-

> ent's contention that there was no dispute, has made its decision — rejecting the objection — in a few short paragraphs, and has made the determination as of the date on which it was ruling, finding that the parties held clearly conflicting views at that date on the matters constituting the subject of the application and consequently that a dispute existed between them." (*I.C.J. Reports 2011 (I)*, p. 226, para. 8.)

However, the Court did not change its position when dealing with that case between Georgia and the Russian Federation in 2011. In fact, it accepted that a dispute existed between the parties about the interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), as Judge Abraham acknowledged. But it was obliged to decline jurisdiction in the case because the compromissory clause in the Convention on which the case was based (Art. 22) relates to "[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention". It was this prior condition for referral to the Court which had not been satisfied, and not that of the existence of the dispute.

We therefore do indeed have a jurisprudence which takes "a strictly realistic and practical view, free of all hints of formalism", as Judge Abraham put it in his opinion (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Judgment, I.C.J. Reports 2011 (I)*, p. 228, para. 14), and which allows the Court to determine the existence of a dispute not only on the basis of acts that took place prior to the filing of the Application, but also on that of the positions adopted by the parties in the course of the written and oral proceedings. The important thing is to establish "a disagreement on a point of law or fact, a conflict of legal views or of interests", to use the classic wording of the PCIJ's Judgment in the *Mavrommatis Concessions* case in 1924 (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

In the cases brought before the Court by the Marshall Islands, the latter has placed emphasis on the statement that it made, before the filing of its Application, at the Second Conference on the Humanitarian Impact of Nuclear Weapons, held in Narayit (Mexico) on 13 and 14 February 2014, when it declared:

> "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 also would 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."

The Court has recalled on numerous occasions that its determination of the existence of a dispute "must turn on an examination of the facts", and that "[t]he matter is one of substance, not of form" which requires "objective determination". Such a dispute "may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). Hence in the present case, in order for the Court to determine objectively that the dispute exists, it is sufficient to establish that the Marshall Islands has clearly accused the "nuclear" States of failing to comply with Article VI of the NPT or the corresponding customary obligation, and that the Respondent countries have maintained, each for its own part, that they were fulfilling the obligation in question.

In its previous case law, the Court took account of the positions adopted by the parties during the proceedings when it sought to determine the dispute objectively. If it had not proceeded in such a way, the Court could have arrived at an absurd conclusion by making time stand still on the date when the Application was filed; the subject of the dispute might have changed, or even disappeared, according to the positions set forth before the Court. Let us even suppose that the premises of a dispute have taken shape before the filing of the Application and that the opposing views have been expressed clearly during the proceedings, can the Court then declare that it lacks jurisdiction on the basis of a question of form and not of substance or content? At the risk, as in the present case, of seeing the Applicant file a new application immediately after the finding of lack of jurisdiction is announced! Where is the sound administration of justice in all of that?

The Court has in fact operated in a "realistic and practical" way, and with pragmatism, since its function is to settle disputes when they are established before it, and not to shelter behind some kind of formalism, at the risk of witnessing a deterioration in the situation between the parties.

Thus, in the Judgment on preliminary objections delivered on 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Yugoslavia contested the existence of a dispute with Bosnia and Herzegovina regarding violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The Court found that Yugoslavia had "wholly denied all of Bosnia and Herzegovina's allegations, whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the . . . proceedings relating to [preliminary] objections" (*I.C.J. Reports 1996 (II)*, p. 614, para. 28), i.e., after the date when the Application was filed.

In the Judgment on preliminary objections delivered on 10 February 2005 in the case concerning *Certain Property (Liechtenstein* v. *Germany)*, the Court referred to the Parties' positions during the proceedings in

order to determine the existence of a dispute. It thus found that "in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter", concluding that "[i]n conformity with well-established jurisprudence . . . there is a legal dispute . . . between Liechtenstein and Germany" (*I.C.J. Reports 2005*, p. 19, para. 25). The Court relied in this respect on the precedent from the *Genocide* case in 1996, as cited above. For the sake of completeness, it should be mentioned that:

> "[t]he Court further notes that Germany's position taken in the course of bilateral consultations and in the letter . . . of 20 January 2000 [before the filing of the Application] has evidentiary value in support of the proposition that Liechtenstein's claims were positively opposed by Germany" *(ibid.)*.

In other words, the Court took note of the positions of the parties prior to the filing of the Application only once it had determined the existence of a dispute on the basis of the exchanges between them during the proceedings. All of this serves to reinforce the practical, realistic and pragmatic nature of the Court's jurisprudence, in accordance with the principle of consent upon which its jurisdiction is founded and with the principle of equality between the parties.

In light of the Court's well-established jurisprudence on the existence of a dispute, which takes account of all the evidence available to the Court at the point when it decides on and adopts its judgment, one might have thought that the positive opposition between the respective views of the Marshall Islands and each of the Respondents should logically have led the Court to dismiss the objection of lack of jurisdiction based on the absence of a dispute. However, the matters at stake in these cases are such that the majority has sought to adduce another argument, of a subjective nature, which has nothing to do with that jurisprudence. This is said to be the "determination" that the Respondent "was aware or could not have been unaware that its views were 'positively opposed' by the Applicant". The majority relies in this respect on the Judgment on preliminary objections delivered on 17 March 2016 in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (*I.C.J. Reports 2016 (I)*, p. 3). First, however, the Marshall Islands and the Respondent States had no knowledge of that Judgment, since it was handed down on 17 March 2016, after the closure of the oral proceedings in the present case, which took place from 9 to 16 March 2016. And, second, it concerned a case in which, in the face of all the evidence, Colombia argued that it was unaware of Nicaragua's position with regard to the implementation of and compliance with a judgment of the Court.

The second Judgment invoked in support of this subjective argument employed in order to conclude that there is no dispute is taken from the *Georgia* v. *Russian Federation* case. In that case, however, the point at issue was the application of a compromissory clause, Article 22 of CERD,

which lays down, as a precondition for the Court's jurisdiction, the existence of a dispute that falls within the scope of that Convention and, above all, the holding of negotiations on the matter beforehand between the parties.

To my mind, the so-called determination of "being aware or having been aware" cannot be used as a lifeline for a decision which is in no way related to the well-established case law of the Court on this question. The majority has tried to remove these two cases from their contexts. In the *Nicaragua* v. *Colombia* case, the latter could not have been unaware of the problem posed by the application of a judgment in a case to which it had been party. In putting forward, on that basis, a new criterion for the existence of a dispute, the majority is seriously compromising the approach of the Court in future to the question of whether a dispute exists.

By placing itself, in this way, in a difficult position which it has attempted to justify, but without success, the majority is consequently not allowing the Court to fulfil its function as the principal judicial organ of the United Nations, whose task is to assist the parties in settling their disputes and thereby to contribute to peace through the implementation of international law.

(Signed) Mohamed BENNOUNA.

DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA*

1. I regret not to be able to accompany the Court's majority in the Judgment of today, 5 October 2016 in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom)*, whereby it has found that the existence of a dispute between the Parties has not been established before it, and that the Court has no jurisdiction to consider the Application lodged with it by the Marshall Islands, and cannot thus proceed to the merits of the case. I entirely disagree with the present Judgment. As my dissenting position covers all points addressed in it, in its reasoning as well as in its resolutory points, I feel obliged, in the faithful exercise of the international judicial function, to lay on the records the foundations of my own position thereon.

2. In doing so, I distance myself as much as I can from the position of the Court's split majority, so as to remain in peace with my conscience. I shall endeavour to make clear the reasons of my personal position on the matter addressed in the present Judgment, in the course of the present dissenting opinion. I shall begin by examining the question of the existence of a dispute before the Hague Court (its objective determination by the Court and the threshold for the determination of the existence of a dispute). I shall then turn attention to the distinct series of UN General Assembly resolutions on nuclear weapons and *opinio juris*. After surveying also UN Security Council resolutions and *opinio juris*, I shall dwell upon the saga of the United Nations in the condemnation of nuclear weapons. Next, I shall address the positions of the Contending Parties on UN resolutions and the emergence of *opinio juris*, and their responses to questions from the Bench.

3. In logical sequence, I shall then, looking well back in time, underline the need to go beyond the strict inter-State dimension, bearing in mind the attention of the UN Charter to peoples. Then, after recalling the fundamental principle of the juridical equality of States, I shall dwell upon the unfoundedness of the strategy of "deterrence". My next line of con-

siderations pertains to the illegality of nuclear weapons and the obligation of nuclear disarmament, encompassing: *(a)* the condemnation of all weapons of mass destruction; *(b)* the prohibition of nuclear weapons (the need of a people-centred approach, and the fundamental right to life); *(c)* the absolute prohibitions of *jus cogens* and the humanization of international law; *(d)* pitfalls of legal positivism.

4. This will bring me to address the recourse to the "Martens clause" as an expression of the *raison d'humanité*. My following reflections, on nuclear disarmament, will be in the line of jusnaturalism, the humanist conception and the universality of international law; in addressing the universalist approach, I shall draw attention to the principle of humanity and the *jus necessarium* transcending the limitations of *jus voluntarium*. I shall then turn attention to the NPT Review Conferences, to the relevant establishment of nuclear-weapon-free zones, and to the Conferences on the Humanitarian Impact of Nuclear Weapons. The way will then be paved for my final considerations, on *opinio juris communis* emanating from conscience *(recta ratio)*, well above the "will", — and, last but not least, to the epilogue (recapitulation).

II. The Existence of a Dispute before the Hague Court

1. Objective Determination by the Court

5. May I start by addressing the issue of the existence of a dispute before the Hague Court. In the *jurisprudence constante* of the Hague Court (PCIJ and ICJ), a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[1]. Whether there exists a dispute is a matter for "objective determination" by the Court; the "mere denial of the existence of a dispute does not prove its non-existence"[2]. The Court must examine if "the claim of one party is positively opposed by the other"[3]. The Court further states that "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the

[1] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[2] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

[3] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90.

claim of one party by the other need not be necessarily be stated *expressis verbis*"[4].

6. Over the last decade, the Court has deemed it fit to insist on its own faculty to proceed to the "objective determination" of the dispute. Thus, in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility* (*Judgment, I.C.J. Reports 2006*, p. 6), for example, the ICJ has recalled that, as long ago as 1924, the PCIJ stated that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). It then added that

> "For its part, the present Court has had occasion a number of times to state the following:
>
> > 'In order to establish the existence of a dispute, 'it must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18, para. 24)'." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90.)

7. Shortly afterwards, in its Judgment on preliminary objections (of 18 November 2008) in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the ICJ has again recalled that

> "In numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: 'the jurisdiction of the Court must

[4] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

normally be assessed on the date of the filing of the act instituting proceedings' (to this effect, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44).

. . . . . .

(I)t is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether those conditions are met.

. . . . . .

What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.

. . . . . .

[T]he Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings.

However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction." (*Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-81.)

8. More recently, in its Judgment on preliminary objections (of 1 April 2011) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, (hereinafter *Application of the CERD Convention*) the ICJ has seen it fit, once again, to stress:

"The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'. (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). Whether there is a dispute in a given case is a matter for 'objective determination' by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*,

p. 328); and, most recently, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 42-44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44.)" (*I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.)

9. This passage of the 2011 Judgment in the case of the *Application of the CERD Convention* reiterates what the ICJ has held in its *jurisprudence constante*. Yet, shortly afterwards in that same Judgment, the ICJ has decided to apply to the facts of the case a higher threshold for the determination of the existence of a dispute, by proceeding to ascertain whether the applicant State had given the respondent State prior notice of its claim and whether the respondent State had opposed it[5]. On this basis, it has concluded that no dispute had arisen between the Contending Parties (before August 2008). Such new requirement, however, is not consistent with the PCIJ's and the ICJ's *jurisprudence constante* on the determination of the existence of a dispute (cf. *supra*).

10. Now, in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the three respondent States (India, United Kingdom and Pakistan), seek to rely on a requirement of prior notification of the claim, or the test of prior awareness of the claim of the applicant State (the Marshall Islands), for a dispute to exist under the ICJ's Statute or general international law. Yet, nowhere can such a requirement be found in the Court's

[5] Cf. paras. 50-105, and esp. paras. 31, 61 and 104-105, of the Court's Judgment of 1 April 2011.

jurisprudence constante as to the existence of a dispute: quite to the contrary, the ICJ has made clear that the position or the attitude of a party can be established by inference[6]. Pursuant to the Court's approach, it is not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute.

11. The respondent States in the present case have made reference to the Court's 2011 Judgment in the case of the *Application of the CERD Convention* in support of their position that prior notice of the applicant's claim is a requirement for the existence of a dispute. Already in my dissenting opinion (para. 161) in that case, I criticized the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that goes beyond the *jurisprudence constante* of the PCIJ and the ICJ itself (cf. *supra*).

12. As I pointed out in that dissenting opinion in the case of the *Application of the CERD Convention*,

> "[a]s to the first preliminary objection, for example, the Court spent 92 paragraphs to concede that, in its view, a legal dispute at last crystallized, on 10 August 2008 (para. 93), only *after* the outbreak of an open and declared war between Georgia and Russia! I find that truly extraordinary: the emergence of a legal dispute only *after* the outbreak of widespread violence and war! Are there disputes which are quintessentially and ontologically *legal*, devoid of any political ingredients or considerations? I do not think so. The same formalistic reasoning leads the Court, in 70 paragraphs, to uphold the second preliminary objection, on the basis of alleged (unfulfilled) 'preconditions' of its own construction, in my view at variance with its own *jurisprudence constante* and with the more lucid international legal doctrine." (*I.C.J. Reports 2011 (I)*, p. 305, para. 161.)

13. Half a decade later, I was hopeful that the Court would distance itself from the formalistic approach it adopted in the case of the *Applica-*

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[6] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89:

> "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis.* In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party."

tion of the CERD Convention. As it regrettably has not done so, I feel obliged to reiterate here my dissenting position on the issue, this time in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. In effect, there is no general requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ[7]. It should not pass unnoticed that the *purpose* of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function.

14. There is no requirement under general international law that the contending parties must first "exhaust" diplomatic negotiations before lodging a case with, and instituting proceedings before, the Court (as a precondition for the existence of the dispute). There is no such requirement in general international law, nor in the ICJ's Statute, nor in the Court's case law. This is precisely what the ICJ held in its Judgment on preliminary objections (of 11 June 1998) in the case of *Land and Maritime Boundary between Cameroon and Nigeria*: it clearly stated that "Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court" (*I.C.J. Reports 1998*, p. 303, para. 56).

15. The Court's statement refers to the "exhaustion" of diplomatic negotiations, — to discard the concept. In effect, there is no such a requirement in the UN Charter either, that negotiations would need to be resorted to or attempted. May I reiterate that the Court's determination of the existence of the dispute is not designed to protect the respondent State(s), but rather to safeguard the proper exercise of its own judicial function in contentious cases. It is thus a matter for objective determination by the Court, as it recalled in that same Judgment (para. 87), on the basis of its own *jurisprudence constante* on the matter.

*2. Existence of a Dispute in the Cas d'Espèce (*Marshall Islands *v.* United Kingdom *Case)*

16. In the present case opposing the Marshall Islands to the United Kingdom, there were two sustained and quite distinct courses of conduct of the two Contending Parties, evidencing their distinct legal positions (as to the duty of negotiations leading to nuclear disarmament

[7] Cf., to this effect, S. Rosenne, *The Law and Practice of the International Court (1920-2005)*, 4th ed., Vol. III, Leiden, Nijhoff/Brill, 2006, p. 1153.

in all its aspects under strict and effective international control), which suffice for the determination of the existence of a dispute. The Marshall Islands drew attention to the fact that the United Kingdom has consistently opposed the commencement of multilateral negotiations on nuclear disarmament[8], and has voted against General Assembly resolutions reaffirming the obligations recognized in the 1996 ICJ Advisory Opinion and calling for negotiations on nuclear disarmament[9].

17. There were thus opposing views of the Contending Parties as to their divergent voting records in respect of the aforementioned General Assembly resolutions[10]. The primary articulation of the Marshall Islands' claim was its declaration in the Conference of Nayarit on 14 February 2014, wherein the Marshall Islands contested the legality of the conduct of the nuclear-weapon States [NWS], (including the United Kingdom), under the NPT and customary international law. The fact that the Marshall Islands' declaration was addressed to a plurality of States (namely "all States possessing nuclear arsenals"), and not to the United Kingdom individually, in my perception does not affect the existence of a dispute.

18. States possessing nuclear weapons are a small and easily identifiable group of States — to which the United Kingdom belongs — of the international community. The Marshall Islands' declaration was made with sufficient clarity to enable all NWS, including the United Kingdom, to consider the existence of a dispute concerning the theme; the Marshall Islands' declaration clearly identified the legal basis of the claim and the conduct complained of. Likewise, the fact that the United Kingdom was not present at the Conference of Nayarit of 2014 does not prejudice the opposition of legal views between the Marshall Islands and the United Kingdom.

19. There is a consistent course of distinct conducts by the two Contending Parties. This is followed by a claim, as to the substance of the matter at issue. This is sufficient for a dispute to crystallize; nothing more is required. The United Kingdom's subsequent submissions before the ICJ confirm the opposition of legal views: suffice it to mention that the United Kingdom stated that the allegations brought by the Marshall Islands are "manifestly unfounded on the merits"[11]: this is a clear opposition to the Marshall Islands' claim. A dispute already existed on the date of filing of the Application in the *cas d'espèce*, and the subsequent arguments of the Parties before the Court confirm that.

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[8] Cf. Written statement of the Marshall Islands, para. 40.

[9] Cf. resolutions A/RES/68/32, A/RES/68/42, and A/RES/68/47 of 5 December 2013; A/RES/69/58, A/RES/69/43, and A/RES/69/48 of 2 December 2014; A/RES/70/34, A/RES/70/56, and A/RES/70/52 of 7 December 2015.

[10] CR 2016/13, Response of the Marshall Islands to the questions addressed by Judge Cançado Trindade to both Parties, para. 9.

[11] Preliminary Objections of the United Kingdom, para. 5.

3. The Threshold for the Determination of the Existence of a Dispute

20. In the present cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India/United Kingdom/Pakistan)*, the Court's majority has unduly heightened the threshold for establishing the existence of a dispute. Even if dismissing the need for an applicant State to provide notice of a dispute, in practice, the requirement stipulated goes far beyond giving notice: the Court effectively requires an applicant State to set out its legal claim, to direct it specifically to the prospective-respondent State(s), and to make the alleged harmful conduct clear. All of this forms part of the "awareness" requirement that the Court's majority has laid down, seemingly undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the Contending Parties.

21. This is not in line with the ICJ's previous *obiter dicta* on inference, contradicting it. For example, in the aforementioned case of *Land and Maritime Boundary between Cameroon and Nigeria* (1998), the ICJ stated that

> "[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party." (*I.C.J. Reports 1998*, p. 315, para. 89.)

22. The view taken by the Court's majority in the present case contradicts the Hague Court's (PCIJ and ICJ) own earlier case law, in which it has taken a much less formalistic approach to the establishment of the existence of a dispute. Early in its life, the PCIJ made clear that it did not attach much importance to "matters of form"[12]; it added that it could not "be hampered by a mere defect of form"[13]. The PCIJ further stated that "the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. (. . .) [T]he Court considers that it cannot require that the dispute should have manifested itself in a formal way."[14]

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[12] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.

[13] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

[14] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.

23. The ICJ has, likewise, in its own case law, avoided to take a very formalistic approach to the determination of the existence of a dispute[15]. May I recall, in this respect, *inter alia*, as notable examples, the Court's *obiter dicta* on the issue, in the cases of *East Timor (Portugal* v. *Australia)*, of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, and of *Certain Property (Liechtenstein* v. *Germany)*. In those cases, the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case law, it is clear that a dispute exists in each of the present cases lodged with it by the Marshall Islands.

24. In the case of *East Timor* (1995), in response to Australia's preliminary objection that there was no dispute between itself and Portugal, the Court stated: "Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute"[16]. Shortly afterwards, in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (preliminary objections, 1996), in response to Yugoslavia's preliminary objection that the Court did not have jurisdiction under Article IX of the Convention against Genocide because there was no dispute between the Parties, the Court, contrariwise, found that there was a dispute between them, on the basis that Yugoslavia had "wholly denied all of Bosnia and Herzegovina's allegations, whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the (. . .) proceedings relating to [preliminary] objections"[17]. Accordingly, "by reason of the rejection by Yugoslavia of the complaints formulated against it"[18], the ICJ found that there was a dispute.

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[15] Cf., e.g., Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, pp. 28-29, para. 38; case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83. Moreover, the critical date for the determination of the existence of a dispute is, "in principle" (as the ICJ says), the date on which the application is submitted to the Court (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52); the ICJ's phraseology shows that this is not a strict rule, but rather one to be approached with flexibility.

[16] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22.

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 595 and 614-615, paras. 27-29.

[18] *Ibid.*, p. 615, para. 29.

25. In the case of *Certain Property* (preliminary objections, 2005), as to Germany's preliminary objection that there was no dispute between the parties, the ICJ found that complaints of fact and law formulated by Liechtenstein were denied by Germany; accordingly, "[i]n conformity with well-established jurisprudence" — the ICJ concluded — "by virtue of this denial", there was a legal dispute between Liechtenstein and Germany[19]. Now, in the present proceedings before the Court, in each of the three cases lodged with the ICJ by the Marshall Islands (against India, the United Kingdom and Pakistan), the respondent States have expressly denied the arguments of the Marshall Islands. May we now take note of the denials which, on the basis of the Court's aforementioned *jurisprudence constante*, evidence the existence of a dispute between the Contending Parties [20].

4. Contentions in the Marshall Islands *v.* United Kingdom *Case*

26. The Marshall Islands argues that the United Kingdom has violated its obligations under Article VI of the NPT as well as its obligations under customary international law with regard to nuclear disarmament and the cessation of the nuclear arms race[21]. Although the United Kingdom's Preliminary Objections do not address the merits of the dispute, there is one statement by the United Kingdom that reveals a dispute between the Parties:

> "The silence by the Marshall Islands vis-à-vis the UK on nuclear disarmament issues comes against a backdrop of both a progressive unilateral reduction by the UK of its own nuclear arsenal, (. . .), and of active UK engagement in efforts, *inter alia*, to secure and extend nuclear-weapon-free zones around the world. The UK is a party to the Protocols to the Treaty of Tlatelolco, the Treaty of Rarotonga and the Treaty of Pelindaba, addressing, respectively, nuclear-weapon-free zones in Latin America and the Caribbean, the South Pacific, and Africa. The UK has ratified the Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia and continues to engage with the States parties to the Treaty on the Southeast Asia

[19] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25, citing the Court's Judgments in the cases of *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22; and of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 615, para. 29.

[20] As the present proceedings relate to jurisdiction, the opposition of views is captured in the various jurisdictional objections; it would be even more forceful in pleadings on the merits, which, given the Court's majority decision, will regrettably no longer take place.

[21] Application instituting proceedings of the Marshall Islands, pp. 54-56, paras. 100-109.

> Nuclear-Weapon-Free Zone. The UK signed the Comprehensive Nuclear Test Ban Treaty on the first day it was opened for signature and was, alongside France, the first nuclear-weapon State to become a party to it. Beyond this, the UK is leading efforts to develop verification technologies to ensure that any future nuclear disarmament treaty will apply under strict and effective international control.
>
> Against this background, the Marshall Islands' Application instituting proceedings against the UK alleging a breach *inter alia* of Article VI of the NPT, and of asserted parallel obligations of customary international law, came entirely out of the blue. The United Kingdom considers the allegations to be manifestly unfounded on the merits."[22]

5. General Assessment

27. Always attentive and over-sensitive to the position of nuclear-weapon States [NWS] (cf. Part XIII, *infra*) — such as the respondent States in the present cases (India, United Kingdom and Pakistan) — the Court, in the *cas d'espèce*, dismisses the statements made by the Marshall Islands in multilateral *fora* before the filing of the Application, as being, in its view, insufficient to determine the existence of a dispute. Moreover, the Court's split majority makes *tabula rasa* of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application (case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52); as already seen, in its case law the ICJ has taken into account conduct post-dating that critical date (cf. *supra*).

28. In an entirely formalistic reasoning, the Court borrows the *obiter dicta* it made in the case of the *Application of the CERD Convention* (2011) — unduly elevating the threshold for the determination of the existence of a dispute — in respect of a compromissory clause under that Convention (wrongly interpreted anyway, making abstraction of the object and purpose of the CERD Convention). In the present case, opposing the Marshall Islands to the United Kingdom, worse still, the Court's majority takes that higher standard out of context, and applies it herein, in a case lodged with the Court on the basis of an optional clause declaration, even though also concerning a conventional obligation (under the NPT).

29. This attempt to heighten still further the threshold for the determination of the existence of a dispute (requiring further factual precisions

[22] Preliminary Objections of the United Kingdom, pp. 2-3, paras. 4-5.

from the applicant) is, besides formalistic, artificial: it does not follow from the definition of a dispute in the Court's *jurisprudence constante*, as being "a conflict of legal views or of interests", as already seen (cf. *supra*). The Court's majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State (in applying the criterion of "awareness", amounting, in my perception, to an obstacle to access to justice), even in a situation where, as in the *cas d'espèce*, there are two consistent and distinct courses of conduct on the part of the Contending Parties.

30. Furthermore, and in conclusion, there is a clear denial by the respondent States (India, United Kingdom and Pakistan) of the arguments made against them by the applicant State, the Marshall Islands. By virtue of these denials there is a legal dispute between the Marshall Islands and each of the three respondent States. The formalistic raising, by the Court's majority, of the higher threshold for the determination of the existence of a dispute, is not in conformity with the *jurisprudence constante* of the PCIJ and ICJ on the matter (cf. *supra*). Furthermore, in my perception, it unduly creates a difficulty for the very *access to justice* (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable.

III. UN General Assembly Resolutions and *Opinio Juris*

31. In the course of the proceedings in the present cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, both the applicant State (the Marshall Islands) and the respondent States (India, United Kingdom and Pakistan) addressed UN General Assembly resolutions on the matter of nuclear disarmament (cf. Part VI, *infra*). This is the point that I purport to consider, in sequence, in the present dissenting opinion, namely, in addition to the acknowledgment before the ICJ (1995) of the authority and legal value of General Assembly resolutions on nuclear weapons as breach of the UN Charter, the distinct series of: *(a)* UN General Assembly Resolutions on Nuclear Weapons (1961-1981); *(b)* UN General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992); *(c)* UN General Assembly Resolutions Condemning Nuclear Weapons (1982-2015); *(d)* UN General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015).

1. UN General Assembly Resolutions on Nuclear Weapons (1961-1981)

32. The 1970s was the First Disarmament Decade: it was so declared by General Assembly resolution A/RES/2602E (XXIV) of 16 December

1969, followed by two other resolutions of 1978 and 1980 on non-use of nuclear weapons and prevention of nuclear war[23]. The General Assembly specifically called upon States to intensify efforts for the cessation of the nuclear arms race, nuclear disarmament and the elimination of other weapons of mass destruction. Even before that, the ground-breaking General Assembly resolution 1653 (XVI), of 24 November 1961, advanced its *célèbre* "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons" (cf. Part V, *infra*). In 1979, when the First Disarmament Decade was coming to an end, the General Assembly, disappointed that the objectives of the first decade had not been realized, declared the 1980s as a Second Disarmament Decade[24]. Likewise, the 1990s were subsequently declared the Third Disarmament Decade[25].

33. In this first period under review (1961-1981), the UN General Assembly paid continuously special attention to disarmament issues and to nuclear disarmament in particular. May I refer to General Assembly resolutions A/RES/2934 of 29 November 1972; A/RES/2936 of 29 November 1972; A/RES/3078 of 6 December 1973; A/RES/3257 of 9 December 1974; A/RES/3466 of 11 December 1975; A/RES/3478 of 11 December 1975; A/RES/31/66 of 10 December 1976; A/RES/32/78 of 12 December 1977; A/RES/33/71 of 14 December 1978; A/RES/33/72 of 14 December 1978; A/RES/33/91 of 16 December 1978; A/RES/34/83 of 11 December 1979; A/RES/34/84 of 11 December 1979; A/RES/34/85 of 11 December 1979; A/RES/34/86 of 11 December 1979; A/RES/35/152 of 12 December 1980; A/RES/35/155 of 12 December 1980; A/RES/35/156 of 12 December 1980; A/RES/36/81 of 9 December 1981; A/RES/36/84 of 9 December 1981; A/RES/36/92 of 9 December 1981; A/RES/36/94 of 9 December 1981; A/RES/36/95 of 9 December 1981; A/RES/36/97 of 9 December 1981; and A/RES/36/100 of 9 December 1981.

34. In 1978 and 1982, the UN General Assembly held two Special Sessions on Nuclear Disarmament (respectively, the Tenth and Twelfth Sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed. In fact, it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war. In a subsequent series of its resolutions (in the following period of 1982-2015), as we shall see, the General Assembly moved on straightforwardly to the condemnation of nuclear weapons (cf. *infra*).

[23] Namely, in sequence, General Assembly resolutions A/RES/33/71B of 14 December 1978, and A/RES/35/152D of 12 December 1980.

[24] Cf. General Assembly resolutions A/RES/34/75 of 11 December 1979, and A/RES/35/46 of 3 December 1980.

[25] Cf. General Assembly resolutions A/RES/43/78L of 7 December 1988, and A/RES/45/62A of 4 December 1990.

35. In its resolutions adopted during the present period of 1972-1981, the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its condemnation of all nuclear weapon tests, in whatever environment they may be conducted. It called upon States that had not yet done so to adhere to the 1963 Test Ban Treaty (banning nuclear tests in the atmosphere, in outer space and under water) and called for the conclusion of a comprehensive test ban treaty, which would ban nuclear weapons tests in all environments (e.g. underground as well). Pending the conclusion of such treaty, it urged NWS to suspend nuclear weapon tests in all environments.

36. The General Assembly also emphasized that NWS bear a special responsibility for fulfilling the goal of achieving nuclear disarmament, and in particular those nuclear weapon States that are parties to international agreements in which they have declared their intention to achieve the cessation of the nuclear arms race. It further called specifically on the Heads of State of the USSR and the United States to implement the procedures for the entry into force of the Strategic Arms Limitation agreement (so-called "SALT" agreement).

37. At the 84th plenary meeting, following the Tenth Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a "violation of the Charter of the United Nations" and "a crime against humanity", and that the use of nuclear weapons should be prohibited, pending nuclear disarmament[26]. The General Assembly further noted the aspiration of non-nuclear-weapon States [NNWS] to prevent nuclear weapons from being stationed on their territories through the establishment of nuclear-weapon-free zones, and supported their efforts to conclude an international convention strengthening the guarantees for their security against the use or threat of use of nuclear weapons. As part of the measures to facilitate the process of nuclear disarmament and the non-proliferation of nuclear weapons, it requested the Committee on Disarmament to consider the question of the cessation and prohibition of the production of fissionable material for weapons purposes.

[26] Cf. General Assembly resolutions A/RES/33/71B of 14 December 1978, and A/RES/35/152D of 12 December 1980.

2. UN General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992)

38. Every year in the successive period 1982-1992 (following up on the Tenth and Twelvth Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions also calling for a nuclear-weapons freeze. May I refer to General Assembly resolutions A/RES/37/100A of 13 December 1982; A/RES/38/73E of 15 December 1983; A/RES/39/63C of 12 December 1984; A/RES/40/151C of 16 December 1985; A/RES/41/60E of 3 December 1986; A/RES/42/39B of 30 November 1987; A/RES/43/76B of 7 December 1988; A/RES/44/117D of 15 December 1989; A/RES/45/59D of 4 December 1990; A/RES/46/37C of 6 December 1991; and A/RES/47/53E of 9 December 1992.

39. These resolutions on freeze of nuclear weapons note that existing arsenals of nuclear weapons are more than sufficient to destroy all life on earth. They express the conviction that lasting world peace can be based only upon the achievement of general and complete disarmament, under effective international control. In this connection, the aforementioned General Assembly resolutions note that the highest priority objectives in the field of disarmament have to be nuclear disarmament and the elimination of all weapons of mass destruction. They at last call upon NWS to agree to reach "a freeze on nuclear weapons", which would, *inter alia*, provide for "a simultaneous total stoppage of any further production of fissionable material for weapons purposes".

40. Such nuclear-weapons freeze is not seen as an end in itself but as the most effective first step towards: *(a)* halting any further increase and qualitative improvement in the existing arsenals of nuclear weapons; and *(b)* activating negotiations for the substantial reduction and qualitative limitation of nuclear weapons. From 1989 onwards, these resolutions also set out the structure and scope of the prospective joint declaration through which all nuclear-weapons States would agree on a nuclear-arms freeze. Such freeze would encompass: *(a)* a comprehensive test ban; *(b)* cessation of the manufacture of nuclear weapons; *(c)* a ban on all further deployment of nuclear weapons; and *(d)* cessation of the production of fissionable material for weapons purposes.

3. UN General Assembly Resolutions on Nuclear Weapons as Breach of the UN Charter (Acknowledgment before the ICJ, 1995)

41. Two decades ago, when UN General Assembly resolutions condemning nuclear weapons were not as numerous as they are today, they

were already regarded as authoritative in the views of States from distinct continents. This was made clear, e.g., by States which participated in the advisory proceedings of 30 October to 15 November 1995 before the ICJ, conducive to its Advisory Opinion of 8 July 1996 on the *Threat or Use of Nuclear Weapons*. On the occasion, the view was upheld that those General Assembly resolutions expressed a "general consensus" and had a relevant "legal value"[27]. Resolution 1653 (XVI), of 1961, e.g., was invoked as a "law-making" resolution of the General Assembly, in stating that the use of nuclear weapons is contrary to the letter and spirit, and aims, of the United Nations, and, as such, a "direct violation" of the UN Charter[28].

42. It was further stated that, already towards the end of 1995, "numerous" General Assembly resolutions and declarations confirmed the illegality of the use of force, including nuclear weapons[29]. Some General Assembly resolutions (1653 (XVI), of 24 November 1961; 33/71B of 14 December 1978; 34/83G of 11 December 1979; 35/152D of 12 December 1980; 36/92I of 9 December 1981; 45/59B of 4 December 1990; 46/37D of 6 December 1991) were singled out for having significantly declared that the use of nuclear weapons would be a violation of the UN Charter itself[30]. The view was expressed that the series of General Assembly resolutions (starting with resolution 1653 (XVI), of 24 November 1961) amounted to "an authoritative interpretation" of humanitarian law treaties as well as the UN Charter[31].

43. In the advisory proceedings of 1995 before the ICJ, it was further recalled that General Assembly resolution 1653 (XVI) of 1961 was adopted in the form of a declaration, being thus "an assertion of the law", and, ever since, the General Assembly's authority to adopt such declaratory resolutions (in condemnation of nuclear weapons) was generally accepted; such resolutions declaring the use of nuclear weapons "unlawful" were regarded as ensuing from the exercise of an "inherent" power of the General Assembly[32]. The relevance of General Assembly resolutions has been reckoned by large groups of States[33].

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[27] CR 1995/25, of 3 November 1995, pp. 52-53 (statement of Mexico).
[28] CR 1995/22, of 30 October 1995, pp. 44-45 (statement of Australia).
[29] CR 1995/26, of 6 November 1995, pp. 23-24 (statement of Iran).
[30] CR 1995/28, of 9 November 1995, pp. 62-63 (statement of the Philippines).
[31] CR 1995/31, of 13 November 1995, p. 46 (statement of Samoa).
[32] CR 1995/27, of 7 November 1995, pp. 58-59 (statement of Malaysia).
[33] Cf., e.g., CR 1995/35, of 15 November 1995, p. 34, and cf. p. 22 (statement of Zimbabwe, on its initiative as Chair of the Non-Aligned Movement).

44. Ever since the aforementioned acknowledgment of the authority and legal value of General Assembly resolutions in the course of the pleadings of late 1995 before the ICJ, those resolutions continue to grow in number until today, clearly forming, in my perception, an *opinio juris communis* on nuclear disarmament. In addition to those aforementioned, may I also review, in sequence, two other series of General Assembly resolutions, extending to the present, namely: the longstanding series of General Assembly resolutions condemning nuclear weapons (1982-2015), and the series of General Assembly resolutions following up the ICJ's 1996 Advisory Opinion (1997-2015).

4. UN General Assembly Resolutions Condemning Nuclear Weapons (1982-2015)

45. In the period 1982-2015, there is a long series of UN General Assembly resolutions condemning nuclear weapons. May I refer to General Assembly resolutions A/RES/37/100C of 9 December 1982; A/RES/38/73G of 15 December 1983; A/RES/39/63H of 12 December 1984; A/RES/40/151F of 16 December 1985; A/RES/41/60F of 3 December 1986; A/RES/42/39C of 30 November 1987; A/RES/43/76E of 7 December 1988; A/RES/44/117C of 15 December 1989; A/RES/45/59B of 4 December 1990; A/RES/46/37D of 6 December 1991; A/RES/47/53C of 9 December 1992; A/RES/48/76B of 16 December 1993; A/RES/49/76E of 15 December 1994; A/RES/50/71E of 12 December 1995; A/RES/51/46D of 10 December 1996; A/RES/52/39C of 9 December 1997; A/RES/53/78D of 4 December 1998; A/RES/54/55D of 1 December 1999; A/RES/55/34G of 20 November 2000; A/RES/56/25B of 29 November 2001; A/RES/57/94 of 22 November 2002; A/RES/58/64 of 8 December 2003; A/RES/59/102 of 3 December 2004; A/RES/60/88 of 8 December 2005; A/RES/61/97 of 6 December 2006; A/RES/62/51 of 5 December 2007; A/RES/63/75 of 2 December 2008; A/RES/64/59 of 2 December 2009; A/RES/65/80 of 8 December 2010; A/RES/66/57 of 2 December 2011; A/RES/67/64 of 3 December 2012; A/RES/68/58 of 5 December 2013; A/RES/69/69 of 2 December 2014; and A/RES/70/62 of 7 December 2015.

46. In those resolutions, the General Assembly warned against the threat by nuclear weapons to the survival of humankind. They were preceded by two ground-breaking historical resolutions, namely, General Assembly resolution 1 (I) of 24 January 1946, and General Assembly resolution 1653 (XVI), of 24 November 1961 (cf. *infra*). In this new and long series of resolutions condemning nuclear weapons (1982-2015), at the opening of their preambular paragraphs the General Assembly states, year after year, that it is

> "*Alarmed* by the threat to the survival of mankind and to the life-sustaining system posed by nuclear weapons and by their use, inherent in the concepts of deterrence,

Convinced that nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security,

Further convinced that a prohibition of the use or threat of use of nuclear weapons would be a step towards the complete elimination of nuclear weapons leading to general and complete disarmament under strict and effective international control."

47. Those General Assembly resolutions next significantly *reaffirm*, in their preambular paragraphs, year after year, that

"the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity, as declared in its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980 and 36/92 I of 9 December 1981".

48. Still in their preambular paragraphs, those General Assembly resolutions further *note with regret* the inability of the Conference on Disarmament to undertake negotiations with a view to achieving agreement on a nuclear disarmament convention during each previous year. In their operative part, those resolutions reiterate, year after year, the request that the Committee on Disarmament undertakes, on a priority basis, negotiations aiming at achieving agreement on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances, taking as a basis the text of the draft Convention on the Prohibition of the Use of Nuclear Weapons.

49. From 1989 (forty-fourth session) onwards, those resolutions begin to note specifically that a multilateral agreement prohibiting the use or threat of use of nuclear weapons should strengthen international security and help to create the climate for negotiations leading to the complete elimination of nuclear weapons. Subsequently, those resolutions come to stress, in particular, that an international convention would be a step towards the complete elimination of nuclear weapons, leading to general and complete disarmament, under strict and effective international control.

50. Clauses of the kind then evolve, from 1996 onwards[34], to refer expressly to a time framework, i.e., that an international convention would be an important step in a phased programme towards the complete elimination of nuclear weapons, within a specific framework of time. More recent resolutions also expressly refer to the determination to achieve an international convention prohibiting the development, pro-

[34] Cf., e.g., *inter alia*, General Assembly resolution A/RES/50/71E, of 12 December 1995.

duction, stockpiling and use of nuclear weapons, leading to their ultimate destruction.

5. UN General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015)

51. Ever since the delivery, on 8 July 1996, of the ICJ's Advisory Opinion on *Nuclear Weapons* to date, the General Assembly has been adopting a series of resolutions (1996-2015), as its follow-up. May I refer to General Assembly resolutions A/RES/51/45 of 10 December 1996; A/RES/52/38 of 9 December 1997; A/RES/53/77 of 4 December 1998; A/RES/54/54 of 1 December 1999; A/RES/55/33 of 20 November 2000; A/RES/56/24 of 29 November 2001; A/RES/57/85 of 22 November 2002; A/RES/58/46 of 8 December 2003; A/RES/59/83 of 3 December 2004; A/RES/60/76 of 8 December 2005; A/RES/61/83 of 6 December 2006; A/RES/62/39 of 5 December 2007; A/RES/63/49 of 2 December 2008; A/RES/64/55 of 2 December 2009; A/RES/65/76 of 8 December 2010; A/RES/66/46 of 2 December 2011; A/RES/67/33 of 3 December 2012; A/RES/68/42 of 5 December 2013; A/RES/69/43 of 2 December 2014; and A/RES/70/56 of 7 December 2015. These resolutions make a number of significant statements.

52. The series of aforementioned General Assembly resolutions on follow-up to the 1996 Advisory Opinion of the ICJ (1996-2015) begins by expressing the General Assembly's belief that "the continuing existence of nuclear weapons poses a threat to humanity" and that "their use would have catastrophic consequences for all life on earth", and, further, that "the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again" (2nd preambular paragraph). The General Assembly resolutions reiteratedly reaffirm "the commitment of the international community to the realization of the goal of a nuclear-weapon-free world through the total elimination of nuclear weapons" (3rd preambular paragraph). They recall their request to the Conference on Disarmament to establish an *ad hoc* Committee to commence negotiations on a phased programme of nuclear disarmament, aiming at the elimination of nuclear weapons, within a "time bound framework"; they further reaffirm the role of the Conference on Disarmament as the single multilateral disarmament negotiating forum.

53. The General Assembly then recalls, again and again, that "the solemn obligations of States parties, undertaken in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), particularly to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament" (4th preambular paragraph). They express the goal of achieving a legally binding prohibition on the development, production, testing, deployment, stockpiling, threat or use of nuclear weapons, and their destruction under

"effective international control". They significantly call upon *all States* to fulfil promptly the obligation leading to an early conclusion of a convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination[35].

54. Those resolutions (from 2003 onwards) express deep concern at the lack of progress made in the implementation of the "thirteen steps" agreed to, at the 2000 Review Conference, for the implementation of Article VI of the NPT. The aforementioned series of General Assembly resolutions include, from 2010 onwards, an additional (6th) preambular paragraph, expressing "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons", and reaffirming, in this context, "the need for all States at all times to comply with applicable international law, including international humanitarian law". Those follow-up General Assembly resolutions further recognize

> "with satisfaction that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia's nuclear-weapon-free status, are gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons" (10th preambular paragraph).

55. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. They also take note of the "Five-Point Proposal on Nuclear Disarmament" made by the UN Secretary-General (cf. Part XVII, *infra*), and recognize the need for a multilaterally negotiated and legally binding instrument to assure that NNWS stand against the threat or use of nuclear weapons, pending the total elimination of nuclear weapons. In their operative part, the same series of General Assembly resolutions underline the ICJ's unanimous conclusion, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, 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" (para. 1).

[35] Note that in earlier resolutions, the following year is explicitly referenced, i.e., States should commence negotiations in "the following year". This reference is removed in later resolutions.

56. Looking at this particular series of General Assembly follow-up resolutions as a whole, it should not pass unnoticed that they contain paragraphs referring to the obligation to pursue and conclude, in good faith, negotiations leading to nuclear disarmament, without any reference to the NPT or to States parties to it. They rather refer to that obligation as a general one, not grounded on any treaty provision. *All States*, and not only States parties to the NPT, are called upon to fulfil promptly that obligation, incumbent upon *all States*, to report (to the Secretary-General) on their compliance with the resolutions at issue. There are, notably, other paragraphs in those resolutions that are specifically directed at nuclear-weapon States, or make specific references to the NPT. In sum, references to *all States* are deliberate, and in the absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament.

IV. UN Security Council Resolutions and *Opinio Juris*

57. Like the UN General Assembly, the UN Security Council has also often dwelt upon the matter at issue. May I refer, *inter alia*, to Security Council resolutions S/23500, of 31 January 1992; S/RES/984, of 11 April 1995; S/RES/1540, of 28 April 2004; S/RES/1673, of 27 April 2006; S/RES/1810, of 25 April 2008; S/RES/1887, of 24 September 2009; and S/RES/1997, of 11 July 2011 — to which others can be added[36]. May I at first recall that, at a Security Council's meeting at the level of Heads of State and Government, held on 31 January 1992, the President of the UN Security Council made a statement on behalf of the members of the Security Council that called upon all member States to fulfil their obligations on matters of arms control and disarmament, and to prevent the proliferation of all weapons of mass destruction[37] (encompassing nuclear, chemical, and biological weapons).

58. The statement expressed the feeling prevailing at the time that the end of the Cold War "has raised hopes for a safer, more equitable and more humane world", giving now to the world "the best chance of achiev-

[36] Cf. also Security Council resolutions S/RES/1695 of 15 July 2006; S/RES/1718 of 14 October 2006; S/RES/1874 of 12 June 2009; S/RES/1928 of 7 June 2010; S/RES/2094 of 7 March 2013; S/RES/2141 of 5 March 2014; S/RES/2159 of 9 June 2014; S/RES/2224 of 9 June 2015; S/RES/2270 of 2 March 2016. In preambular paragraphs of all these Security Council resolutions, the Security Council reaffirms, time and time again, that the proliferation of nuclear, chemical and biological weapons, and their means of delivery, constitutes a threat to international peace and security.

[37] UN doc. S/23500, of 31 January 1992, pp. 1-5.

ing international peace and security since the foundation of the United Nations"[38]. The members of the Security Council then warned against the threat to international peace and security of all weapons of mass destruction, and expressed their commitment to take appropriate action to prevent "the spread of technology related to the research for or production of such weapons"[39]. They further stressed the importance of "the integral role in the implementation" of the NPT of "fully effective IAEA safeguards", and of "effective export controls"; they added that they would take "appropriate measures in the case of any violations notified to them by the IAEA"[40].

59. The proliferation of all weapons of mass destruction is defined in the aforementioned Security Council statement, notably, as a threat to international peace and security, — a point which was to be referred to, in subsequent resolutions of the Security Council, to justify its action under Chapter VII of the UN Charter. In three of its subsequent resolutions, in a preambular paragraph (resolution 1540, of 28 April 2004, para. 2; resolution 1810, of 25 April 2008, para. 3; and resolution 1887, of 24 September 2009, para. 2), the Security Council reaffirms the statement of its President (adopted on 31 January 1992), and, also in other resolutions, further asserts (also in preambular paragraphs) that the proliferation of nuclear, chemical and biological weapons is a threat to international peace and security[41] and that all States need to take measures to prevent such proliferation.

60. In resolution 1540/2004 of 28 April 2004, adopted by the Security Council acting under Chapter VII of the UN Charter, it sets forth legally binding obligations on all UN Member States to set up and enforce appropriate and effective measures against the proliferation of nuclear, chemical, and biological weapons, — including the adoption of controls and a reporting procedure for UN Member States to a Committee of the Security Council (sometimes referred to as the "1540 Committee"). Subsequent Security Council resolutions reaffirm resolution 1540/2004 and call upon UN Member States to implement it.

61. The UN Security Council refers, in particular, in two of its resolutions (984/1995, of 11 April 1995; and 1887/2009 of 24 September 2009), to the obligation to pursue negotiations in good faith in relation to nuclear disarmament. In its preamble, Security Council resolu-

[38] UN doc. S/23500, of 31 January 1992, pp. 2 and 5.
[39] *Ibid.*, p. 4.
[40] *Ibid.*
[41] Cf. e.g. Security Council resolutions S/RES/1540, of 28 April 2004; S/RES/1673, of 27 April 2006; S/RES/1810, of 25 April 2008; S/RES/1977, of 20 April 2011. And cf. also resolutions S/RES/1695, of 15 July 2006; S/RES/1718, of 14 October 2006; S/RES/1874, of 12 June 2009; S/RES/1928, of 7 June 2010; S/RES/2094, of 7 March 2013; S/RES/2141, of 5 March 2014; S/RES/2159, of 9 June 2014; S/RES/2224, of 9 June 2015; and S/RES/2270, of 2 March 2016.

tion 984/1995 affirms the need for all States parties to the NPT "to comply fully with all their obligations"; in its operative part, it further

> "[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" (para. 8).

It should not pass unnoticed that Security Council resolution 984/1995 pre-dates the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*.

62. And Security Council resolution 1887/2009 of 24 September 2009, in its operative part, again calls upon States parties to the NPT "to comply fully with all their obligations and fulfil their commitments under the Treaty" (para. 2), and, in particular, "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"; furthermore, it calls upon "all other States to join in this endeavour" (para. 5). It should not pass unnoticed that it is a general call, upon all UN Member States, whether or not parties to the NPT.

63. In my perception, the aforementioned resolutions of the Security Council, like those of the General Assembly (cf. *supra*), addressing all UN Member States, provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT. In particular, the fact that the Security Council calls upon *all States*, and not only States parties to the NPT, to pursue negotiations towards nuclear disarmament in good faith (or to join the NPT State parties in this endeavour) is significant. It is an indication that the obligation is incumbent on all UN Member States, irrespectively of their being or not Parties to the NPT.

V. The Saga of the United Nations in the Condemnation of Nuclear Weapons

64. The UN resolutions (of the General Assembly and the Security Council) that I have just reviewed *(supra)* portray the United Nations' longstanding saga in the condemnation of nuclear weapons. This saga goes back to the birth and earlier years of the United Nations. In fact, nuclear weapons were not in the minds of the delegates to the San Francisco Conference of June 1945, at the time when the United Nations Charter was adopted on 26 June 1945. The United States' dropping of atomic bombs over Hiroshima and Nagasaki, heralding the nuclear age,

occurred on 6 and 9 August 1945, respectively, over ten weeks before the UN Charter's entry into force, on 24 October 1945.

65. As soon as the United Nations Organization came into being, it promptly sought to equip itself to face the new challenges of the nuclear age: the General Assembly's very first resolution, — resolution 1 (I) of 24 January 1946, — thus, established a Commission to deal with the matter, entrusted with submitting reports to the Security Council "in the interest of peace and security" (para. 2 *(a)*), as well as with making proposals for "control of atomic energy to the extent necessary to ensure its use only for peaceful purposes", and for "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction" (para. 5 *(b) (c)*).

66. One decade later, in 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking resolution: it would be proper here to recall the precise terms of the historical General Assembly resolution 1653 (XVI), of 24 November 1961, titled *"Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons"*. That *célèbre* resolution 1653 (1961) remains contemporary today, and, 55 years later, continues to require close attention; in it,

> "*The General Assembly,*
>
> *Mindful* of its responsibility under the Charter of the United Nations in the maintenance of international peace and security, as well as in the consideration of principles governing disarmament,
>
> *Gravely concerned* that, while negotiations on disarmament have not so far achieved satisfactory results, the armaments race, particularly in the nuclear and thermo-nuclear fields, has reached a dangerous stage requiring all possible precautionary measures to protect humanity and civilization from the hazard of nuclear and thermo-nuclear catastrophe,
>
> *Recalling* that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Conventions of The Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties,
>
> *Considering* that the use of nuclear and thermo-nuclear weapons would bring about indiscriminate suffering and destruction to mankind and civilization to an even greater extent than the use of those weapons declared by the aforementioned international declarations

and agreements to be contrary to the laws of humanity and a crime under international law,

Believing that the use of weapons of mass destruction, such as nuclear and thermo-nuclear weapons, is a direct negation of the high ideals and objectives which the United Nations has been established to achieve through the protection of succeeding generations from the scourge of war and through the preservation and promotion of their cultures,

1. *Declares* that:
   (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
   (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
   (c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;
   (d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization;
2. *Requests* the Secretary-General to consult the Governments of Member States to ascertain their views on the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear and thermo-nuclear weapons for war purposes and to report on the results of such consultation to the General Assembly at its seventeenth session."

67. Over half a century later, the lucid and poignant declaration contained in General Assembly resolution 1653 (1961) appears endowed with permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear Test Ban Treaty (CTBT), adopted on 24 September 1996, has not yet entered into force, although 164 States have ratified it to date.

68. It is beyond the scope of the present dissenting opinion to dwell upon the reasons why, already for two decades, one remains awaiting for the CTBT's entry into force[42]. Suffice it here to recall that the CTBT provides (Art. XIV) that for it to enter into force, the 44 States specified in its Annex 2 need to ratify it[43]; a number of these States have not yet ratified the CTBT, including some NWS, like India and Pakistan. NWS have invoked distinct reasons for their positions conditioning nuclear disarmament (cf. *infra*). The entry into force of the CTBT has thus been delayed.

69. Recently, in a panel in Vienna (on 27 April 2016) in commemoration of the twentieth anniversary of the CTBT, the UN Secretary-General (Ban Ki-moon) pondered that there have been advances in the matter, but there remains a long way to go, in the determination "to bring into force a legally binding prohibition against all nuclear tests". He recalled to have

> "repeatedly pointed to the toxic legacy that some 2,000 tests left on people and the environment in parts of Central Asia, North Africa, North America and the South Pacific. Nuclear testing poisons water, causes cancers, and pollutes the area with radioactive fall-out for generations and generations to come. We are here to honour the victims. The best tribute to them is action to ban and to stop nuclear testing. Their sufferings should teach the world to end this madness."[44]

He then called on the (eight) remaining CTBT Annex 2 States "to sign and ratify the Treaty without further delay", so as to strengthen its goal of universality; in this way — he concluded — "we can leave a safer world, free of nuclear tests, to our children and to succeeding generations of this world"[45].

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[42] For a historical account and the perspectives of the CTBT, cf., e.g., K. A. Hansen, *The Comprehensive Nuclear Test Ban Treaty*, Stanford, Stanford University Press, 2006, pp. 1-84; [Various Authors], *Nuclear Weapons after the Comprehensive Test Ban Treaty* (ed. E. Arnett), Stockholm-Solna/Oxford, SIPRI/Oxford University Press, 1996, pp. 1-141; J. Ramaker, J. Mackby, P. D. Marshall and R. Geil, *The Final Test — A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna, Ed. Prep. Comm. of CTBTO, 2003, pp. 1-265.

[43] Those 44 States, named in Annex 2, participated in the CTBT negotiations at the Conference on Disarmament, from 1994 to 1996, and possessed nuclear reactors at that time.

[44] UN doc. SG/SM/17709-DC/3628, of 27 April 2016, pp. 1-2.

[45] *Ibid.*, p. 2.

70. To this one may add the unaccomplished endeavours of the UN General Assembly Special Sessions on Disarmament. Of the three Special Sessions held so far (in 1978, Tenth Special Session; in 1982, Twelfth Special Session; and in 1988, Fifteenth Special Session)[46], the first one appears to have been the most significant one so far. The Final Document adopted unanimously (without a vote) by the First Special Session on Disarmament sets up a programme of action on disarmament and the corresponding mechanism in its current form. In the present case before the ICJ, the Marshall Islands refers to this document in its Memorial, singling out its relevance for the interpretation of Article VI of the NPT and the corresponding customary international law obligation of nuclear disarmament (paras. 129-132).

71. That Final Document of the first General Assembly Special Session on Disarmament (1978) addresses nuclear disarmament in its distinct aspects. In this respect, the General Assembly begins by observing that the accumulation of nuclear weapons constitutes a threat to the future of humankind (para. 1), in effect "the greatest danger" to humankind and to "the survival of civilization" (para. 47). It adds that the arms race, particularly in its nuclear aspect, is incompatible with the principles enshrined in the United Nations Charter (para. 12). In its view, the most effective guarantee against the dangers of nuclear war is the complete elimination of nuclear weapons (paras. 8 and 56)[47].

72. While disarmament is the responsibility of all States, the General Assembly asserts that NWS have the primary responsibility for nuclear disarmament. There is pressing need of "urgent negotiations of agreements" to that end, and in particular to conclude "a treaty prohibiting nuclear-weapon tests" (paras. 50-51). It further stresses the importance of nuclear-weapon-free zones that have been established or are the subject of negotiations in various parts of the globe (paras. 60-64).

73. The Conference on Disarmament, since 1979 the sole multilateral disarmament-negotiating forum of the international community, has helped to negotiate multilateral arms-limitation and disarmament agreements[48]. It has focused its work on four main issues, namely: nuclear disarmament, prohibition of the production of fissile material for weapon use, prevention of arms race in outer space, and negative security assurances. Yet, since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in face of the invocation of

[46] Ever since, several General Assembly resolutions have called for a Fourth Special Session on Disarmament, but it has not yet taken place.

[47] And cf. also paras. 18 and 20.

[48] E.g., the aforementioned NPT, CTBT, the Biological Weapons Convention, and the Chemical Weapons Convention, in addition to the sea-bed treaties, and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.

divergent security interests, added to the understanding that nuclear weapons require mutuality; furthermore, the Rules of Procedure of the Conference provide that all decisions must be adopted by consensus. In sum, some States blame political factors for causing its long-standing stalemate, while others attribute it to outdated procedural rules.

74. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of mass destruction, as illustrated by the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (on 10 April 1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (on 13 January 1993); distinctly from the CTBT *(supra)*, these two Conventions have already entered into force (on 26 March 1975, and on 29 April 1997, respectively).

75. If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the *universality* of contemporary international law — as envisaged by its "founding fathers", already in the sixteenth-seventeenth centuries, — with its underlying fundamental principles (cf. *infra*).

76. The truth is that, in our times, the obligation of nuclear disarmament has emerged and crystallized, in both conventional and customary international law, and the United Nations has been giving a most valuable contribution to this over the decades. The matter at issue, the United Nations saga in this domain, was brought to the attention of the ICJ, two decades ago, in the advisory proceedings that led to its Advisory Opinion of 1996 on the *Threat or Use of Nuclear Weapons*, and now again, two decades later, in the present contentious proceedings in the cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, opposing the Marshall Islands to India, Pakistan and the United Kingdom, respectively.

77. The aforementioned UN resolutions were in effect the object of attention on the part of the Contending Parties before the Court (Marshall Islands, India, Pakistan and the United Kingdom). In the oral phase of their arguments, they were dealt with by the participating States (Marshall Islands, India and the United Kingdom), and, extensively so, in particular, by the Marshall Islands and India. The key point is the relation of those resolutions with the emergence of *opinio juris*, of relevance to the identification of a customary international law obligation in the present domain. May I turn, first, to the positions sustained by the Contending Parties, and then, to the questions I put to them in the public sitting of 16 March 2016 before the ICJ in the *cas d'espèce*, and the responses received from them.

VI. UN Resolutions and the Emergence of *Opinio Juris*: The Positions of the Contending Parties

78. In their written submissions and oral arguments before the Court in the present case(s) of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the Marshall Islands addresses General Assembly resolutions on nuclear disarmament, in relation to the development of customary international law[49]; it also refers to Security Council resolutions[50]. Quoting the ICJ's Advisory Opinion of 1996, it contends (perhaps not as clearly as it could have done) that although General Assembly resolutions lack binding force, they may "sometimes have normative value", and thus contribute to the emergence of an *opinio juris*[51].

79. In its written submissions and oral arguments before the Court, India addresses UN General Assembly resolutions on follow-up to the ICJ's Advisory Opinion of 1996, pointing out that it is the only nuclear weapon State that has co-sponsored and voted in favour of such resolutions[52]. India supports nuclear disarmament "in a time-bound, universal, non-discriminatory, phased and verifiable manner"[53]. And it criticizes the Marshall Islands for not supporting the General Assembly follow-up resolutions in its own voting pattern (having voted against one of them, in favour once, and all other times abstained)[54].

80. In its Preliminary Objections (of 15 June 2015), the United Kingdom, after recalling the Marshall Islands' position on earlier UN Gen-

[49] CR 2016/1, of 7 March 2016, para. 7.
[50] *Ibid.*, para. 8.
[51] *Ibid.*, para. 7.
[52] CR 2016/4, of 10 March 2016, p. 19, para. 1.
[53] Counter-Memorial of India, p. 9, para. 13.
[54] *Ibid.*, p. 8, para. 12.

eral Assembly resolutions, in the 1960s and 1970s (paras. 21 and 98 *(c)* and *(h)*), then refers to its own position thereon (paras. 84 and 99 *(c)*). It also refers to UN Security Council resolutions (para. 92). It then recalls the Marshall Islands' arguments — e.g., that "the United Kingdom has always voted against" General Assembly resolutions on the follow-up of the ICJ Advisory Opinion of 1996, and of the UN High Level Meetings in 2013 and 2014 (paras. 98 *(e)* and *(h)*), — in order to rebut them (paras. 99-103).

81. As for Pakistan, though it informed the Court of its decision not to participate in the oral phase of the present proceedings (letter of 2 March 2016), in the submissions in its Counter-Memorial it argues that the ICJ 1996 Advisory Opinion nowhere stated that the obligation under Article VI of the NPT was a general obligation or that it was opposable *erga omnes*; in its view, there was no prima facie evidence to this effect *erga omnes*[55]. As to the UN General Assembly resolutions following up the ICJ's 1996 Advisory Opinion, Pakistan notes that it has voted in favour of these resolutions from 1997 to 2015, and by contrast, it adds, the Marshall Islands abstained from voting in 2002 and 2003 and again from 2005 to 2012[56].

82. After recalling that it is not a party to the NPT[57], Pakistan further argues that General Assembly resolutions do not have binding force and cannot thus, in its view, give rise to obligations enforceable against a State[58]. Pakistan concludes that the General Assembly resolutions do not support the proposition that there exists a customary international law obligation "rooted" in Article VI of the NPT. Rather, it is the NPT that underpins the Marshall Islands' claims[59].

83. In sum, the United Kingdom has voted against such resolutions, the Marshall Islands has abstained in most of them, India and Pakistan have voted in favour of them. Despite these distinct patterns of voting, in my view the UN General Assembly resolutions reviewed in the present dissenting opinion, taken altogether, are not at all deprived of their contribution to the conformation of *opinio juris* as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the UN General Assembly itself (and not only of the large majority of UN Member States which voted in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole (cf. Part XX, *infra*).

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[55] Counter-Memorial of Pakistan, p. 8, para. 2.3.
[56] *Ibid.*, para. 2.4.
[57] *Ibid.*, p. 14, para. 4.4; p. 30, para. 7.55.
[58] *Ibid.*, p. 38, paras. 7.95-7.97.
[59] *Ibid.*, para. 7.97.

VII. Questions from the Bench and Responses from the Parties

84. At the end of the public sittings before the Court in the present case, I deemed it fit to put the following questions (on 16 March 2016, in the afternoon) to the Contending Parties:

> "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 UN General Assembly resolutions on nuclear disarmament. Parallel to the resolutions on the matter which go back to the early 1970s (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 ICJ 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."[60]

85. One week later (on 23 March 2016), the United Kingdom and the Marshall Islands submitted to the ICJ their written replies to my questions. In its response to them, the United Kingdom stated that resolutions adopted by international organizations may, in some circumstances, be evidence of customary international law or contribute to its development; however, they do not constitute an expression of customary international law in and of themselves. In the *cas d'espèce*, the United Kingdom deems it unnecessary to assess whether the General Assembly resolutions following up on the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons* constitute evidence of custom, as the obligation set forth in Article VI of the NPT is binding upon the United Kingdom anyway, irrespective of whether there is a corresponding obligation in customary international law[61].

86. The Marshall Islands, for its part, recalls the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, as well as a number of

[60] CR 2016/9, of 16 September 2016, pp. 33-34.

[61] Reply of the United Kingdom to the Questions Addressed by Judge Cançado Trindade to Both Parties, ICJ doc. MIUK 2016/13, of 23 March 2016, pp. 1-2, para. 3.

General Assembly resolutions upholding the obligation to pursue negotiations leading to nuclear disarmament, in support of its position as to the existence of a customary international law obligation to this end. It also refers to the ICJ's *obiter* dictum in the case of *Nicaragua* v. *United States of America*, to the effect that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions"[62].

87. In the perception of the Marshall Islands, the attitude of States towards General Assembly resolutions adopted in the period 1982-1995 indicates an emerging *opinio juris* on the obligation to conduct negotiations in good faith leading to general and complete nuclear disarmament. The Marshall Islands then states that the attitude of States to resolutions following up the 1996 ICJ's Advisory Opinion — those affirming the existence of an obligation to pursue negotiations leading to nuclear disarmament — constitutes an expression of *opinio juris*, in support of a customary international obligation to this end[63].

88. As to the incidence of General Assembly resolutions on the existence of a dispute in the *cas d'espèce*, the Marshall Islands contends that opposing attitudes of States to such resolutions may contribute to demonstrating the existence of a dispute[64]. As to the present case opposing the Marshall Islands to the United Kingdom, the Marshall Islands contends that the diverging voting records of the Marshall Islands and the United Kingdom are a clear indication of the opposing views of the Parties concerning the obligations enshrined in Article VI of the NPT (and the corresponding obligation of customary international law)[65].

VIII. Human Wickedness: From the Twenty-First Century Back to the Book of Genesis

89. Since the beginning of the nuclear age in August 1945, some of the great thinkers of the twentieth century started inquiring whether humankind has a future. Indeed, this is a question which cannot be eluded. Thus, already in 1946, for example, deeply shocked by the United States' atomic bombings of Hiroshima and Nagasaki (on 6 and 9 August 1945,

[62] The Marshall Islands also cites the International Law Commission's Draft Conclusions on the *Identification of Customary International Law* (2015), which recognize the importance of the attitude of States towards General Assembly resolutions for establishing State practice and *opinio juris*. Reply of the Marshall Islands to the Questions Addressed by Judge Cançado Trindade to Both Parties, ICJ doc. MIUK 2016/13, of 23 March 2016, pp. 2-3, paras. 2-5.

[63] *Ibid.*, p. 4, para. 7.

[64] *Ibid.*, para. 8.

[65] *Ibid.*, para. 9.

respectively)[66], Mahatma Gandhi, in promptly expressing his worry about the future of human society, wrote, in the Journal *Harijan*, on 7 July 1946, that

> "So far as I can see, the atomic bomb has deadened the finest feeling that has sustained mankind for ages. There used to be the so-called laws of war which made it tolerable. Now we know the naked truth. War knows no law except that of might."[67]

90. And Gandhi, denouncing its brutality, added that the "atom bomb is the weapon of ultimate force and destruction", evidencing the "futility" of such violence; the development of the atom bomb "represents the most sinful and diabolical use of science"[68]. In the same Journal *Harijan*, M. Gandhi further wrote, on 29 September 1946, that non-violence is "the only thing the atom bomb cannot destroy"; and he further warned that "unless now the world adopts non-violence, it will spell certain suicide for mankind"[69].

91. Over a decade later, in the late 1950s, Karl Jaspers, in his book *La bombe atomique et l'avenir de l'homme* (1958), regretted that the existence of nuclear weapons seemed to have been taken for granted, despite their capacity to destroy humankind and all life on the surface of earth[70]. One has thus to admit, he added, that "this Earth, which was born of an atomic explosion, may well also be destroyed by atomic bombs"[71]. Jaspers further regretted that progress had occurred in technological knowledge, but there had been "no progress of ethics nor of reason". Human nature has not changed: "man must change or die"[72].

92. In the early 1960s, for his part, Bertrand Russell, in his book *Has Man a Future?* (1961), likewise regretted that people seemed to have got used to the existence of nuclear weapons, in a world dominated by a "will towards death", prevailing over sanity[73]. Unfortunately, he proceeded, "love for power" has enticed States "to pursue irrational poli-

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[66] Preceded by a nuclear test undertaken by the United States at Alamagordo, New Mexico, on 16 July 1945.

[67] M. Gandhi, "Atom Bomb and Ahimsa", *Harijan* (7 July 1946), reproduced in: *Journalist Gandhi — Selected Writings of Gandhi* (org. S. Sharma), 1st ed., Mumbai, Ed. Gandhi Book Centre, 1994, p. 104; also cited in: P. F. Power, *Gandhi on World Affairs*, London, Allen & Unwin, 1961, pp. 63-64.

[68] Cited in: *What Mahatma Gandhi Said about the Atom Bomb* (org. Y. P. Anand), New Delhi, National Gandhi Museum, 1998, p. 5.

[69] From the Journal *Harijan* (29 September 1946), cited in: Faisal Devji, *The Impossible Indian — Gandhi and the Temptation of Violence*, London, Hurst & Co., 2012, p. 150.

[70] K. Jaspers, *La bombe atomique et l'avenir de l'homme* [1958], Paris, Buchet/Chastel, 1963, pp. 22 and 336.

[71] *Ibid.*, p. 576 *[translation by the Registry]*.

[72] *Ibid.*, pp. 621 and 640 *[translation by the Registry]*.

[73] B. Russell, *Has Man a Future?*, [London], Penguin Books, 1962 [reprint], pp. 27 and 37.

cies"; and he added: "Those who regard Genesis as authentic history, may take Cain as the first example: he may well have thought that, with Abel out of the way, he could rule over coming generations"[74]. To Russell, it is "in the hearts of men that the evil lies", it is in their minds that "the cure must be sought"[75]. He further regretted the discouraging results of disarmament conferences, and even wrote that ICJ pronouncements on the issue should be authoritative, and it was not "optional" for States "to respect or not international law"[76].

93. For his part, Karl Popper, at the end of his life, in his book (in the form of an interview) *The Lesson of This Century* (1997), in assembling his recollections of the twentieth century, expressed the anguish, for example, at the time of the 1962 Cuban Missile crisis, with the finding that each of the 38 warheads at issue had three thousand times more power than the atomic bomb dropped over Hiroshima[77]. Once again, the constatation: human nature has not changed. Popper, like other great thinkers of the twentieth century, regretted that no lessons seemed to have been learned from the past; this increased the concern they shared, in successive decades, with the future of humankind, in the presence of arsenals of nuclear weapons.

94. A contemporary writer, Max Gallo, in his recent novel *Caïn et Abel — Le premier crime*, has written that the presence of evil is within everyone; "evil lies at the heart of good, and this ambiguous reality is peculiar to the affairs of humankind"[78]. Writers of the past, he went on, "they too — you, Dante, you, Dostoyevsky, and those who inspired you, Aeschylus, Sophocles — fan the flames of punishment and guilt"[79]. And he added:

> "Everywhere, Cain stabs or strangles Abel. (. . .) And no one seems to see (. . .) the imminent death of all humankind. It holds in its hands the weapon of its destruction. Now it is not only entire cities that will be burnt down, razed to the ground: all life will be consumed, and the earth vitrified.
>
> Two cities have already suffered that fate, and the shadows of their inhabitants' bodies are forever embedded in the stone by a heat as hot as the sun's lava.
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> . . . . . .

[74] *Op. cit. supra* note 73, p. 45.
[75] *Ibid.*, pp. 45-46, and cf. 69.
[76] *Ibid.*, pp. 97 and 79.
[77] K. Popper, *The Lesson of This Century* (interview with G. Bosetti), London/N.Y., Routledge, 1997, pp. 24 and 28. And cf. also, earlier on, K. Popper, *La Responsabilidad de Vivir — Escritos sobre Política, Historia y Conocimiento* [1994], Barcelona, Paidós, 2012 (reed.), p. 242, and cf. p. 274.
[78] M. Gallo, *Caïn et Abel — Le premier crime*, [Paris], Fayard, 2011, pp. 112 and 141 *[translation by the Registry]*.
[79] *Ibid.*, p. 174 *[translation by the Registry]*.

> Cain will pursue Abel everywhere (. . .) Vulnerable cities will be soaked in blood. The highest towers will be destroyed, their inhabitants buried beneath the rubble."[80]

95. As well captured by those and other thinkers, in the Book of Genesis, the episode of the brothers Cain and Abel portraying the first murder ever, came to be seen, over the centuries, as disclosing the presence of evil and guilt in the world where everyone lives. This called for care, prudence and reflection, as it became possible to realize that human beings were gradually distancing themselves from their Creator. The fragility of civilizations soon became visible. That distancing became manifest in the subsequent episode of the Tower of Babel (Genesis, Chap. 11: 9). As they were built, civilizations could be destroyed. History was to provide many examples of that (as singled out, in the twentieth century, by Arnold Toynbee). Over the centuries, with the growth of scientific-technological knowledge, the human capacity of self-destruction increased considerably, having become limitless in the present nuclear age.

96. Turning back to the aforementioned book by Bertrand Russell, also in its French edition (*L'homme survivra-t-il?*, 1963), he further warned therein that

> "[I]l faut que nous nous rendions compte que la haine, la perte de temps, d'argent et d'habilité intellectuelle en vue de la création d'engins de destruction, la crainte du mal que nous pouvons nous faire mutuellement, le risque quotidien et permanent de voir la fin de tout ce que l'homme a réalisé, sont le produit de la folie humaine. (. . .) C'est dans nos cœurs que réside le mal, c'est de nos cœurs qu'il doit être extirpé"[81]. ["[W]e must become aware that the hatred, the expenditure of time and money and intellectual ability upon weapons of destruction, the fear of what we may do to each other, and the imminent daily and continued risk of an end to all that man has achieved, . . . all this is a product of human folly . . . It is in our hearts that the evil lies, and it is from our hearts that it must be plucked out."[82]]

97. Some other great thinkers of the twentieth century (from distinct branches of knowledge), expressed their grave common concern with the increased human capacity of destruction coupled with the development of scientific-technological knowledge. Thus, the historian Arnold Toynbee (*A Study in History*, 1934-1954; and *Civilization on Trial*, 1948), regretted precisely the modern tragedy that human iniquity was not eliminated

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[80] *Op. cit. supra* note 78, pp. 236-237 *[translation by the Registry]*.

[81] B. Russell, *L'homme survivra-t-il?*, Paris, Ed. J. Didier, 1963, pp. 162-163.

[82] B. Russell, *Has Man a Future?*, *op. cit. supra* note 73, pp. 109-110. Towards the end of his life, Bertrand Russell again warned against the extreme danger of atomic and hydrogen bombs, and expressed his concern that people seemed to get used to their existence; cf. B. Russell, *Autobiography* [1967], London, Unwin, 1985 (reed.), pp. 554-555.

with the development of scientific-technological knowledge, but widely enlarged, without a concomitant advance at spiritual level[83]. And the increase in armaments and in the capacity of destruction, he added, became a symptom of the fall of civilizations[84].

98. For his part, the writer Hermann Hesse, in a posthumous book of essays (*Guerre et paix*, 1946), originally published shortly after the Second World War, warned that with the mass killings, not only do we keep on killing ourselves, but also our present and perhaps also our future[85]. The worst destruction, he added, was the one organized by the State itself, with its corollary, "the philosophy of the State", accompanied by capital and industry[86]. The philosopher and theologian Jacques Maritain (*Œuvres complètes*, 1961-1967), in turn, wrote that the atrocities perpetrated in the twentieth century had "a more tragic significance for human conscience"[87]. In calling for an "integral humanism", he warned that the human person transcends the State, and the realization of the common good is to be pursued keeping in mind human dignity[88]. In his criticism of the "realists", he stressed the imperatives of ethics and justice, and the importance of general principles of law, in the line of jusnaturalist thinking[89].

99. Another writer, the humanist Stefan Zweig, remained always concerned with the fate of humankind. He was impressed with the Scripture's legend of the Tower of Babel, having written an essay on it in 1916, and kept it in mind over the years, as shown in successive essays written in

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[83] Cf. A. J. Toynbee, *A Study in History*, Oxford University Press, 1970 [3rd reprint], pp. 48-558, 559-701, 702-718 and 826-850; A. J. Toynbee, *Civilization on Trial*, Oxford/N.Y., Oxford University Press, 1948, pp. 3-263.

[84] A. J. Toynbee, *Guerra e Civilização* [*War and Civilization*], Lisbon, Edit. Presença, 1963, pp. 29, 129 and 178.

[85] H. Hesse, *Sobre la Guerra y la Paz* [1946], 5th ed., Barcelona, Edit. Noguer, 1986, pp. 119 and 122.

[86] H. Hesse, *Guerre et Paix*, Paris, L'Arche Ed., 2003 (reed.), pp. 127 and 133.

[87] J. Maritain, "Dieu et la permission du mal", *Œuvres de Jacques Maritain — 1961-1967 (Jacques et Raissa Maritain — Œuvres complètes)*, Vol. XII, Fribourg/Paris, Ed. Universitaires/Ed. Saint-Paul, 1992, p. 17, and cf. p. 41 *[translation by the Registry]*.

[88] Cf. J. Maritain, *Humanisme intégral*, Paris, Aubier, 2000 (reed.), pp. 18, 37, 137 and 230-232; J. Maritain, *The Person and the Common Good*, Notre Dame, University of Notre Dame Press, 2002 (reed.), pp. 29, 49-50, 92-93 and 104; J. Maritain, *O Homem e o Estado*, 4th ed., Rio de Janeiro, Livr. Agir Ed., 1966, pp. 96-102; J. Maritain, *Los Derechos del Hombre y la Ley Natural*, Buenos Aires, Ed. Leviatan, 1982, pp. 38, 44, 50, 69 and 94-95, and cf. pp. 79-82; J. Maritain, *Para una Filosofía de la Persona Humana*, Buenos Aires, Ed. Club de Lectores, 1984, pp. 164, 176-178, 196-197, 221 and 231.

[89] J. Maritain, *De la justice politique — Notes sur la présente guerre*, Paris, Libr. Plon, 1940, pp. 88, 90-91, 106-107 and 112-114.

more than the two following decades[90], taking it as a symbol of the perennial yearning for a unified humanity. In his own words,

> "The history of tomorrow must be a history of all humanity and the conflicts between individual conflicts must be seen as redundant alongside the common good of the community. History must then be transformed from the current woeful State to a completely new position; (. . .) it must clearly contrast the old ideal of victory with the new one of unity and the old glorification of war with a new contempt for it. (. . .) [T]he only important thing is to push forward under the banner of a community of nations, the mentality of mankind (. . .)"[91]

100. Yet, in his dense and thoughtful intellectual autobiography (*Le monde d'hier*, 1944), written shortly before putting an end to his own life, Stefan Zweig expressed his deep concern with the fading away of conscience, disclosed by the fact that the world got used to the "dehumanization, injustice and brutality, as never before in hundreds of centuries"[92]; persons had been transformed into simple objects[93]. Earlier on — before the nuclear age — his friend the psychologist Sigmund Freud, in a well-known essay (*Civilization and Its Discontents*, 1930), expressed his deep preoccupation with what he perceived as an impulse to barbarism and destruction, which could not be expelled from the human psyche[94]. In face of human hostility and the threat of self-disintegration, he added, there is a consequent loss of happiness[95].

101. Another psychologist, Carl Jung, referring, in his book *Aspects du drame contemporain* (1948), to events of contemporary history of his epoch, warned against subsuming individuals under the State; in his view, collective evil and culpability contaminate everyone everywhere[96]. He further warned against the tragic dehumanization of others[97] and the psychic exteriorizations of mass movements (of the collective unconscience) conducive to destruction[98].

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[90] As shown in his posthumous book of essays: S. Zweig, *Messages from a Lost World*, London, Pushkin Press, 2016, pp. 55, 88-90, 97, 107 and 176.

[91] *Ibid.*, pp. 170 and 175.

[92] S. Zweig, *O Mundo que Eu Vi* [1944, *Die Welt von Gestern*], Rio de Janeiro, Edit. Record, 1999, p. 483, and cf. 272-274, 278, 462, 467, 474, 490 and 503-505.

[93] *Ibid.*, p. 490.

[94] Sigmund Freud, *Civilization and Its Discontents* [1930], N.Y., Norton & Cia., 1962 (reed.), pp. 7-9, 26, 36-37 and 59-63.

[95] Cf. *ibid.*, pp. 23 and 67-92.

[96] C. G. Jung, *Aspects du drame contemporain*, Geneva/Paris, Libr. de l'Univ. Georg/Ed. de la Colonne Vendôme, 1948, pp. 99 and 145.

[97] *Ibid.*, pp. 173 and 179.

[98] *Ibid.*, pp. 198-200, 208, 218-219 and 223.

102. To the writer and theologian Albert Schweitzer (who wrote his *Kulturphilosophie* in 1923), the essence of civilization lies in the respect for life, to the benefit of each person and of humankind[99]. He rejected the "illness" of *Realpolitik*, having stated that good consists in the preservation and exaltation of life, and evil lies in its destruction; nowadays more than ever, he added, we need an "ethics of reverence for life", what requires responsibility[100]. He insisted, in his book *La civilisation et l'éthique* (1923), that respect for life started from awareness of one's responsibility vis-à-vis the life of others[101].

103. Later on in his life, then in the nuclear age, in his series of lectures *Paix ou guerre atomique* (1958), Schweitzer called for an end to nuclear weapons, with their "unimaginable destruction and annihilation"[102]. In his own words,

> "There are no victors in a nuclear war, only the vanquished. Each belligerent suffers the same damage from the adversary's atomic bombs and missiles as it inflicts with its own. The result is continuous annihilation (. . .). It can only say: are we both going to commit suicide by mutual extermination?"[103]

104. Well before them, by the turn of the nineteenth to the twentieth century, the writer Leo Tolstoy warned (*The Slavery of Our Times*, 1900) against the undue use of the State monopoly of "organized violence", conforming a new form of slavery of the vulnerable ones[104]; he criticized the recruitment of personnel to be sent to war to kill defenseless persons, perpetrating acts of extreme violence[105]. On his turn, the physician Georges Duhamel warned (in his account *Civilization, 1914-1917*) against the fact that war had become an industry of killing, with a "barbaric ideology", destroying civilization with its "lack of humanity"; yet, he still cherished the hope that the spirit of humanism could flourish from the ashes[106].

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[99] A. Schweitzer, *Filosofia da Civilização* [1923], São Paulo, Edit. Unesp, 2011 (reed.), pp. 80, 304, 311 and 315.

[100] A. Schweitzer, *Pilgrimage to Humanity [Weg zur Humanität]*, N.Y., Philosophical Library, 1961, pp. 87-88, 99 and 101.

[101] M. Arnold, *Albert Schweitzer — La compassion et la raison*, Lyon, Ed. Olivétan, 2015, pp. 74-75 and 77 *[translation by the Registry]*.

[102] Cited in *ibid.*, p. 111 *[translation by the Registry]*.

[103] Extract from his book *Paix ou guerre atomique* (1958), reproduced in his posthumous book of essays: A. Schweitzer, *Respect de la vie* (org. B. Kaempf), Paris, Ed. Arfuyen/CIAL, 1990, p. 98 *[translation by the Registry]*.

[104] L. Tolstoy, *La Esclavitud de Nuestro Tiempo* [1900], Barcelona, Littera, 2000 (reed.), pp. 86-87, 89, 91 and 97.

[105] *Ibid.*, pp. 101, 103-104 and 121.

[106] G. Duhamel, *Civilisation — 1914-1917*, Paris, Mercure de France, 1944, pp. 53 and 274-275; G. Duhamel, *Mémorial de la guerre blanche — 1938*, Paris, Mercure de France, 1945, pp. 41, 95, 100, 102 and 170.

105. The historian of ideas, Isaiah Berlin, for his part, warned *(The Proper Study of Mankind)* against the dangers of the *raison d'Etat*, and stressed the relevance of *values*, in the search of knowledge, of cultures, and of the *recta ratio*[107]. On his turn, the writer Erich Fromm upheld human life in insisting that there could only exist a truly "civilized" society if based on humanist values[108]. Towards the end of his life, in his book *The Anatomy of Human Destructivity* (1974), he warned against destruction and propounded the prevalence of love for life[109].

106. Fromm further warned that the devastation of wars (including the contemporary ones) has led to the loss of hope and to brutalization, amidst the tension of the co-existence or ambivalence between civilization and barbarism, which requires all our endeavours towards the revival of humanism[110]. Likewise, in our days, the philosopher Edgar Morin has also warned that the advances of scientific knowledge disclosed an ambivalence, in that they provided, on the one hand, the means to improve the knowledge of the world, and, on the other hand, with the production (and proliferation) of nuclear weapons, in addition to other weapons (biological and chemical) of mass destruction, the means to destroy the world[111].

107. The future has thus become unpredictable, and unknown, in face of the confrontation between the forces of life and the forces of death. Yet, he added, human beings are endowed with conscience, and are aware that civilizations, as well as the whole of humankind, are mortal[112]. Morin further contended the tragic experiences lived in recent times should lead to the repentance of barbarism and the return to humanism; in effect, to think about, and resist to, barbarism, amounts to contributing to recreate humanism[113].

108. For his part, in the late 1980s, in his book of essays *Silences et mémoires d'hommes* (1989), Elie Wiesel stressed the need of memory and attention to the world wherein we live, so as to combat the indifference to

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[107] I. Berlin, *The Proper Study of Mankind*, N.Y., Farrar & Straus & Giroux, 2000 (reed.), pp. 78, 135, 155, 217, 235-236, 242, 247, 311 and 334; I. Berlin, "Return of the *Volksgeist*: Nationalism, Good and Bad", *At Century's End* (ed. N. P. Gardels), San Diego/Cal., Alti Publ., 1995, p. 94.

[108] Cf. E. Fromm, *Las Cadenas de la Ilusión — Una Autobiografía Intelectual* [1962], Barcelona, Paidós, 2008 (reed.), pp. 78 and 234-239.

[109] Cf. E. Fromm, *Anatomía de la Destructividad Humana* [1974], Mexico/Madrid/Buenos Aires, 2009 (reed.), pp. 16-468; and cf. also E. Fromm, *El Amor a la Vida* [1983 — *Über die Liebe zum Leben*], Barcelona, Paidós, 2016 (4th reprint), pp. 15-250.

[110] E. Fromm, *Las Cadenas de la Ilusión . . .*, *op. cit. supra* note 108, pp. 240 and 250-251.

[111] E. Morin, *Vers l'abîme?*, Paris, L'Herne, 2012, pp. 9, 24-25 and 40-41.

[112] *Ibid.*, pp. 27, 30, 59, 85, 89, 126 and 181.

[113] E. Morin, *Breve Historia de la Barbarie en Occidente*, Barcelona, Paidós, 2009, p. 94, and cf. pp. 60 and 92-93.

violence and evil[114]. Looking back to the Book of Genesis, he saw it fit to recall that

> "Cain and Abel — the first children on earth — discovered they were enemies. Although they were brothers, one became the murderer and the other the victim. What lesson should we learn from this? Two men may be brothers and nonetheless want to kill each other. And also: whoever does the killing, kills his brother. But it is only later that we learn this."[115]

109. Turning attention to the threat of nuclear weapons, Wiesel sharply criticized the already prevailing attitude of indifference to it: "the world, today, seems astonishingly indifferent to the nuclear question", — an attitude which he found not understandable[116]. And he added that

> "Indifference (. . .) can also become contagious. (. . .) Indifference can, moreover, serve as a measure of the progress of the evil that is undermining society. (. . .) Here again, memory alone can awaken us. If we remember what happened forty years ago, there is a chance we can prevent further disasters. Otherwise, we are at risk of being the victims of our own indifference. For if we are indifferent to the lessons of our past, we will be indifferent to the hopes inherent in our future. (. . .) My fear is this: if we forget, we will be forgotten. (. . .) If we remain indifferent to our fate, (. . .) there will be no one left to tell our story."[117]

110. In effect, already in the early twentieth century, Henri Bergson, in his monograph *La conscience et la vie* (1911), devoted attention to the search for meaning in life: to him, to live with consciousness is to remember the past (memory) in the present, and to anticipate the future[118]. In his own words, "To remember what is no longer, to anticipate what does not yet exist, that is the first function of consciousness. (. . .) Consciousness is a link between what was and what will be, a bridge between the past and the future."[119]

111. Also in international legal doctrine, there have been those who have felt the need to move away from State voluntarism and acknowledge the

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[114] E. Wiesel, *Silences et mémoires d'hommes*, Paris, Ed. du Seuil, 1989, pp. 166, 173 and 175.

[115] *Ibid.*, pp. 167-168.

[116] *Ibid.*, p. 174, and cf. p. 170 *[translation by the Registry]*.

[117] *Ibid.*, pp. 175-176 *[translation by the Registry]*.

[118] H. Bergson, *La conscience et la vie* [1911], Paris, PUF, 2012 [reprint], pp. 10-11, 13 and 26.

[119] *Ibid.*, pp. 5-6 *[translation by the Registry]*.

prevalence of conscience over the "will". It is not my intention to dwell upon this point here, as I have dealt with it elsewhere[120]. For the purposes of the present dissenting opinion, suffice it to recall a couple of examples. The jurist Gustav Radbruch, at the end of his life, forcefully discarded legal positivism, always subservient to power and the established order, and formulated his moving conversion and profession of faith in jusnaturalism[121]. His lucid message was preserved and has been projected in time[122], thanks to the devotion of his students and disciples of the School of Heidelberg.

112. There are further examples of doctrinal endeavours to put limits to State voluntarism, such as the jusnaturalist construction of, e.g., Alfred Verdross, — as from the *idée du droit*, — of an objective law finding expression in the general principles of law, preceding positive international law[123]; or else the conception of the *droit spontané*, of Roberto Ago, upholding the spontaneous formation (emanating from human conscience, well beyond the "will" of individual States) of new rules of international law[124].

113. In the view of Albert de La Pradelle, the conception of the formation of international law on the strict basis of reciprocal rights and duties only of States is "extremely grave and dangerous"[125]. International law is a "law of the human community", encompassing, besides States, also peoples and human beings; it is the "law of all mankind", on the foundations of which are the general principles of law[126]. To de La Pradelle, this *"droit de l'humanité"* is not static, but rather dynamic, attentive to human values, in the line of jusnaturalist thinking[127].

114. "Juridical conscience" is invoked in lucid criticisms of legal positivism[128]. Thus, in his monograph-plea (of 1964) against nuclear weap-

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[120] Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/the Hague Academy of International Law, 2013, pp. 141-147 and 153-161.

[121] Cf. G. Radbruch, *Introducción a la Filosofia del Derecho*, 3rd ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 9-180.

[122] Cf., e.g., R. Alexy, *The Argument from Injustice — A Reply to Legal Positivism*, Oxford University Press, 2010, pp. 3-130.

[123] A. Verdross, *Derecho Internacional Público*, 5th ed., Madrid, Aguilar, 1969 [reprint], pp. 15-19.

[124] R. Ago, "Nouvelles réflexions sur la codification du droit international", 92 *Revue générale de droit international public* (1988), p. 540, and cf. p. 541 on "la nature non volontaire de l'origine du droit coutumier".

[125] A. de La Pradelle, *Droit international public* (cours sténographié), Paris, Institut des Hautes Etudes Internationales/Centre Européen de la Dotation Carnegie, November 1932/May 1933, p. 33, and cf. pp. 36-37.

[126] *Ibid.*, pp. 49-59, 149, 222 and 264.

[127] Cf. *ibid.*, pp. 412-413.

[128] Such as, e.g., those of Antonio Gómez Robledo, *Meditación sobre la Justicia* [1963], Mexico/Buenos Aires, Fondo de Cultura Económica, 1963, pp. 179 and 185; R. Quadri, "Cours général de droit international public", 113 *Recueil des cours de l'Académie de droit international de La Haye* (1964), pp. 326, 332, 336-337, 339 and 350-351.

ons, for example, Stefan Glaser sustained that customary international norms are those that, "according to universal conscience", ought to regulate the international community, for fulfilling common interest and responding to the demands of justice; and he added that

> "It is on this universal conscience that the main characteristic of international law is based: the belief that its norms are essential for the common good explains why they are recognized as binding rules."[129]

115. This is the position that I also uphold; in my own understanding, it is the universal juridical conscience that is the ultimate material source of international law[130]. In my view, one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the "will" of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole.

116. For my part, within the ICJ, I have deemed it fit to ponder, in my dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 365-366, paras. 488-489), that, from Homer's *Iliad* (late eighth or early seventh century BC) to date, individuals, indoctrinated and conditioned for war and destruction, have become objects of the struggle for domination. I recalled that this has been lucidly warned by Simone Weil, in a penetrating essay (of 1934), in which war victimizes everyone, there occurring "the substitution of the ends by the means", transforming human life into a simple means, which can be sacrificed; individuals become unable to think, in face of the "social machine" of destruction of the spirit[131].

117. The presence of evil has accompanied and marked human existence over the centuries. In the same aforementioned dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2015), after drawing attention

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[129] S. Glaser, *L'arme nucléaire à la lumière du droit international*, Paris, Pedone, 1964, p. 18 *[translation by the Registry]*.

[130] Cf. A. A. Cançado Trindade, *op. cit. supra* note 120, Chap. VI, pp. 139-161.

[131] S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131; S. Weil, *Réflexions sur les causes de la liberté et de l'oppression sociale*, Paris, Gallimard, 1955, pp. 124-125, and cf. pp. 114-115 and 144.

to "the ever-lasting presence of evil, which appears proper to the human condition, in all times", I added:

> "It is thus understandable that it has attracted the concern of, and has presented challenges to, legal thinking, in our times and previous centuries, as well as other branches of knowledge (such as, e.g., history, psychology, anthropology, sociology, philosophy and theology, among others). It has marked presence in literature as well. This long-standing concern, over centuries, has not, however, succeeded to provide an explanation for evil.
>
> Despite the endeavours of human thinking, through history, we have not been able to rid humankind of it. Like the passing of time, the ever-lasting presence of evil is yet another mystery surrounding human beings, wherever and while they live. Whenever individuals purport to subject their fellow human beings to their 'will', placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R. P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of humankind has accounted for the continuous presence of that concern throughout the history of human thinking.[132]
>
> Religions were the first to dwell upon the problem of evil, which came also to be considered by philosophy, history, psychology, social sciences and literature. Over the centuries, human thinking has always acknowledged the need to examine the problem of evil, its incidence in human relations, in the world wherein we live, without losing faith in human values[133]. Despite the perennial quest of human thinking to find answers to the problem of evil, going as far back as the Book of Job, or even further back, to the Genesis itself[134], — not even theology has found an explanation for it, that is satisfactory to all." (*I.C.J. Reports 2015 (I)*, pp. 361-362, paras. 472-474.)

118. The Scripture's account of Cain and Abel (Genesis, Chap. 4: 8-10) through the centuries came to be regarded as the aetiology of the frag-

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[132] R. P. Sertillanges, *Le problème du mal — l'histoire*, Paris, Aubier, 1948, pp. 5-412.

[133] *Ibid.*

[134] Cf., *inter alia*, e.g., M. Neusch, *L'énigme du mal*, Paris, Bayard, 2007, pp. 7-193; J. Maritain, *Dio e la Permissione del Male*, 6th ed., Brescia, Edit. Morcelliana, 2000, pp. 9-100; E. Fromm, *Anatomía de la Destructividad Humana*, Mexico/Madrid/Buenos Aires, Siglo XXI Edit., 2009 [reprint.], pp. 11-468; P. Ricœur, *Evil — A Challenge to Philosophy and Theology*, London, Continuum, 2007, pp. 33-72; P. Ricœur, *Le mal — Un défi à la philosophie et à la théologie*, Geneva, Ed. Labor et Fides, 2004, pp. 19-65; C. S. Nino, *Juicio al Mal Absoluto*, Buenos Aires, Emecé Edit., 1997, pp. 7-292; A. Morton, *On Evil*, N.Y./London, Routledge, 2004, pp. 1-148; T. Eagleton, *On Evil*, New Haven/London, Yale University Press, 2010, pp. 1-163; P. Dews, *The Idea of Evil*, Oxford, Wiley-Blackwell, 2013, pp. 1-234.

mentation of humankind, as from the indifference of an individual to the fate of another. The increasing disregard for human life was fostered by growing, generalized and uncontrolled violence in search of domination. This was further aggravated by ideological manipulations, and even the dehumanization of the others, the ones to be victimized. The problem of evil continues to be studied, in face of the human capacity for extreme violence and self-destruction on a large scale[135]. The tragic message of the Book of Genesis, in my perception, seems perennial, as contemporary as ever, in the current nuclear age.

IX. The Attention of the United Nations Charter to Peoples

119. It should be kept in mind that the United Nations Charter was adopted on 26 June 1945 on behalf of "we, the peoples of the United Nations". In several provisions it expresses its concern with the living conditions of all peoples (preamble, Arts. 55, 73 *(a)*, 76, 80), and calls for the promotion of, and universal respect for, human rights (Arts. 55 *(c)*, 62 (2), 68, 76 *(c)*). It invokes the "principles of justice and international law" (Art. 1 (1), and refers to "justice and respect for the obligations arising from treaties and other sources of international law" (preamble). It further states that the Statute of the ICJ, "the principal judicial organ of the United Nations", forms "an integral part" of the UN Charter itself (Art. 92).

120. In the mid-1950s, Max Huber, a former judge of the PCIJ, wrote that international law has to protect also values common to humankind, attentive to respect for life and human dignity, in the line of the jusnaturalist conception of the *jus gentium*; the UN Charter, in incorporating human rights into this *droit de l'humanité*, initiated a new era in the development of international law, in a way rescuing the idea of the *civitas maxima*, which marked presence already in the historical origins of the

[135] Cf., moreover, *inter alia*, e.g., [Various Authors], *Le Mal* (ed. C. Crignon), Paris, Flammarion, 2000, pp. 11-232; J. Waller, *Becoming Evil*, 2nd ed., Oxford University Press, 2007, pp. 3-330; S. Baron-Cohen, *The Science of Evil — On Empathy and the Origins of Cruelty*, N.Y., Basic Books, 2012, pp. 1-243; L. Svendsen, *A Philosophy of Evil*, Champaign/London, Dalkey Archive Press, 2011 [reprint], pp. 9-282; M. Salvioli, *Bene e Male — Variazioni sul Tema*, Bologna, Ed. Studio Domenicano (ESD), 2012, pp. 11-185; D. Livingstone Smith, *Less than Human*, N.Y., St. Martin's Press, 2011, pp. 1-316; R. Safranski, *El Mal, o el Drama de la Libertad*, 4th ed., Barcelona, Tusquets Edit., 2014, pp. 15-281; S. Neiman, *Evil in Modern Thought*, 2nd ed., Princeton/Oxford, Princeton University Press, 2015, pp. 1-359; J.-C. Guillebaud, *Le tourment de la guerre*, Paris, Ed. de l'Iconoclaste, 2016, pp. 9-390.

law of nations. The UN Charter's attention to peoples, its principled position for the protection of the human person, much transcends positive domestic law and politics[136].

121. The new vision advanced by the UN Charter, and espoused by the law of the United Nations, has, in my perception, an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension[137]. Such reasoning beyond the inter-State dimension is faithful to the UN Charter, the ICJ being "the principal judicial organ of the United Nations" (Art. 92).

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[136] Max Huber, *La pensée et l'action de la Croix-Rouge*, Geneva, CICR, 1954, pp. 26, 247, 270, 286 and 291.

[137] Cf., e.g., the case of *Nottebohm (Liechtenstein* v. *Guatemala)* (1955, pertaining to double nationality); the cases of the *Trial of Pakistani Prisoners of War (Pakistan* v. *India)* (1973), of the *Hostages (United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran))* case (1980); of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case (1996 and 2007); of the *Frontier Dispute (Burkina Faso/Republic of Mali)* (1986); the triad of cases concerning consular assistance — namely, the cases *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)* (1998), the case *LaGrand (Germany* v. *United States of America)* (2001), the case *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (2004); the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (2000), concerning grave violations of human rights and of international humanitarian law; of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* (1996); of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (2009 and 2012), pertaining to the principle of universal jurisdiction under the UN Convention against Torture; of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (2010) (on detention and expulsion of a foreigner), of the *Jurisdictional Immunities of the State (Germany* v. *Italy; Greece intervening)* (2010 and 2012); of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (2011); of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)* (provisional measures, 2011); of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (2015). To those cases one can add the two most recent Advisory Opinions of the ICJ, on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (2010); and on a *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (2012).

122. Recently, in one of such cases, that of the *Application of the Convention against Genocide*, in my extensive dissenting opinion appended thereto, I have deemed it fit, *inter alia*, to warn that

> "The present case concerning the *Application of the Convention against Genocide* provides yet another illustration of the pressing need to overcome and move away from the dogmatic and strict inter-State outlook, even more cogently. In effect, the 1948 Convention against Genocide, adopted on the eve of the Universal Declaration of Human Rights, is not State-centred, but rather *people-centred*. The Convention against Genocide cannot be properly interpreted and applied with a strict State- centred outlook, with attention turned to inter-State susceptibilities. Attention is to be kept on the *justiciables*, on the victims — real and potential victims — so as to impart justice under the Genocide Convention." (*I.C.J. Reports 2015 (I)*, p. 368, para. 496.)

123. In a report in the early 1990s, a former UN Secretary-General, calling for a "concerted effort" towards complete disarmament, rightly pondered that "[i]n today's world, societies can no longer afford to solve problems by the use of force. (. . .) [O]ne of the most important means of reducing violence in inter-State relations is disarmament"[138]. There followed the cycle of World Conferences of the United Nations during the 1990s, in a commendable endeavour of the United Nations *to go beyond and transcend the purely inter-State dimension*, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind.

124. Those UN World Conferences disclosed a growing awareness of the international community as a whole, and entered into a continuing universal dialogue between UN Member States and entities of the civil societies, — which I well remember, having participated in it[139], — so as to devise the new international agenda in the search of common solutions for the new challenges affecting humankind as a whole. In focusing attention on vulnerable segments of the populations, the immediate concern

[138] B. Boutros-Ghali, "New dimensions of arms regulation and disarmament in the post-Cold War era — Report of the Secretary-General", N.Y., United Nations, 1993, para. 46.

[139] E.g., in the UN Conference on Environment and Development (Rio de Janeiro, 1992, in its World NGO Forum) and in the II World Conference on Human Rights (Vienna, 1993, in the same Forum and in its Drafting Committee).

has been with meeting basic human needs, that memorable cycle of world conferences disclosed a common concern with the deterioration of living conditions, dramatically affecting increasingly greater segments of the population in many parts of the world nowadays[140].

125. The common denominator in those UN World Conferences — as I have pointed out on distinct occasions over the last two decades[141] — can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. The placing of the well-being of peoples and human beings, of the improvement of their conditions of living, at the centre of the concerns of the international community, is remindful of the historical origins of the *droit des gens*[142].

126. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (adopted by General Assembly's resolution 55/2, of 8 September 2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (para. II (8)), and, noticeably,

> "To strive for the elimination of weapons of mass destruction, particularly nuclear weapons, and to keep all options open for achieving this aim, including the possibility of convening an international conference to identify ways of eliminating nuclear dangers." (Para. II (9).)

[140] A growing call was formed for the pursuance of social justice *among* and *within* nations.

[141] A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 13-356; A. A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the UN World Conferences", *Japan and International Law — Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A. A. Cançado Trindade, "The Contribution of Recent World Conferences of the United Nations to the Relations between Sustainable Development and Economic, Social and Cultural Rights", *Les hommes et l'environnement: Quels droits pour le vingt-et-unième siècle? — Etudes en hommage à Alexandre Kiss* (eds. M. Prieur and C. Lambrechts), Paris, Ed. Frison-Roche, 1998, pp. 119-146; A. A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Vienna, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994), pp. 9-57.

[142] Those Conferences acknowledged that human rights do in fact permeate all areas of human activity, and contributed decisively to the reestablishment of the central position of human beings in the conceptual universe of the law of nations *(droit des gens)*. Cf., on the matter, A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 1-187.

127. In addition to our responsibilities to our individual societies, — the UN Millennium Declaration added,

> "we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. (. . .) [W]e have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.
>
> We reaffirm our commitment to the purposes and principles of the Charter of the United Nations, which have proved timeless and universal. Indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent" (A/RES/55/2, paras. I (2-3)).

X. Impertinence of the So-Called *Monetary Gold* "Principle"

128. The distortions generated by the obsession with the strict inter-State paradigm are not hard to detect. An example is afforded, in this connection, by the ICJ's handling of the *East Timor* case (1995): the East Timorese people had no *locus standi* to request intervention in the proceedings, not even to present an *amicus curiae*, although the crucial point under consideration was that of sovereignty over their own territory. Worse still, the interests of a third State (which had not even accepted the Court's jurisdiction) were taken for granted and promptly safeguarded by the Court, by means of the application of the so-called *Monetary Gold* "principle" — an assumed "principle" also invoked now, two decades later, in the present case concerning the obligation of elimination of nuclear weapons!

129. Attention has to be turned to the *nature* of the case at issue, which may well require a reasoning— as the *cas d'espèce* does — moving away from "a strict State-centred voluntarist perspective" and from the "exaltation of State consent", and seeking guidance in fundamental principles *(prima principia)*, such as the principle of humanity. This is what I pointed out in my extensive dissenting opinion in the case concerning the *Application of the Convention against Genocide*, where I pondered *inter alia* that such *prima principia* confer to the international legal order "its ineluctable axiological dimension"; they "conform its *substratum*, and convey the idea of an *objective* justice, in the line of jusnaturalist thinking" (*I.C.J. Reports 2015 (I)*, p. 373, para. 517).

130. That was not the first time I made such ponderation: I had done the same, in another extensive dissenting opinion, in the case concerning

the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* [hereinafter *CERD*]. In my subsequent aforementioned dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* I expressed my dissatisfaction that in a case pertaining to the interpretation and application of the Convention against Genocide, the ICJ even made recourse to the so-called *Monetary Gold* "principle"[143], which had no place in a case like that, and "which does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework" (*I.C.J. Reports 2015 (I)*, p. 374, para. 519).

131. May I, in the present dissenting opinion, this time in the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, again leave on the records my dissatisfaction for the same reason. Once again, may I stress that the adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*.

XI. The Fundamental Principle of the Juridical Equality of States

132. The present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* stresses the utmost importance of the principle of the juridical equality of States. The importance attributed to fundamental principles, the idea of an objective justice, and its incidence upon the laws, go back in time, being deeply-rooted in jusnaturalist thinking. If laws are deprived of justice, they no longer oblige in conscience. Ethics cannot be dissociated from law; in the international scenario, each one is responsible for all the others. To the "founding fathers" of the law of nations *(droit des gens)*, like Francisco de Vitoria and Francisco Suárez, the principle of equality was fundamental, in the relations among individuals, as well as among nations. Their teachings have survived the erosion of time: today, four

[143] Even if only to dismiss it (para. 116).

and a half centuries later, the basic principle of equality and non-discrimination is in the foundations of the law of the United Nations itself.

133. The present case is surely not the first one before the ICJ that brings to the fore the relevance of the principle of the juridical equality of States. In the ICJ's Order (of Provisional Measures of Protection) of 3 March 2014, I have deemed it fit to point out, in my separate opinion appended thereto, that the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*

> "bears witness of the relevance of the principle of the juridical equality of States. The prevalence of this fundamental principle has marked a longstanding presence in the realm of international law, ever since the times of the II Hague Peace Conference of 1907, and then of the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists, in June-July 1920. Recourse was then made, by that Committee, *inter alia*, to general principles of law, as these latter embodied the objective idea of justice. A general principle such as that of the juridical equality of States, enshrined a quarter of a century later in the United Nations Charter (Art. 2 (1)), is ineluctably intermingled with the quest for justice.
>
> Subsequently, throughout the drafting of the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1964-1970), the need was felt to make it clear that stronger States cannot impose their will upon the weak, and that *de facto* inequalities among States cannot affect the weaker in the vindication of their rights. The principle of the juridical equality of States gave expression to this concern, embodying the *idée de justice*, emanated from the universal juridical conscience." (*I.C.J. Reports 2014*, p. 184, paras. 44-45.)

134. And one decade earlier, in my General Course on public international law delivered at the Hague Academy of International Law (2005), I pondered that

> "On successive occasions the principles of international law have proved to be of fundamental importance to humankind's quest for justice. This is clearly illustrated by the role played, *inter alia*, by the principle of juridical equality of States. This fundamental principle, — the historical roots of which go back to the II Hague Peace Conference of 1907, — proclaimed in the UN Charter and enunciated also in the 1970 Declaration of Principles, means ultimately that all States, — factually strong and weak, great and small, — are equal before international law, are entitled to the same protection under the

law and before the organs of international justice, and to equality in the exercise of international rights and duties.

Despite successive attempts to undermine it, the principle of juridical equality of States has remained, from the II Hague Peace Conference of 1907 to date, one of the basic pillars of international law. It has withstood the onslaught of time, and shown itself salutary for the peaceful conducting of international relations, being ineluctably associated — as it stands — with the foundations of international law. It has been very important for the international legal system itself, and has proven to be a cornerstone of international law in the United Nations era. In fact, the UN Charter gave it a new dimension, and the principle developments such as that of the system of collective security, within the ambit of the law of the United Nations."[144]

135. By the turn of the century, the General Assembly's resolution 55/2, of 8 September 2000, adopted the United Nations Millennium Declaration, which *inter alia* upheld the "sovereign equality of all States", in conformity with "the principles of justice and international law" (para. I (4)). Half a decade later, the General Assembly's resolution 60/1, of 16 September 2005, adopted the World Summit Outcome, which *inter alia* expressed the determination "to establish a just and lasting peace all over the world in accordance with the purposes and principles of the [UN] Charter", as well as "to uphold the sovereign equality of all States" (para. I (5)). In stressing therein the "vital importance of an effective multilateral system" to face current challenges to international peace and security (paras. 6-7), the international community reiterated its profession of faith in the general principles of international law.

XII. Unfoundedness of the Strategy of "Deterrence"

136. In effect, the strategy of "deterrence", pursued by NWS in the present context of nuclear disarmament in order to attempt to justify their own position, makes abstraction of the fundamental principle of the juridical equality of States, enshrined into the UN Charter. Factual

[144] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, pp. 84-85, and cf. pp. 62-63, 65 and 73.

inequalities cannot be made to prevail over the juridical equality of States. All UN Member States are juridically equal. The strategy of a few States pursuing their own "national security interests" cannot be made to prevail over a fundamental principle of international law set forth in the UN Charter: factual inequalities between States cannot, and do not prevail over the juridical equality of States.

137. In its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, permeated with ambiguity, the ICJ gave undue weight to "the still strong adherence to the practice of deterrence" (*I.C.J. Reports 1996 (I)*, pp. 254 and 255, paras. 67 and 73) by a few NWS, to the point of beholding in it an obstacle to the formation and consolidation of *opinio juris* and a customary rule as to the illegality of nuclear weapons, leading to "a specific and express prohibition" of their use (*ibid.*, p. 255, para. 73). Here the Court assumed its usual positivist posture: in its view, the prohibition must be express, stated in positive law, even if those weapons are capable of destroying all life on earth, the whole of humankind . . .

138. The ICJ, in its Advisory Opinion of 1996, gave too much weight to the opposition of NWS as to the existence of an *opinio juris* on the unlawfulness of nuclear weapons. And this, despite the fact that, in their overwhelming majority, Member States of the United Nations stand clearly against nuclear weapons, and in favour of nuclear disarmament. The 1996 Advisory Opinion, notwithstanding, appears unduly influenced by the lack of logic of "deterrence"[145]. One cannot conceive, as the 1996 Advisory Opinion did, of recourse to nuclear weapons by a hypothetical State in "self-defence" at the unbearable cost of the devastating effects and sufferings inflicted upon humankind as a whole, in an "escalation to apocalypse"[146].

139. The infliction of such devastation and suffering is in flagrant breach of international law, — of the ILHR, IHL and the law of the United Nations (cf. Part XIII, *infra*). It is, furthermore, in flagrant breach of norms of *jus cogens*[147]. The strategy of "deterrence" seems to make abstraction of all that. The ICJ, as the International Court *of Justice*, should have given, on all occasions when it has been called upon to pro-

[145] Cf. criticisms of such posture in, e.g., A. Sayed, *Quand le droit est face à son néant — Le droit à l'épreuve de l'emploi de l'arme nucléaire*, Brussels, Bruylant, 1998, pp. 79-80, 84, 88-89, 96 and 113.

[146] Cf. *ibid.*, p. 147, and cf. pp. 129, 133, 151, 160, 174-175, 197 and 199-200.

[147] On the expansion of the material content of this latter, cf. A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington, OAS General Secretariat, 2009, pp. 3-29.

nounce on nuclear weapons (in the exercise of its jurisdiction on contentious and advisory matters), far greater weight to the *raison d'humanité*[148], rather than to the *raison d'Etat* nourishing "deterrence". We have to keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the *raison d'Etat*. The *raison d'humanité*, in my understanding, prevails surely over considerations of *Realpolitik*.

140. In its 1996 Advisory Opinion, the ICJ, however, at the same time, rightly acknowledged the importance of complete nuclear disarmament, asserted in the series of General Assembly resolutions, and the relevance of the corresponding obligation under Article VI of the NPT to the international community as a whole (*I.C.J. Reports 1996 (I)*, pp. 263-264, paras. 99 and 102). To the Court, this is an obligation of result, and not of mere conduct (*ibid.*, p. 264, para. 99). Yet, it did not extract the consequences of that. Had it done so, it would have reached the conclusion that nuclear disarmament cannot be hampered by the conduct of a few States — the NWS — which maintain and modernize their own arsenals of nuclear weapons, pursuant to their strategy of "deterrence".

141. The strategy of "deterrence" has a suicidal component. Nowadays, in 2016, twenty years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an *opinio juris communis* as to the illegality of nuclear weapons, and as to the well-established obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such *opinio juris* cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that *opinio juris* discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of "deterrence".

142. Such strategy is incompatible with jusnaturalist thinking, always attentive to ethical considerations (cf. Part XV, *infra*). Over half a century ago (precisely 55 years ago), the UN General Assembly had already stated, in its seminal resolution 1653 (XVI) of 1961, that the use of nuclear weapons was "contrary to the spirit, letter and aims of the United Nations", a "direct violation" of the UN Charter, a breach of international law and of "the laws of humanity", and "a crime against mankind and civilization" (operative para. 1). Several subsequent General Assembly resolu-

[148] A. A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* — Belo Horizonte/Brazil (2001), pp. 11-23.

tions upheld the same understanding of resolution 1653 (XVI) of 1961 (cf. Part III, *supra*), leaving thus no room at all for ambiguity or hesitation, or to any concession.

143. Two decades ago, in the advisory proceedings of late 1995 before the ICJ, conducive to its 1996 Advisory Opinion on *Threat or Use of Nuclear Weapons*, fierce criticisms were voiced of the strategy of "deterrence", keeping in mind the inhumane sufferings of victims of nuclear detonation, radiation and contamination[149]. Attention was drawn, on the occasion, to the "distortion of logic" in "deterrence", in trying to rely on so immensely destructive weapons to keep peace, and in further trying to persuade others "to accept that for the last 50 or so years this new and more dangerous and potentially genocidal level of armaments should be credited with keeping peace"[150].

144. In the aforementioned advisory proceedings, "nuclear deterrence" was dismissed as being "simply the maintenance of a balance of fear"[151]; it was criticized as seeking to ground itself on a "highly questionable" premise, whereby a handful of NWS feel free to "arrogate to themselves" the faculty "to determine what is world peace and security, exclusive in the context of their own" national strategies and interests[152]. It was contended that nuclear weapons are in breach of international law by their own nature, as weapons of catastrophic mass destruction; "nuclear deterrence" wrongfully assumes that States and individuals act rationally, leaving the world "under the nuclear sword of Damocles", stimulating "the nuclear ambitions of their countries, thereby increasing overall instability", and also increasing the danger of their being used "intentionally or accidentally"[153].

145. The NWS, in persisting to rely on the strategy of "deterrence", seem to overlook the above-reviewed distinct series of UN General Assembly resolutions (cf. Part III, *supra*) condemning nuclear weapons and calling for their elimination. The strategy of "deterrence" has come under strong criticism over the years, for the serious risks it carries, and for its indifference to the goal — supported by the United Nations, — of achieving a world free of nuclear weapons. Very recently, participants in the

[149] Cf., e.g., the testimonies of the Mayors of Hiroshima and Nagasaki, in Part XIII, *infra*.
[150] CR 1995/35, of 15 November 1995, p. 32 (statement of Zimbabwe).
[151] CR 1995/27, of 7 November 1995, p. 37 (statement of the Mayor of Nagasaki).
[152] *Ibid.*, p. 45, para. 14 (statement of Malaysia).
[153] *Ibid.*, p. 55, para. 8; and cf. pp. 60-61 and 63, paras. 17-20 (statement of Malaysia).

series of Conferences on Humanitarian Impact of Nuclear Weapons (2013-2014) strongly criticized the strategy of nuclear "deterrence". In a statement sent to the 2014 Vienna Conference, the UN Secretary-General warned against the dangers of nuclear "deterrence", undermining world stability (cf. Part XIX, *infra*).

146. There is here, in effect, clearly formed, an *opinio juris communis* as to the illegality and prohibition of nuclear weapons. The use or threat of use of nuclear weapons being a clear breach of international law, of international humanitarian law and of the international law of human rights, and of the UN Charter, renders unsustainable and unfounded any invocation of the strategy of "deterrence". In my view, a few States cannot keep on insisting on "national security interests" to arrogate to themselves indefinitely the prerogative to determine by themselves the conditions of world peace, and to impose them upon all others, the overwhelming majority of the international community. The survival of humankind cannot be made to depend on the "will" of a handful of privileged States. The universal juridical conscience stands well above the "will" of individual States.

XIII. The Illegality of Nuclear Weapons and the Obligation of Nuclear Disarmament

1. The Condemnation of All Weapons of Mass Destruction

147. Since the beginning of the nuclear age, it became clear that the effects of nuclear weapons (such as heat and radiation) cannot be limited to military targets only, being thus by nature indiscriminate and disproportionate in their long-term devastation, disclosing the utmost cruelty. The *opinio juris communis* as to the prohibition of nuclear weapons, and of all weapons of mass destruction, has gradually been formed, over the last decades[154]. If weapons less destructive than nuclear weapons have already been expressly prohibited (as is the case of biological and chemical weapons), it would be nonsensical to argue that, those which have not, by positive conventional international law, like nuclear weapons, would not likewise be illicit; after all, they have far greater and long-lasting devastating effects, threatening the existence of the international community as a whole.

[154] Cf., e.g., G. E. do Nascimento e Silva, "A Proliferação Nuclear e o Direito Internacional", *Pensamiento Jurídico y Sociedad Internacional — Libro-Homenaje al Prof. A. Truyol y Serra*, Vol. II, Madrid, Universidad Complutense, 1986, pp. 877-886; C. A. Dunshee de Abranches, *Proscrição das Armas Nucleares*, Rio de Janeiro, Livr. Freitas Bastos, 1964, pp. 114-179.

148. It may be recalled that, already in 1969, *all* weapons of mass destruction were condemned by the Institut de droit international (I.D.I.). In the debates of its Edinburgh session on the matter, emphasis was placed on the need to respect the principle of distinction (between military and non-military objectives), and the terrifying effects of the use of nuclear weapons were pointed out, — the example of the atomic bombing of Hiroshima and Nagasaki having been expressly recalled[155]. In its resolution of September 1969 on the matter, the Institut began by restating, in the preamble, the *prohibition of recourse to force* in international law, and the duty of protection of civilian populations in any armed conflict; it further recalled the general principles of international law, customary rules and conventions, — supported by international case law and practice, — which "clearly restrict" the extent to which the parties engaged in a conflict may harm the adversary, and warned against "the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole"[156].

149. In its operative part, the aforementioned resolution of the Institut stressed the importance of the principle of distinction (between military and non-military objectives) as a "fundamental principle of international law" and the pressing need to protect civilian populations in armed conflicts[157], and added, in paragraphs 4 and 7, that:

> "Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes.
>
> . . . . . .
>
> Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of 'blind' weapons."[158]

150. For its part, the International Law Association (ILA), in its more recent work (in 2014) on nuclear disarmament, after referring to Arti-

[155] Cf. *Annuaire de l'Institut de droit international* — Session d'Edimbourg (1969)-II, pp. 49-50, 53, 55, 60, 62-63, 66, 88-90 and 99.
[156] *Ibid.*, pp. 375-376.
[157] *Ibid.*, pp. 376-377, paras. 1-3, 5-6 and 8.
[158] *Ibid.*, pp. 376-377.

cle VI of the NPT, was of the view that it was not only conventional, but also an evolving customary international obligation with an *erga omnes* character, affecting "the international community as a whole", and not only the States parties to the NPT[159]. It also referred to the "world-wide public opinion" pointing to "the catastrophic consequences for humankind of any use or detonation of nuclear weapons", and added that reliance on nuclear weapons for "deterrence" was thus unsustainable[160].

151. In its view, "nuclear" deterrence is not a global "umbrella", but rather a threat to international peace and security, and NWS are still far from implementing Article VI of the NPT[161]. To the International Law Association, the provisions of Article VI are not limited to States parties to the NPT, "they are part of customary international law or at least evolving custom"; they are valid *erga omnes*, as they affect "the international community as a whole", and not only a group of States or a particular State[162]. Thus, as just seen, learned institutions in international law, such as the IDI and the ILA, have also sustained the prohibition in international law of all weapons of mass destruction, starting with nuclear weapons, the most devastating of all.

152. A single use of nuclear weapons, irrespective of the circumstances, may today ultimately mean the end of humankind itself[163]. All weapons of mass destruction are illegal, and are prohibited: this is what ineluctably ensues from an international legal order of which the ultimate material source is the *universal juridical conscience*[164]. This is the position I have consistently sustained over the years, including in a lecture I delivered at the University of Hiroshima, Japan, on 20 December 2004[165]. I have done so in the line of jusnaturalist thinking, faithful to the lessons of the

[159] International Law Association Committee: *Nuclear Weapons, Non-Proliferation and Contemporary International Law* (Second Report: *Legal Aspects of Nuclear Disarmament*), ILA, Washington Conference, 2014, pp. 2-4.

[160] *Ibid.*, pp. 5-6.

[161] *Ibid.*, pp. 8-9.

[162] *Ibid.*, p. 18.

[163] Nagendra Singh, *Nuclear Weapons and International Law*, London, Stevens, 1959, p. 242.

[164] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, Chap. VI ("The Material Source of International Law: Manifestations of the Universal Juridical Conscience"), pp. 139-161.

[165] Text of my lecture reproduced in: A. A. Cançado Trindade, *Le droit international pour la personne humaine*, Paris, Pedone, 2012, Chap. I ("L'illicéité de toutes les armes de destruction massive au regard du droit international contemporain"), pp. 61-90;

"founding fathers" of the law of nations, keeping in mind not only States, but also peoples and individuals, and humankind as a whole.

2. The Prohibition of Nuclear Weapons: The Need of a People-Centred Approach

153. In effect, the nuclear age itself, from its very beginning (the atomic blasts of Hiroshima and Nagasaki in August 1945) can be properly studied from a people-centred approach. There are moving testimonies and historical accounts of the devastating effects of nuclear weapons, from surviving victims and witnesses[166]. Yet, even with the eruption of the nuclear age, attention remained focused largely on State strategies: it took some time for them gradually to shift to the devastating effects of nuclear weapons on peoples.

154. As recalled in one of the historical accounts, only at the First Conference against Atomic and Hydrogen Bombs (1955), "the victims had their first opportunity, after ten years of silence, to make themselves heard", in that forum[167]. Over the last decades, there have been endeavours to shift attention from State strategies to the numerous victims and enormous damages caused by nuclear weapons, focusing on "human misery and human dignity"[168]. Recently, one significant initiative to this effect has been the series of Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014), which I shall survey later on in this dissenting opinion (cf. Part XIX, *infra*).

155. There has been a chorus of voices of those who have been personally victimized by nuclear weapons in distinct circumstances, — either in the atomic bombings of Hiroshima and Nagasaki (1945), or in nuclear testing (during the Cold-War era) in regions such as Central Asia and the

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A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, Chap. XVII ("The Illegality under Contemporary International Law of All Weapons of Mass Destruction"), pp. 361-390.

[166] Michihiko Hachiya, *Journal d'Hiroshima — 6 août-30 septembre 1945* [1955], Paris, Ed. Tallandier, 2015 (reed.), pp. 25-281; Toyofumi Ogura, *Letters from the End of the World — A First-Hand Account of the Bombing of Hiroshima* [1948], Tokyo/N.Y./London, Kodansha International, 2001 (reed.), pp. 15-173; Naomi Shohno, *The Legacy of Hiroshima — Its Past, Our Future*, Tokyo, Kösei Publ. Co., 1987 (reed.), pp. 13-140; Kenzaburo Oe, *Notes de Hiroshima* [1965], [Paris,] Gallimard, 1996 (reed.), pp. 17-230; J. Hersey, *Hiroshima* [1946], London, Penguin, 2015 [reprint], pp. 1-98.

[167] Kenzaburo Oe, *Hiroshima Notes* [1965], N.Y./London, Marion Boyars, 1997 (reed.), pp. 72 and 159.

[168] *Ibid.*, pp. 149 and 162.

Pacific. Focusing on their intensive suffering (e.g., ensuing from radioactive contamination and forced displacement)[169], affecting successive generations, they have drawn attention to the humanitarian consequences of nuclear weapon detonations.

156. In addressing the issue of nuclear weapons, on four successive occasions (cf. *infra*), the ICJ appears, however, to have always suffered from inter-State myopia. Despite the clarity of the formidable threat that nuclear weapons represent, the treatment of the issue of their prohibition under international law has most regrettably remained permeated by ambiguities. The present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* is the third time that attempts were made, by means of the lodging of contentious cases with the ICJ, to obtain its pronouncement thereon. On two prior occasions — in the *Nuclear Tests* cases (1974 and 1995)[170], the Court assumed, in both of them, a rather evasive posture, avoiding to pronounce clearly on the substance of a matter pertaining to the very survival of humankind.

157. May I here briefly single out one aspect of those earlier contentious proceedings, given its significance in historical perspective. It should not pass unnoticed that, in the first *Nuclear Tests* case *(Australia* v. *France; New Zealand* v. *France)*, one of the applicant States contended, *inter alia*, that the nuclear testing undertaken by the French Government in the South Pacific region violated not only the right of New Zealand that no radioactive material enter its territory, air space and territorial waters *and* those of other Pacific territories but *also* "the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fall-out be conducted"[171].

158. For its part, the other applicant State contended that it was seeking protection to the life, health and well-being of Australia's population, in common with the populations of other States, against atmospheric nuclear tests by any State[172]. Thus, over three decades ago, the perspective of the Applications instituting proceedings of both New Zealand and Australia (of 1973) went clearly — and correctly so — beyond the purely inter-State dimension, as the problem at issue concerned the international community as a whole.

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[169] Cf. J. Borrie, "Humanitarian Reframing of Nuclear Weapons and the Logic of a Ban", 90 *International Affairs* (2014), p. 633, and cf. pp. 637, 643-644 and 646.

[170] Cf. *I.C.J. Reports 1974*, pp. 63-455; and cf. *I.C.J. Reports 1995*, pp. 4-23, and the position of three dissenting judges in *ibid.*, pp. 317-421.

[171] Application instituting proceedings (of 9 May 1973), *Nuclear Tests* case *(New Zealand* v. *France)*, pp. 8 and 15-16, cf. pp. 4-16.

[172] *Ibid.*, *Nuclear Tests* case *(Australia* v. *France)*, pp. 12 and 14, paras. 40, 47 and 49 (1).

159. Both Australia and New Zealand insisted on the people-centred approach throughout the legal proceedings (written and oral phases). New Zealand, for example, in its Memorial, invoked the obligation *erga omnes* not to undertake nuclear testing "owed to the international community as a whole" (paras. 207-208), adding that non-compliance with it aroused "the keenest sense of alarm and antagonism among the peoples" and States of the region wherein the tests were conducted (para. 212). In its oral arguments in the public sitting of 10 July 1974 in the same *Nuclear Tests* case, New Zealand again invoked "the rights of all members of the international community", and the obligations *erga omnes* owed to the international community as a whole[173]. And Australia, for example, in its oral arguments in the public sitting of 8 July 1974, referring to the 1963 Partial Test Ban Treaty, underlined the concern of "the whole international community" for "the future of mankind" and the responsibility imposed by "the principles of international law" upon "all States to refrain from testing nuclear weapons in the atmosphere"[174].

160. The outcome of the *Nuclear Test* cases, however, was rather disappointing: even though the ICJ issued orders of provisional measures of protection in the cases in June 1973 (requiring the respondent State to cease testing), subsequently, in its Judgments of 1974[175], in view of the announcement of France's voluntary discontinuance of its atmospheric tests, the ICJ found, yielding to State voluntarism, that the claims of Australia and New Zealand no longer had "any object" and that it was thus not called upon to give a decision thereon[176]. The dissenting judges in the case rightly pointed out that the legal dispute between the Contending Parties, far from having ceased, still persisted, since what Australia and New Zealand sought was a declaratory judgment of the ICJ stating that atmospheric nuclear tests were contrary to international law[177].

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[173] *I.C.J. Pleadings, Nuclear Tests (New Zealand* v. *France)*, Vol. II: 1973-1974, pp. 256-257 and 264-266.

[174] *I.C.J. Pleadings, Nuclear Tests (Australia* v. *France)*, Vol. I, p. 503.

[175] For a critical parallel between the 1973 Orders and the 1974 Judgments, cf. P. Lellouche, "The *Nuclear Tests* Cases: Judicial Silence *versus* Atomic Blasts", 16 *Harvard International Law Journal* (1975), pp. 615-627 and 635; and, for further criticisms, cf. *ibid.*, pp. 614-637;

[176] *I.C.J. Reports 1974*, pp. 272 and 478, respectively.

[177] *Nuclear Tests* case, joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *ibid.*, pp. 319-322, 367-369, 496, 500, 502-504, 514 and 520-521; and cf. dissenting opinion of Judge De Castro, *ibid.*, pp. 386-390; and dissenting opinion of Judge Barwick, *ibid.*, pp. 392-394, 404-405, 436-437 and 525-528. It was further pointed out that the ICJ should thus have dwelt upon the question of the existence of rules of *customary* international law prohibiting States from causing, through atmospheric nuclear tests, the deposit of radio-active fall-out on the territory of other States; *Nuclear Tests* case, separate opinion of Judge Petrén, *I.C.J. Reports 1974*, pp. 303-306 and 488-489.

161. The reticent position of the ICJ in that case was even more regrettable if one recalls that the applicants, in referring to the "psychological injury" caused to the peoples of the South Pacific region through their "anxiety as to the possible effects of radioactive fall-out on the well-being of themselves and their descendants", as a result of the atmospheric nuclear tests, ironically invoked the notion of *erga omnes* obligations (as propounded by the ICJ itself in its *obiter dicta* in the *Barcelona Traction* case only four years earlier)[178]. As the ICJ reserved itself the right, in certain circumstances, to reopen the case decided in 1974, it did so two decades later, upon an Application instituted by New Zealand *versus* France. But in its Order of 22 September 1995, the ICJ dismissed the complaint, as it did not fit into the *caveat* of the 1974 Judgment, which concerned atmospheric nuclear tests; here, the complaint was directed against the underground nuclear tests conducted by France since 1974[179].

162. The ICJ thus lost two historical opportunities, in both contentious cases (1974 and 1995), to clarify the key point at issue (nuclear tests). And now, with the decision it has just rendered today, 5 October 2016, it has lost a third occasion, this time to pronounce on the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, at the request of the Marshall Islands. This time the Court has found that the existence of a legal dispute has not been established before it and that it has no jurisdiction to consider the Application lodged with it by the Marshall Islands on 24 April 2014.

163. Furthermore, in the mid-1990s, the Court was called upon to exercise its advisory function, in respect of a directly related issue, that of nuclear weapons: both the UN General Assembly and the World Health Organization (WHO) opened those proceedings before the ICJ, by means of requests for an Advisory Opinion. Such requests no longer referred to nuclear tests, but rather to the question of the threat or use of nuclear weapons in the light of international law, for the determination of their illegality or otherwise.

It was the existence or otherwise of such customary rules that had to be determined, — a question which unfortunately was left largely unanswered by the Court in that case.

[178] As recalled in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *I.C.J. Reports 1974*, pp. 362, 368-369 and 520-521; as well as in the dissenting opinion of Judge Barwick, *ibid.*, pp. 436-437.

[179] Cf. *I.C.J. Reports 1995*, pp. 288-308; once again, there were dissenting opinions (cf. *ibid.*, pp. 317-421). Furthermore, petitions against the French nuclear tests in the atoll of Mururoa and in that of Fangataufa, in French Polynesia, were lodged with the European Commission of Human Rights (ECHR); cf. ECHR, case *N. N. Tauira and 18 Others* v. *France* (Appl. No. 28204/95), decision of 4 December 1995, 83-A *Decisions and Reports* (1995), p. 130.

164. In response to only one of the applications, that of the UN General Assembly[180], the Court, in the Advisory Opinion of 8 July 1996 on the *Threat or Use of Nuclear Weapons*, affirmed that neither customary international law nor conventional international law authorizes specifically the threat or use of nuclear weapons; neither one, nor the other, contains a complete and universal prohibition of the threat or use of nuclear weapons as such; it added that such threat or use which is contrary to Article 2 (4) of the UN Charter and does not fulfil the requisites of its Article 51, is illicit; moreover, the conduct in armed conflicts should be compatible with the norms applicable in them, including those of international humanitarian law; it also affirmed the obligation to undertake in good will negotiations conducive to nuclear disarmament in all its aspects[181].

165. In the most controversial part of its Advisory Opinion (resolutory point 2 E), the ICJ stated that the threat or use of nuclear weapons "would be generally contrary to the rules of international law applicable in armed conflict", mainly those of international humanitarian law; however, the Court added that, at the present stage of international law "it cannot conclude definitively if the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake"[182]. The Court therein limited itself to record the existence of a legal uncertainty.

166. In fact, it did not go further than that, and the Advisory Opinion was permeated with evasive ambiguities, not avoiding the shadow of the *non liquet*, in relation to a question which affects, more than each State individually, the whole of humankind. The Advisory Opinion made abstraction of the fact that international humanitarian law applies likewise in case of self-defence, always safeguarding the principles of distinction and proportionality (which nuclear weapons simply ignore)[183], and upholding the prohibition of infliction of unnecessary suffering.

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[180] As the ICJ understood, as to the other application, that the WHO was not competent to deal with the question at issue, despite the purposes of that UN specialized agency at issue and the devastating effects of nuclear weapons over human health and the environment.

[181] *I.C.J. Reports 1996 (I)*, pp. 266-267.

[182] *Ibid.*, p. 266.

[183] L. Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons", 316 *International Review of the Red Cross* (1997), pp. 35-55; H. Fujita, "The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons", *ibid.*, pp. 56-64. International Humanitarian Law prevails also over self-defence; cf. M.-P. Lanfranchi and Th. Christakis, *La licéité de l'emploi d'armes nucléaires*

167. The Advisory Opinion could and should have given greater weight to a point made before the ICJ in the oral arguments of November 1995, namely, that of the need of a people-centred approach in the present domain. Thus, it was stated, for example, that the "experience of the Marshallese people confirms that unnecessary suffering is an unavoidable consequence of the detonation of nuclear weapons"[184]; the effects of nuclear weapons, by their nature, are widespread, adverse and indiscriminate, affecting also future generations[185]. It was further stated that the "horrifying evidence" of the use of atomic bombs in Hiroshima and Nagasaki, followed by the experience and the aftermath of the nuclear tests carried out in the region of the Pacific Island States in the 1950s and the 1960s, have alerted to "the much graver risks to which mankind is exposed by the use of nuclear weapons"[186].

168. The 1996 Opinion, on the one hand, recognized that nuclear weapons cause indiscriminate and durable suffering, and have an enormous destructive effect (para. 35), and that the principles of humanitarian law (encompassing customary law) are "intransgressible" (para. 79); nevertheless, these considerations did not appear sufficient to the Court to discard the use of such weapons also in self-defence, thus eluding to tell what the law is in all circumstances. It is clear to me that States are bound to respect, and to ensure respect, for international humanitarian law (IHL) and the international law of human rights (ILHR) in *any circumstances*; their fundamental principles belong to the domain of *jus cogens*, in prohibition of nuclear weapons.

169. Again, in the 1996 Opinion, it was the dissenting judges, and not the Court's split majority, who drew attention to this[187], and to the relevance of the Martens clause in the present con-

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devant la Cour internationale de Justice, Aix-Marseille/Paris, Université d'Aix-Marseille III/Economica, 1997, pp. 111, 121 and 123; S. Mahmoudi, "The International Court of Justice and Nuclear Weapons", 66 *Nordic Journal of International Law* (1997), pp. 77-100; E. David, "The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons", 316 *International Review of the Red Cross* (1997), pp. 21-34.

[184] CR 1995/32, of 14 November 1995, p. 22 (statement of the Marshall Islands).

[185] *Ibid.*, p. 23.

[186] *Ibid.*, p. 31 (statement of Solomon Islands). Customary international law and general principles of international law have an incidence in this domain; *ibid.*, pp. 36 and 39-40.

[187] Cf. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, dissenting opinion of Judge Koroma, pp. 573-574 and 578.

text[188] (cf. Part XIV, *infra*). Moreover, the 1996 Opinion also minimized (para. 71) the resolutions of the UN General Assembly which affirm the illegality of nuclear weapons[189] and condemn their use as a violation of the UN Charter and as a crime against humanity. Instead, it took note of the "policy of deterrence", which led it to find that the members of the international community continued "profoundly divided" on the matter, rendering it impossible to determine the existence of an *opinio juris* in this respect (para. 67).

170. It was not incumbent upon the Court to resort to the unfounded strategy of "deterrence" (cf. Part XII, *supra*), devoid of any legal value for the determination of the formation of a customary international law obligation of prohibition of the use of nuclear weapons. The Court did not contribute on this matter. In unduly relying on "deterrence" (para. 73), it singled out a division, in its view "profound", between an extremely reduced group of nuclear powers on the one hand, and the vast majority of the countries of the world on the other; it ended up by favouring the former, by means of an inadmissible *non liquet*[190].

171. The Court, thus, lost yet another opportunity, — in the exercise of its advisory function as well, — to contribute to the consolidation of the *opinio juris communis* in condemnation of nuclear weapons. Its 1996 Advisory Opinion considered the survival of a hypothetical State (in its resolutory point 2E), rather than that of peoples and individuals, and ultimately of humankind as a whole. It seemed to have overlooked that the survival of a State cannot have primacy over the right to survival of humankind as a whole.

3. The Prohibition of Nuclear Weapons: The Fundamental Right to Life

172. There is yet another related point to keep in mind. The ICJ's 1996 Advisory Opinion erroneously took IHL as *lex specialis* (para. 25), overstepping the ILHR, oblivious that the maxim *lex specialis derogat*

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[188] Cf. *op. cit. supra* note 187, dissenting opinions of Judge Shahabuddeen, pp. 386-387, 406, 408, 410-411 and 425; and of Judge Weeramantry, pp. 477-478, 481, 483, 486-487, 490-491, 494, 508 and 553-554.

[189] Notably, the ground-breaking General Assembly resolution 1653 (XVI), of 24 November 1961.

[190] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, pp. 415-418; L. Condorelli, "Nuclear Weapons: A Weighty Matter for the International Court of Justice — *Jura Novit Curia*?", 316 *International Review of the Red Cross* (1997), pp. 9-20; M. Mohr, "Advisory Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law — A Few Thoughts on Its Strengths and Weaknesses", 316 *International Review of the Red Cross* (1997), pp. 92-102. The Opinion is not conclusive and provides no guidance; J.-P. Queneudec, "E.T. à la C.I.J.: méditations d'un extra-terrestre sur deux avis consultatifs", 100 *Revue générale de droit international public* (1996), pp. 907-914, esp. p. 912.

generalis, thus understood, has no application in the present context: in face of the immense threat of nuclear weapons to human life on earth, both IHL and the ILHR apply in a converging way[191], so as to enhance the much-needed protection of human life. In any circumstances, the norms which best protect are the ones which apply, be they of IHL or of the ILHR, or any other branch of international protection of the human person (such as the international law of refugees). They are all equally important. Regrettably, the 1996 Advisory Opinion unduly minimized the international case law and the whole doctrinal construction on the right to life in the ambit of the ILHR.

173. It should not pass unnoticed, in this connection, that contemporary international human rights tribunals, such as the European (ECHR) and the Inter-American (IACtHR) Courts of Human Rights, in the adjudication of successive cases in recent years, have taken into account the relevant principles and norms of both the ILHR and IHL (conventional and customary). For its part, the African Commission of Human and Peoples' Rights (ACHPR), in its long-standing practice, has likewise acknowledged the approximations and convergences between the ILHR and IHL, and drawn attention to the principles underlying both branches of protection (such as, e.g., the principle of humanity).

174. This has been done, in distinct continents, so as to seek to secure the most effective safeguard of the protected rights, in all circumstances (including in times of armed conflict). Contrary to what was held in the ICJ's 1996 Advisory Opinion, there is no *lex specialis* here, but rather a concerted endeavour to apply the relevant norms (be they of the ILHR or of IHL) that best protect human beings. This is particularly important when they find themselves in a situation of utmost vulnerability, — such as in the present context of threat or use of nuclear weapons. In their case law, international human rights tribunals (like the ECHR and the IACtHR) have focused attention on the imperative of securing protection, e.g., to the fundamental right to life, of persons in great vulnerability (potential victims)[192].

[191] Cf. A. A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario — Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

[192] Cf. A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2012 [reprint], Chaps. II-III and VII, pp. 17-62 and 125-131.

175. In the course of the proceedings before the ICJ in the present cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the applicant State draws attention reiteratedly to the devastating effects upon human life of nuclear weapons detonations. Thus, in the case opposing the Marshall Islands to the United Kingdom, the applicant State draws attention, in its Memorial, to the destructive effects of nuclear weapons (testing) in space and time (pp. 12-14). In its oral arguments of 11 March 2016, the Marshall Islands addresses the "tragic losses to the Marshallese", the "dire health consequences suffered by the Marshallese following nuclear contamination, including extreme birth defects and cancers"[193].

176. In the case opposing the Marshall Islands to India, the applicant State, in its Memorial, refers to the grave "health and environmental consequences of nuclear testing" upon the Marshallese (pp. 5-6). In its oral arguments of 7 March 2016, the Marshall Islands stated:

> "The Marshall Islands has a unique and devastating history with nuclear weapons. While it was designated as a Trust Territory by the United Nations, no fewer than 67 atomic and thermonuclear weapons were deliberately exploded as 'tests' in the Marshall Islands, by the United States. (. . .) Several islands in my country were vaporized and others are estimated to remain uninhabitable for thousands of years. Many, many Marshallese died, suffered birth defects never before seen and battled cancers resulting from the contamination. Tragically the Marshall Islands thus bears *eyewitness* to the horrific and indiscriminate lethal capacity of these weapons, and the intergenerational and continuing effects that they perpetuate even 60 years later.
>
> One 'test' in particular, called the 'Bravo' test [in March 1954], was one thousand times stronger than the bombs dropped on Hiroshima and Nagasaki."[194]

177. And in the case opposing the Marshall Islands to Pakistan, the applicant State, in its Memorial, likewise addresses the serious "health and environmental consequences of nuclear testing" upon the Marshallese (pp. 5-6). In its oral arguments of 8 March 2016, the Marshall Islands recalls the 67 atomic and thermonuclear weapons "tests" that it had to endure (since it became a UN Trust Territory); it further recalls the reference, in the UN Charter, to nations "large and small" having "equal rights" (preamble), and to the assertion in its Article 2 that the

[193] CR 2016/5, of 11 March 2016, p. 9, para. 10.
[194] CR 2016/1, of 7 March 2016, p. 16, paras. 4-5.

United Nations is "based on the principle of the sovereign equality of all its Members"[195].

178. Two decades earlier, in the course of the advisory proceedings before the ICJ of late 1995 preceding the 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the devastating effects upon human life of nuclear weapons detonations were likewise brought to the Court's attention. It is beyond the purposes of the present dissenting opinion to review all statements to this effect; suffice it here to recall two of the most moving statements, from the Mayors of Hiroshima and Nagasaki, who appeared before the Court as members of the delegation of Japan. The Mayor of Hiroshima (Mr. Takashi Hiraoka) thus began his statement of 7 November 1995 before the ICJ:

> "I am here today representing Hiroshima citizens, who desire the abolition of nuclear weapons. More particularly, I represent the hundreds of thousands of victims whose lives were cut short, and survivors who are still suffering the effects of radiation, 50 years later. On their behalf, I am here to testify to the cruel, inhuman nature of nuclear weapons.
>
> . . . . . .
>
> The development of the atomic bomb was the product of co-operation among politicians, military and scientists. The nuclear age began the moment the bombs were dropped on human beings.
>
> Their enormous destructive power reduced utterly innocent civilian populations to ashes. Women, the elderly, and the newborn were bathed in deadly radiation and slaughtered."[196]

179. After stressing that the mass killing was "utterly indiscriminate", he added that, even today, "thousands of people struggle daily with the curse of illness caused by that radiation", there being until then "no truly accurate casualty figures"[197]. The exposure in Hiroshima to high-levels of radiation, he proceeded, "was the first in human history", generating leukaemia, distinct kinds of cancer (of breast, lung, stomach, thyroid, and other), extending for "years or decades", with all the fear generated by such continuing killing "across years or decades"[198].

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[195] CR 2016/2, of 8 March 2016, p. 10, paras. 5-7.
[196] CR 1995/27, of 7 November 1995, pp. 22-23.
[197] *Ibid.*, pp. 24-25.
[198] *Ibid.*, pp. 25-27.

180. Even half a century later, added the Mayor of Hiroshima, "the effects of radiation on human bodies are not thoroughly understood. Medically, we do know that radiation destroys cells in the human body, which can lead to many forms of pathology"[199]. The victimized segments of the population have continued suffering "psychologically, physically, and socially from the atomic bomb's after-effects"[200]. He further stated that

> "The horror of nuclear weapons (. . .) derives (. . .) from the tremendous destructive power, but equally from radiation, the effects of which reach across generations. (. . .) What could be more cruel? Nuclear weapons are more cruel and inhumane than any weapon banned thus far by international law."[201]

181. After singling out the significance of UN General Assembly resolution 1653 (XVI) of 1961, the Mayor of Hiroshima warned that "[t]he stockpiles of nuclear weapons on earth today are enough to annihilate the entire human race several times over. These weapons are possessed on the assumption that they can be used"[202]. He concluded with a strong criticism of the strategy of "deterrence"; in his own words,

> "As long as nuclear weapons exist, the human race faces a real and present danger of self-extermination. The idea based on nuclear deterrence that nuclear war can be controlled and won exhibits a failure of human intelligence to comprehend the human tragedy and global environmental destruction brought about by nuclear war. (. . .)
>
> [O]nly through a treaty that clearly stipulates the abolition of nuclear weapons can the world step toward the future. (. . .)"[203]

182. For his part, the Mayor of Nagasaki (Mr. Iccho Itoh), in his statement before the ICJ, also of 7 November 1995, likewise warned that "nuclear weapons bring enormous, indiscriminate devastation to civilian populations"; thus, five decades ago, in Hiroshima and Nagasaki, "a single aircraft dropped a single bomb and snuffed out the lives of 140,000 and 74,000 people, respectively. And that is not all. Even the people who were lucky enough to survive continue to this day to suffer from the late effects unique to nuclear weapons. In this way, nuclear

[199] CR 1995/27, of 7 November 1995, p. 25.
[200] *Ibid.*, pp. 27-28.
[201] *Ibid.*, p. 30.
[202] *Ibid.*, pp. 30-31.
[203] *Ibid.*, p. 31.

weapons bring enormous, indiscriminate devastation to civilian populations"[204].

183. He added that "the most fundamental difference between nuclear and conventional weapons is that the former release radioactive rays at the time of explosion", and the exposure to large doses of radiation generates a "high incidence of disease" and mortality (such as leukaemia and cancer). Descendants of atomic bomb survivors will have, amidst anxiety, "to be monitored for several generations to clarify the genetic impact"; "nuclear weapons are inhuman tools for mass slaughter and destruction", their use "violates international law"[205]. The Mayor of Nagasaki concluded with a strong criticism of "nuclear deterrence", characterizing it as "simply the maintenance of a balance of fear" (CR 1995/27, p. 37), always threatening peace, with its "psychology of suspicion and intimidation"; the Nagasaki survivors of the atomic bombing of 50 years ago, "continue to live in fear of late effects"[206].

184. Those testimonies before the ICJ, in the course of contentious proceedings (in 2016) as well as advisory proceedings (two decades earlier, in 1995), leave it quite clear that the threat or use (including "testing") of nuclear weapons entails an arbitrary deprivation of human life, and is in flagrant breach of the fundamental right to life. It is in manifest breach of the ILHR, of IHL, as well as the law of the United Nations, and has an incidence also on the ILR. There are, furthermore, in such grave breach, aggravating circumstances: the harm caused by radiation from nuclear weapons cannot be contained in space, nor can it be contained in time, it is a true inter-generational harm.

185. As pointed out in the pleadings before the ICJ of late 1995, the use of nuclear weapons thus violates the right to life (and the right to health) of "not only people currently living, but also of the unborn, of those to be born, of subsequent generations"[207]. Is there anything quintessentially more cruel? To use nuclear weapons appears like condemning innocent persons to hell on earth, even *before* they are born. That seems to go even further than the Book of Genesis's story of the original sin. In reaction to such extreme cruelty, the consciousness of the rights inherent

[204] CR 1995/27, of 7 November 1995, p. 33.
[205] *Ibid.*, pp. 36-37.
[206] *Ibid.*, pp. 39.
[207] CR 1995/35, of 15 November 1995, p. 28 (statement of Zimbabwe).

to the human person has always marked a central presence in endeavours towards complete nuclear disarmament.

4. The Absolute Prohibitions of Jus Cogens *and the Humanization of International Law*

186. The absolute prohibition of arbitrary deprivation of human life *(supra)* is one of *jus cogens*, originating in the ILHR, and with an incidence also on IHL and the ILR, and marking presence also in the law of the United Nations. The absolute prohibition of inflicting cruel, inhuman or degrading treatment is one of *jus cogens*, originating likewise in the ILHR, and with an incidence also on IHL and the ILR. The absolute prohibition of inflicting unnecessary suffering is one of *jus cogens*, originating in IHL, and with an incidence also on the ILHR and the ILR.

187. In addition to those converging trends (ILHR, IHL, ILR) of international protection of the rights of the human person, those prohibitions of *jus cogens* mark presence also in contemporary international criminal law (ICL), as well as in the *corpus juris gentium* of condemnation of all weapons of mass destruction. The absolute prohibitions of *jus cogens* nowadays encompass the threat or use of nuclear weapons, for all the human suffering they entail: in the case of their use, a suffering without limits in space or in time, and extending to succeeding generations.

188. I have been characterizing, over the years, the doctrinal and jurisprudential construction of international *jus cogens* as proper of the new *jus gentium* of our times, the international law for humankind. I have been sustaining, moreover, that, by definition, international *jus cogens* goes beyond the law of treaties, extending itself to the law of the international responsibility of the State, and to the whole *corpus juris* of contemporary international law, and reaching, ultimately, any juridical act[208].

189. In my lectures in an OAS Course of international law delivered in Rio de Janeiro almost a decade ago, e.g., I have deemed it fit to ponder that

> "The fact that the concepts both of the *jus cogens*, and of the obligations (and rights) *erga omnes* ensuing therefrom, already integrate

[208] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, Chap. XII, pp. 291-326.

the conceptual universe of contemporary international law, the new *jus gentium* of our days, discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values. This significant evolution of the recognition and assertion of norms of *jus cogens* and obligations *erga omnes* of protection is to be fostered, seeking to secure its full practical application, to the benefit of all human beings. In this way the universalist vision of the founding fathers of the *droit des gens* is being duly rescued. New conceptions of the kind impose themselves in our days, and, of their faithful observance, will depend to a large extent on the future evolution of contemporary international law.

This latter does not emanate from the inscrutable 'will' of the States, but rather, in my view, from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of international law (States, international organizations, human beings, and humankind as a whole). Above the will stands the conscience. (. . .)

The current process of the necessary *humanization* of international law stands in reaction to that state of affairs. It bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the *droit des gens*. In rescuing the universalist vision which marked the origins of the most lucid doctrine of international law, the aforementioned process of humanization contributes to the construction of the new *jus gentium* of the twenty-first century, oriented by the general principles of law. This process is enhanced by its own conceptual achievements, such as, to start with, the acknowledgement and recognition of *jus cogens* and the consequent obligations *erga omnes* of protection, followed by other concepts disclosing likewise a universalist perspective of the law of nations.

. . . . . .

The emergence and assertion of *jus cogens* in contemporary international law fulfil the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. The evolution of the concept of *jus cogens* transcends nowadays the ambit of both the law of treaties and the law of the international responsibility of the States, so as to reach general international law and the very foundations of the international legal order."[209]

[209] A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., OAS General Secretariat, 2009, pp. 3-29.

5. Pitfalls of Legal Positivism: A Rebuttal of the So-Called Lotus *"Principle"*

190. A matter which concerns the whole of humankind, such as that of the existence of nuclear weapons, can no longer be appropriately dealt with from a purely inter-State outlook of international law, which is wholly surpassed in our days. After all, without humankind there is no State whatsoever; one cannot simply have in mind States, apparently overlooking humankind. In its 1996 Advisory Opinion, the ICJ took note of the treaties which nowadays prohibit, e.g., biological and chemical weapons[210], and weapons which cause excessive damages or have indiscriminate effects (*I.C.J. Reports 1996 (I)*, p. 256, para. 76)[211].

191. But the fact that nowadays, in 2016, there does not yet exist a similar general treaty, of specific prohibition of nuclear weapons, does not mean that these latter are permissible (in certain circumstances, even in self-defence)[212]. In my understanding, it cannot be sustained, in a matter which concerns the future of humankind, that which is not expressly prohibited is thereby permitted (a classic postulate of positivism). This posture would amount to the traditional — and surpassed — attitude of the *laisser-faire, laisser-passer*, proper of an international legal order fragmented by State voluntarist subjectivism, which in the history of international law has invariably favoured the most powerful ones. *Ubi societas, ibi jus . . .*

192. Legal positivists, together with the so-called "realists" of *Realpolitik*, have always been sensitive to the established power, rather than to values. They overlook the time dimension, and are incapable to behold a universalist perspective. They are static, in time and space. Nowadays, in the second decade of the twenty-first century, in an international legal order which purports to assert common superior values, amidst considerations of international *ordre public*, and basic considerations of humanity, it is precisely the reverse logic which is to prevail: *that which is not permitted, is prohibited*[213].

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[210] The Geneva Protocol of 1925, and the Conventions of 1972 and 1993 against Biological and Chemical Weapons, respectively.

[211] E.g., the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

[212] The Roman-privatist influence — with its emphasis on the autonomy of the will had harmful consequences in traditional international law; in the public domain, quite to the contrary, conscience stands above the "will", also in the determination of competences.

[213] A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, p. 1099.

193. Even in the days of the *"Lotus"* case (1927), the view endorsed by the old PCIJ whereby under international law everything that was not expressly prohibited would thereby be permitted, was object of severe criticisms, not only of a compelling dissenting opinion in the case itself[214] but also on the part of expert writing of the time[215]. Such conception could only have flourished in an epoch "politically secure" in global terms, certainly quite different from that of the current nuclear age, in face of the recurrent threat of nuclear weapons and other weapons of mass destruction, the growing vulnerability of territorial States and indeed of the world population, and the increasing complexity in the conducting of international relations. In our days, in face of such a terrifying threat, it is the logical opposite to that of the *"Lotus"* case which imposes itself: all that is not expressly permitted is surely prohibited[216]. All weapons of mass destruction, including nuclear weapons, are illegal and prohibited under contemporary international law.

194. The case of *Shimoda and Others* (District Court of Tokyo, decision of 7 December 1963), with the dismissed claims of five injured survivors of the atomic bombings of Hiroshima and Nagasaki, stands as a grave illustration of the veracity of the *maxim summum jus, summa injuria*, when one proceeds on the basis of an allegedly absolute submission of the human person to a degenerated international legal order built on an exclusively inter-State basis. May I here reiterate what I wrote in 1981, regarding the *Shimoda and Others* case, namely,

> "The whole arguments in the case reflect the insufficiencies of an international legal order being conceived and erected on the basis of an exclusive inter-State system, leaving individual human beings impotent in the absence of express treaty provisions granting them procedural status at international level. Even in such a matter directly affecting fundamental human rights, the arguments were conducted in the case in the classical lines of the conceptual apparatus of the so-called law on diplomatic protection, in a further illustration of international legal reasoning still being haunted by the old Vattelian fiction."[217]

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[214] Cf. dissenting opinion of Judge Loder, *"Lotus"* case *[France* v. *Turkey], Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 34 (such conception was not in accordance with the "spirit of international law").

[215] Cf. J. L. Brierly, *The Basis of Obligation in International Law and Other Papers*, Oxford, Clarendon Press, 1958, p. 144; H. Lauterpacht, *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, pp. 409-412 and 94-96; and cf., subsequently, e.g., G. Herczegh, "Sociology of International Relations and International Law", *Questions of International Law* (ed. G. Haraszti), Budapest, Progresprint, 1971, pp. 69-71 and 77.

[216] A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, *op. cit. supra* note 213, p. 1099.

[217] A. A. Cançado Trindade, "The Voluntarist Conception of International Law: A

195. There exists nowadays an *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law. There is no "gap" concerning nuclear weapons; given the indiscriminate, lasting and indescribable suffering they inflict, they are outlawed, as much as other weapons of mass destruction (biological and chemical weapons) are. The positivist outlook purporting to challenge this prohibition of contemporary general international law has long been surpassed. Nor can this matter be approached from a strictly inter-State outlook, without taking into account the condition of peoples and human beings as subjects of international law.

196. All weapons of mass destruction are illegal under contemporary international law. The threat or use of such weapons is condemned in any circumstances by the universal juridical conscience, which in my view constitutes the ultimate material source of international law, as of all law. This is in keeping with the conception of the formation and evolution of international law which I have been sustaining for many years; it transcends the limitations of legal positivism, seeking to respond effectively to the needs and aspirations of the international community as a whole, and, ultimately, of all humankind.

XIV. Recourse to the "Martens Clause" as an Expression of the *Raison d'Humanité*

197. Even if there was a "gap" in the law of nations in relation to nuclear weapons, which there is not, it is possible to fill it by resorting to general principles of law. In its 1996 Advisory Opinion, the ICJ preferred to focus on self-defence of a hypothetical individual State, instead of developing the rationale of the Martens clause, the purpose of which is precisely that of filling gaps[218] in the light of the principles of the law of nations, the "laws of humanity" and the "dictates of public conscience"

Re-Assessment", 59 *Revue de droit international de sciences diplomatiques et politiques*, Geneva (1981), p. 214, and cf. pp. 212-213. On the need of a universalist perspective, cf. also K. Tanaka, "The Character of World Law in the International Court of Justice" [translated from Japanese into English by S. Murase], 15 *Japanese Annual of International Law* (1971), pp. 1-22.

[218] J. Salmon, "Le problème des lacunes à la lumière de l'avis 'Licéité de la menace ou de l'emploi d'armes nucléaires' rendu le 8 juillet 1996 par la Cour internationale de Justice", *Mélanges en l'honneur de N. Valticos — Droit et justice* (ed. R.-J. Dupuy), Paris, Pedone, 1999, pp. 197-214, esp. pp. 208-209; R. Ticehurst, "The Martens Clause and the Laws of Armed Conflict", 317 *International Review of the Red Cross* (1997), pp. 125-134,

(terms of the wise premonition of Fyodor Fyodorovich von Martens[219], originally formulated at the I Hague Peace Conference of 1899).

198. Yet, continuing recourse to the Martens clause, from 1899 to our days, consolidates it as an expression of the strength of human conscience. Its historical trajectory of more than one century has sought to extend protection juridically to human beings in all circumstances (even if not contemplated by conventional norms). Its reiteration for over a century in successive international instruments, besides showing that conventional and customary international law in the domain of protection of the human person go together, reveals the Martens clause as an emanation of the *material* source *par excellence* of the whole law of nations (the universal juridical conscience), giving expression to the *raison d'humanité* and imposing limits to the *raison d'Etat*[220].

199. It cannot be denied that nuclear weapons are intrinsically indiscriminate, incontrollable, that they cause severe and durable damage and in a wide scale in space and time, that they are prohibited by international humanitarian law (Articles 35, 48 and 51 of the Additional Protocol I of 1977 to the 1949 Geneva Conventions on international humanitarian law), and are inhuman as weapons of mass destruction[221]. Early in the present nuclear age, the four Geneva Conventions established the *grave violations* of international law (Convention I, Article 49 (3); Convention II, Article 50 (3); Convention III, Article 129 (3); and Convention IV, Article 146 (3)). Such *grave violations*, when involving nuclear weapons, victimize not only States, but all other subjects of international law as well, individuals and groups of individuals, peoples, and humankind as a whole.

200. The absence of conventional norms stating specifically that nuclear weapons are prohibited in all circumstances does not mean that they would be allowed in a given circumstance. Two decades ago, in the course of the advisory proceedings of late 1995 before the ICJ leading to its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*,

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esp. pp. 133-134; A. Azar, *Les opinions des juges dans l'avis consultatif sur la licéité de la menace ou de l'emploi d'armes nucléaires*, Brussels, Bruylant, 1998, p. 61.

[219] Which was intended to extend juridically the protection to the civilians and combatants in all situations, even if not contemplated by the conventional norms.

[220] A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 497-509.

[221] Cf. comments in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (eds. Y. Sandoz, C. Swinarski and B. Zimmermann), Geneva, ICRC/Nijhoff, 1987, pp. 389-420 and 597-600.

some of the participating States drew attention to the incidence of the Martens clause in the present domain[222]. It was pointed out, on the occasion, that the argument that international instruments do not specifically contain an express prohibition of use of nuclear weapons seems to overlook the Martens clause[223].

201. Also in rebuttal of that argument, — typical of legal positivism, in its futile search for an express prohibition, — it was further observed that the "principles of humanity" and the "dictates of public conscience", evoked by the Martens clause, permeate not only the law of armed conflict, but "the whole of international law"; they are essentially dynamic, pointing to conduct which may nowadays be condemned as inhumane by the international community[224], such as recourse to the threat or use of nuclear weapons. It was further stated, in the light of the Martens clause, that the "threat and use of nuclear weapons violate both customary international law and the dictates of public conscience"[225].

202. The Martens clause safeguards the integrity of law (against the undue permissiveness of a *non liquet*) by invoking the principles of the law of nations, the "laws of humanity" and the "dictates of the public conscience". Thus, that absence of a conventional norm is not conclusive, and is by no means the end of the matter, — bearing in mind also customary international law. Such absence of a conventional provision expressly prohibiting nuclear weapons does not at all mean that they are legal or legitimate[226]. The evolution of international law[227] points, in our days, in my understanding, towards the construction of the international law for humankind[228] and, within the framework of this latter, to the outlawing by general international law of all weapons of mass destruction.

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[222] Cf. CR 1995/31, of 13 November 1995, pp. 45-46 (statement of Samoa); CR 1995/25, of 3 November 1995, p. 55 (statement of Mexico); CR 1995/27, of 7 November 1995, p. 60 (statement of Malaysia).

[223] CR 1995/26, of 6 November 1995, p. 32 (statement of Iran).

[224] CR 1995/22, of 30 October 1995, p. 39 (statement of Australia).

[225] CR 1995/35, of 15 November 1995, p. 33 (statement of Zimbabwe).

[226] Stefan Glaser, *L'arme nucléaire à la lumière du droit international*, Paris, Pedone, 1964, pp. 15, 21, 24-27, 32, 36-37, 41, 43-44 and 62-63, and cf. pp. 18 and 53.

[227] If, in other epochs, the ICJ had likewise limited itself to verify a situation of "legal uncertainty" (which, anyway, does not apply in the present context), most likely it would not have issued its *célèbres* Advisory Opinions on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951), and on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (1971), which have so much contributed to the evolution of international law.

[228] Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, pp. 1-726.

203. Had the ICJ, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, made decidedly recourse in great depth to the Martens clause, it would not have lost itself in a sterile exercise, proper of a legal positivism *déjà vu*, of a hopeless search of conventional norms, frustrated by the finding of what it understood to be a lack of these latter as to nuclear weapons specifically, for the purposes of its analysis. The existing arsenals of nuclear weapons, and of other weapons of mass destruction, are to be characterized by what they really are: a scorn and the ultimate insult to human reason, and an affront to the juridical conscience of humankind.

204. The aforementioned evolution of international law, — of which the Martens clause is a significant manifestation, — has gradually moved from an international into a universal dimension, on the basis of fundamental values, and in the sense of an *objective justice*[229], which has always been present in jusnaturalist thinking. Human conscience stands above the "will" of individual States. This evolution has, in my perception, significantly contributed to the formation of an *opinio juris communis* in recent decades, in condemnation of nuclear weapons.

205. This *opinio juris communis* is clearly conformed in our days: the overwhelming majority of Member States of the United Nations, the NNWS, have been sustaining for years the series of General Assembly resolutions in condemnation of the use of nuclear weapons as illegal under general international law. To this we can add other developments, reviewed in the present dissenting opinion, such as, e.g., the NPT Review Conferences, the establishment of regional nuclear-weapon-free zones, and the Conferences on Humanitarian Impact of Nuclear Weapons (cf. Parts XVII-XIX, *infra*).

XV. Nuclear Disarmament: Jusnaturalism, the Humanist Conception and the Universality of International Law

206. The existence of nuclear weapons, — maintained by the strategy of "deterrence" and "mutually assured destruction" ("MAD", as it became adequately called, since it was devised in the Cold-War era), is the contemporary global tragedy of the nuclear age. Death, or self-destruction, haunts everyone everywhere, propelled by human madness. Human beings need protection from themselves, today more than

[229] A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 166-167; and cf. C. Husson-Rochcongar, *Droit international des droits de l'homme et valeurs — Le recours aux valeurs dans la jurisprudence des organes spécialisés*, Brussels, Bruylant, 2012, pp. 309-311, 451-452, 578-580, 744-745 and 771-772.

ever[230], — and this brings our minds to other domains of human knowledge. Law by itself cannot provide answers to this challenge to humankind as a whole.

207. In the domain of nuclear disarmament, we are faced today, within the conceptual universe of international law, with unexplainable insufficiencies, or anomalies, if not absurdities. For example, there are fortunately in our times conventions prohibiting biological and chemical weapons (of 1972 and 1993), but there is to date no such comprehensive conventional prohibition of nuclear weapons, which are far more destructive. There is no such prohibition despite the fact that they are in clear breach of international law, of IHL and the ILHR, as well as of the law of the United Nations.

208. Does this make any sense? Can international law prescind from ethics? In my understanding, not at all. Just as law and ethics go together (in the line of jusnaturalist thinking), scientific knowledge itself cannot be dissociated from ethics. The production of nuclear weapons is an illustration of the divorce between ethical considerations and scientific and technological progress. Otherwise, weapons which can destroy millions of innocent civilians, and the whole of humankind, would not have been conceived and produced.

209. The principles of *recta ratio*, orienting the *lex praeceptiva*, emanate from human conscience, affirming the ineluctable relationship between law and ethics. Ethical considerations are to guide the debates on nuclear disarmament. Nuclear weapons, capable of destroying humankind as a whole, carry evil in themselves. They ignore civilian populations, they make abstraction of the principles of necessity, of distinction and of proportionality. They overlook the principle of humanity. They have no respect for the fundamental right to life. They are wholly illegal and illegitimate, rejected by the *recta ratio*, which endowed *jus gentium*, in its historical evolution, with ethical foundations, and its character of universality.

210. Already in 1984, in its General Comment No. 14 (on the right to life), the UN Human Rights Committee (HRC — under the Covenant on Civil and Political Rights), for example, began by warning that war and mass violence continue to be "a scourge of humanity", taking the lives of thousands of innocent human beings every year (para. 2). In successive sessions of the General Assembly, it added, representatives of States from

[230] In another international jurisdiction, in my separate opinion in the IACtHR's case of the *Massacres of Ituango* v. *Colombia* (judgment of 1 July 2006), I devoted part of my reflections to "human cruelty in its distinct manifestations in the execution of State policies" (Part II, paras. 9-13).

all geographical regions have expressed their growing concern at the development and proliferation of "increasingly awesome weapons of mass destruction" (General Comment No. 14, para. 3). Associating itself with this concern, the HRC stated that

> "It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.
>
> Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.
>
> The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.
>
> The Committee, accordingly, in the interest of mankind, calls upon all States (. . .) to take urgent steps (. . .) to rid the world of this menace." (Paras. 4-7.)[231]

211. The absence in contemporary international law of a comprehensive conventional prohibition of nuclear weapons is incomprehensible. Contrary to what legal positivists think, law is not self-sufficient, it needs inputs from other branches of human knowledge for the realization of justice. Contrary to what legal positivists think, norms and values go together, the former cannot prescind from the latter. Contrary to legal positivism, may I add, jusnaturalism, taking into account ethical considerations, pursues a universalist outlook (which legal positivists are incapable of doing), and beholds humankind as entitled to protection[232].

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[231] General Comment No. 14 (of 1984) of the HRC, text in: United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, doc. HRI/GEN/1/Rev.3, of 15 August 1997, pp. 18-19. The HRC, further stressing that the right to life is a fundamental right which does not admit any derogation not even in time of public emergency, related the current proliferation of weapons of mass destruction to "the supreme duty of States to prevent wars". Cf. also *UN Report of the Human Rights Committee, G.A.O.R.* — Fortieth Session (1985), suppl. No. 40 (A/40/40), p. 162.

[232] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, pp. 1-726. *Recta ratio* and universalism, present in the jusnaturalist thinking of the "founding fathers" of international law (F. de Vitoria, F. Suárez, H. Grotius, among others), go far back in time to the legacies of Cicero,

212. Humankind is subject of rights, in the realm of the new *jus gentium*[233]. As this cannot be visualized from the optics of the State, contemporary international law has reckoned the limits of the State as from the optics of humankind. Natural law thinking has always been attentive to justice, which much transcends positive law. The present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* has been lodged with the International Court *of Justice*, and not with an International Court of Positive Law. The contemporary tragedy of nuclear weapons cannot be addressed from the myopic outlook of positive law alone.

213. Nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations *(le droit des gens)*: they are in flagrant breach of its fundamental principles, and those of IHL, the ILHR, as well as the law of the United Nations. They are a contemporary manifestation of evil, in its perennial trajectory going back to the Book of Genesis (cf. Part VIII, *supra*). Jusnaturalist thinking, always open to ethical considerations, identifies and discards the disrupting effects of the strategy of "deterrence" of fear creation and infliction[234] (cf. Part XII, *supra*). Humankind is victimized by this.

214. In effect, humankind has been, already for a long time, a *potential victim* of nuclear weapons. To establish such condition of potential victim, one does not need to wait for the actual destruction of life on earth. Humankind has, for the last decades, been suffering psychological harm caused by the existence itself of arsenals of nuclear weapons. And there are peoples, and segments of populations, who have been *actual victims* of

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in his characterization of *recta ratio* in the foundations of *jus gentium* itself, and of Thomas Aquinas, in his conception of *synderesis*, as predisposition of human reason to be guided by principles in the search of the common good; *op. cit. supra* note 120, pp. 10-14.

[233] *Ibid.*, Chap. XI, pp. 275-288; A. A. Cançado Trindade, "Quelques réflexions sur l'humanité comme sujet du droit international", *Unité et diversité du droit international — Ecrits en l'honneur du Prof. Pierre-Marie Dupuy* (eds. D. Alland, V. Chetail, O. de Frouville and J. E. Viñuales), Leiden, Nijhoff, 2014, pp. 157-173.

[234] Cf., to this effect, C. A. J. Coady, "Natural Law and Weapons of Mass Destruction", *Ethics and Weapons of Mass Destruction — Religious and Secular Perspectives* (eds. S. H. Hashmi and S. P. Lee), Cambridge University Press, 2004, p. 122, and cf. p. 113; and cf. also J. Finnis, J. M. Boyle Jr. and G. Grisez, *Nuclear Deterrence, Morality and Realism*, Oxford, Clarendon Press, 1987, pp. 77-103, 207-237, 275-319 and 367-390. In effect, contemporary expert writing has become, at last, very critical of the "failed strategy" of "deterrence"; cf., *inter alia*, e.g., [Various Authors], *At the Nuclear Precipice — Catastrophe or Transformation?* (eds. R. Falk and D. Krieger), London, Palgrave/MacMillan, 2008, pp. 162, 209, 218 and 229; A. C. Alves Pereira, *Os Impérios Nucleares e Seus Reféns: Relações Internacionais Contemporâneas*, Rio de Janeiro, Ed. Graal, 1984, pp. 87-88, and cf. pp. 154, 209 and 217.

the vast and harmful effects of nuclear tests. The existence of *actual and potential victims* is acknowledged in international case law in the domain of the international law of human rights [235]. To address this danger from a strict inter-State outlook is to miss the point, to blind oneself. States were created and exist for human beings, and not vice versa.

215. The NPT has a universalist vocation, and counts on everyone, as shown by its three basic principled pillars together. In effect, as soon as it was adopted, the 1968 NPT came to be seen as having been devised and concluded on the basis of those principled pillars, namely: non-proliferation of nuclear weapons (preamble and Articles I-III), peaceful use of nuclear energy (preamble and Articles IV-V), and nuclear disarmament (preamble and Article VI)[236]. The antecedents of the NPT go back to the work of the UN General Assembly in 1953[237]. The NPT's three-pillar framework came to be reckoned as the "grand bargain" between its parties, NWS and NNWS. But soon it became a constant point of debate between NWS and NNWS parties to the NPT. In effect, the "grand bargain" came to be seen as "asymmetrical"[238], and NNWS began to criticize the very slow pace of achieving nuclear disarmament as one of the three basic principled pillars of the NPT (Art. VI)[239].

216. Under the NPT, each State is required to do its due. NWS are no exception to that, if the NPT is not to become dead letter. To achieve the three interrelated goals (non-proliferation of nuclear weapons, peaceful

[235] For an early study on this issue, cf. A. A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des cours de l'Académie de droit international de La Haye* (1987), Chap. XI, pp. 271-283. And for subsequent developments on the notion of *potential victims*, cf. A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2012 [reprint], Chap. VII, pp. 125-131.

[236] Articles VIII-XI, in turn, are procedural in nature.

[237] In particular the speech of President D. D. Eisenhower (US) to the UN General Assembly in 1953, as part of his plan "Atoms for Peace"; cf., e.g., I. Chernus, *Eisenhower's Atoms for Peace*, [Austin], Texas A & M University Press, 2002, pp. 3-154.

[238] J. Burroughs, *The Legal Framework for Non-Use and Elimination of Nuclear Weapons*, [N.Y.], Greenpeace International, 2006, p. 13.

[239] H. Williams, P. Lewis and S. Aghlani, *The Humanitarian Impacts of Nuclear Weapons Initiative: The "Big Tent" in Disarmament*, London, Chatham House, 2015, p. 7; D. H. Joyner, "The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty", *Nuclear Weapons and International Law* (eds. G. Nystuen, S. Casey-Maslen and A. G. Bersagel), Cambridge University Press, 2014, pp. 397, 404 and 417, and cf. pp. 398-399 and 408; and cf. D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, Oxford University Press, 2013 [reprint], pp. 2, 104 and 126, and cf. pp. 20, 26-29, 31, 97 and 124.

use of nuclear energy, and nuclear disarmament) is a duty of each and every State towards humankind as a whole. It is a universal duty of conventional and customary international law in the nuclear age. There is an *opinio juris communis* to this effect, sedimented during recent decades, and evidenced in the successive establishment, in distinct continents, of nuclear-weapon-free zones, and nowadays in the Conferences on the Humanitarian Impact of Nuclear Weapons (cf. Parts XVIII-XIX, *infra*).

XVI. The Principle of Humanity and the Universalist Approach: *Jus Necessarium* Transcending the Limitations of *Jus Voluntarium*

217. In my understanding, there is no point in remaining attached to an outdated and reductionist inter-State outlook, particularly in view of the revival of the conception of the law of nations *(droit des gens)* encompassing humankind as a whole, as foreseen and propounded by the "founding fathers" of international law[240] (in the sixteenth-seventeenth centuries). It would be nonsensical to try to cling to the unduly reductionist inter-State outlook in the international adjudication of a case concerning the Contending Parties and affecting all States, all peoples and humankind as a whole.

218. An artificial, if not fossilized, strictly inter-State mechanism of dispute-settlement cannot pretend to entail or require a (likewise) entirely inadequate and groundless inter-State reasoning. The law of nations cannot be interpreted and applied in a mechanical way, as from an exclusively inter-State paradigm. To start with, the humane ends of States cannot be overlooked. In relation to nuclear weapons, the *potential victims* are the human beings and peoples, beyond their respective States, for whom these latter were created and exist.

219. As I had the occasion to point out in another international jurisdiction, the law of nations *(droit des gens)*, since its historical origins in the sixteenth century, was seen as comprising not only States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole[241]. The strictly inter-State outlook was devised much later on, as from the Vattelian reductionism of the

[240] A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 1-187.

[241] IACtHR, case of the *Moiwana Community* v. *Suriname* (judgment of 15 June 2005), separate opinion of Judge Cançado Trindade, paras. 6-7.

mid-seventeenth century, which became *en vogue* by the end of the sixteenth century and beginning of the twentieth century, with the well-known disastrous consequences — the successive atrocities victimizing human beings and peoples in distinct regions of world, — during the whole twentieth century[242]. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened.

220. Within the ICJ as well, I have had also the occasion to stress the need to go beyond the inter-State outlook. Thus, in my dissenting opinion in the recent case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, I have pointed out, *inter alia*, that the 1948 Convention against Genocide is not State-centric, but is rather oriented towards groups of persons, towards the victims, whom it seeks to protect (*Judgment, I.C.J. Reports 2015 (I)*, pp. 226 and 376, paras. 59 and 529). The humanist vision of the international legal order pursues an outlook centred on the peoples, keeping in mind the humane ends of States.

221. I have further underlined that the *principle of humanity* is deeply-rooted in the long-standing thinking of natural law (*ibid.*, p. 229, para. 69).

> "Humaneness came to the fore even more forcefully in the treatment of persons in *situation of vulnerability*, *or even defencelessness*, such as those deprived of their personal freedom, for whatever reason. The *jus gentium*, when it emerged as amounting to the law of nations, came then to be conceived by its 'founding fathers' (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the *necessary* law of the *societas gentium*.
>
> The *jus gentium*, thus conceived, was inspired by the principle of humanity *lato sensu*. Human conscience prevails over the will of individual States. Respect for the human person is to the benefit of the common good. This humanist vision of the international legal order pursued — as it does nowadays — a *people- centred outlook*, keeping in mind the *humane ends of the State*. The precious legacy of natural law thinking, evoking the right human reason *(recta ratio)*, has never faded away" (*ibid.*, p. 231, paras. 73-74).

The precious legacy of natural law thinking has never vanished; despite the indifference and pragmatism of the "strategic" *droit d'étatistes* (so numerous in the legal profession nowadays), the *principle of humanity* emerged and remained in international legal thinking as an expression of

[242] *Op. cit. supra* note 241, paras. 6-7.

the *raison d'humanité* imposing limits to the *raison d'Etat* (*I.C.J. Reports 2015 (I)*, p. 231, para. 74).

222. This is the position I have always taken, within the ICJ and, earlier on, the IACtHR. For example, in the ICJ's Advisory Opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (of 1 February 2012), I devoted one entire part (Part XI) of my separate opinion to the erosion — as I perceive it — of the inter-State outlook of adjudication by the ICJ (*I.C.J. Reports 2012 (I)*, pp. 79-81, paras. 76-81). I warned likewise in my separate opinion in the case of *Whaling in the Antarctic (Australia* v. *Japan)*, Order of 6 February 2013, on New Zealand's intervention) (*I.C.J. Reports 2013*, pp. 21-23, paras. 21-23), as well as in my recent separate opinion in the case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, (pp. 49-51, paras. 16-21 and pp. 54-58, paras. 28-41).

223. Earlier on, within the IACtHR, I took the same position: for example, *inter alia*, in my concurring opinions in both the Advisory Opinion No. 16, on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law* (of 1 October 1999), and the Advisory Opinion No. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), of the IACtHR, I deemed it fit to point out, — going beyond the strict inter-State dimension, — that, if non-compliance with Article 36 (1) *(b)* of the 1963 Vienna Convention on Consular Relations takes place, it occurs to the detriment not only of a State party but also of the human beings at issue. Such pioneering jurisprudential construction, in the line of jusnaturalist thinking, rested upon the evolving concepts of *jus cogens* and obligations *erga omnes* of protection[243].

224. *Recta ratio* stands firmly above the "will". Human conscience, — the *recta ratio* so cultivated in jusnaturalism, — clearly prevails over the "will" and the strategies of individual States. It points to a universalist conception of the *droit des gens* (the *lex praeceptiva* for the *totus orbis*), applicable to all (States as well as peoples and individuals), given the unity of the human kind. Legal positivism, centred on State power and "will", has never been able to develop such universalist outlook, so essential and necessary to address issues of concern to humankind as a whole, such as that of the obligation of nuclear disarmament. The universal juridical conscience prevails over the "will" of individual States.

[243] Cf. comments of A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 463-468.

225. The "founding fathers" of the law of nations (such as, *inter alia*, F. de Vitoria, F. Suárez and H. Grotius) had in mind humankind as a whole. They conceived a universal *jus gentium* for the *totus orbis*, securing the unity of the *societas gentium*; based on a *lex praeceptiva*, the *jus gentium* was apprehended by the *recta ratio*, and conformed a true *jus necessarium*, much transcending the limitations of the *jus voluntarium*. Law ultimately emanates from the common conscience of what is juridically necessary *(opinio juris communis necessitatis)*[244]. The contribution of the "founding fathers" of *jus gentium* found inspiration largely in the scholastic philosophy of natural law (in particular in the stoic and Thomist conception of *recta ratio* and justice), which recognized the human being as endowed with intrinsic dignity).

226. Moreover, in face of the unity of the humankind, they conceived a truly *universal* law of nations, applicable to all — States as well as peoples and individuals — everywhere *(totus orbis)*. In thus contributing to the emergence of the *jus humanae societatis*, thinkers like Francisco de Vitoria and Domingo de Soto, among others, permeated their lessons with the humanist thinking that preceded them. Four and a half centuries later, their lessons remain contemporary, endowed with perennial validity and aptitude to face, e.g., the contemporary and dangerous problem of the existing arsenals of nuclear weapons. Those thinkers went well beyond the "will" of States, and rested upon the much safer foundation of human conscience (*recta ratio* and justice).

227. The conventional and customary obligation of nuclear disarmament brings to the fore another aspect: the issue of the *validity* of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is *necessary*, — such as a world free of nuclear weapons, — in order to secure the survival of humankind. This *idée du droit* precedes positive international law, and is in line with jusnaturalist thinking.

228. *Opinio juris communis necessitatis* upholds a customary international law obligation to secure the survival of humankind. Conventional and customary obligations go here together. Just as customary rules may eventually be incorporated into a convention, treaty provisions may likewise eventually enter into the *corpus* of general international law. Customary obligations can either precede, or come after, conventional obligations. They evolve *pari passu*. This being so, the search for an express legal prohibition of nuclear weapons (such as the one undertaken in the ICJ's Advisory Opinion of 1996 on the *Threat or Use of Nuclear Weapons*) becomes a futile, if not senseless, exercise of legal positivism.

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[244] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, pp. 137-138.

229. It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of *jus cogens*. And *jus cogens* was reckoned by human conscience well before it was incorporated into the two Vienna Conventions on the Law of Treaties (of 1969 and 1986). As I had the occasion to warn, three decades ago, at the 1986 UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, *jus cogens* is "incompatible with the voluntarist conception of international law, because that conception failed to explain the formation of rules of general international law"[245].

XVII. NPT Review Conferences

230. In fact, in the course of the written phase of the proceedings before the Court in the present case, both the Marshall Islands[246] and the United Kingdom[247] addressed, in their distinct arguments, the series of NPT Review Conferences. For its part, India also addressed the Review Conferences[248], in particular to leave on the records its position on the matter, as explained in a statement made on 9 May 2000.

231. Likewise, in the course of the oral phase of the present proceedings before the Court in *cas d'espèce*, the Marshall Islands referred to the NPT Review Conferences in its oral arguments in two of the three cases it lodged with the Court against India[249], and the United Kingdom[250]; references to the Review Conferences were also made, for their part, in their oral arguments, by the two respondent States which participated in the public sittings before the Court, namely, India[251] and the United Kingdom[252]. Those Review Conferences conform the factual context of the *cas d'espèce*, and cannot pass unnoticed.

May I thus proceed to a brief review of them.

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[245] *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations — Official Records*, Vol. I (statement by the Representative of Brazil, A. A. Cançado Trindade, of 12 March 1986), pp. 187-188, para. 18.

[246] Application instituting proceedings, p. 40, para. 66; and Memorial, pp. 29, 56-60, 61, 63, 68-69, 71 and 73, paras. 50, 123-128, 130, 136, 150, 153, 154, 161-162 and 168; and Statement of Observations on Preliminary Objections [U.K.'s], pp. 15 and 47, paras. 32 and 126.

[247] Preliminary Objections, pp. 1-2, 10 and 23, paras. 2-3, 21 and 50.

[248] Counter-Memorial, p. 15, para. 23, note 49, and Annex 23.

[249] CR 2016/1, of 7 March 2016, pp. 26-27 and 50, paras. 9 and 17 (Marshall Islands); CR 2016/6, of 14 March 2016, p. 32, para. 10 (Marshall Islands).

[250] CR 2016/5, of 11 March 2016, p. 47, para. 8 (Marshall Islands).

[251] CR 2016/4, of 10 March 2016, p. 14, para. 3 (India).

[252] CR 2016/7, of 9 March 2016, pp. 14-16 and 18-19, paras. 20, 22, 24, 32 and 37 (United Kingdom).

232. The NPT Review Conferences, held every five years, started in 1975. The following three Conferences of the kind were held, respectively, in 1980, 1985 and 1990, respectively[253]. The fifth of such Conferences took place in 1995, the same year that the Marshall Islands became a party to the NPT (on 30 January 1995). In one of its decisions, the 1995 NPT Conference singled out the vital role of the NPT in preventing the proliferation of nuclear weapons, and warned that the proliferation of nuclear weapons would seriously increase the danger of nuclear war[254]. For their part, NWS reaffirmed their commitment, under Article VI of the NPT, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.

233. The 1995 Review Conference prolonged indefinitely the NPT, and adopted its decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament". Yet, in its report, the Main Committee I (charged with the implementation of the provisions of the NPT) observed with regret that Article VI and preambular paragraphs 8-12 of the NPT had not been wholly fulfilled[255], with the number of nuclear weapons then existing being greater than the one existing when the NPT entered into force; it further regretted "the continuing lack of progress" on relevant items of the Conference on Disarmament, and urged a commitment on the part of NWS on "no-first use and non-use of nuclear weapons with immediate effect"[256].

234. Between the fifth and the sixth Review Conferences, India and Pakistan carried out nuclear tests in 1998. For its part, on several occasions, the Movement of Non-Aligned Countries called for "urgent" measures of nuclear disarmament[257]. To this effect, the 2000 Review Conference agreed to a document containing the "13 Practical Steps" in order to meet the commitments of States parties under Article VI of the NPT[258]. The "13 Practical Steps" stress the relevance and urgency of ratifications of the CTBT so as to achieve its entry into force, and of setting up a moratorium on nuclear-weapon tests pending such entry into force. Furthermore, they call for the commencement of negotiations on a treaty

[253] For an assessment of these earlier NPT Review Conferences, cf. H. Müller, D. Fischer and W. Kötter, *Nuclear Non-Proliferation and Global Order*, Stockholm-Solna/Oxford, SIPRI/Oxford University Press, 1994, pp. 31-108.

[254] Decision 2, NPT/CONF.1995/32 (Part I), Annex, p. 2.

[255] Final Document, Part II, p. 257, paras. 3-3*ter*., and cf. pp. 258 and 260, paras. 4 and 9.

[256] *Ibid.*, pp. 271-273, paras. 36-39.

[257] NPT/CONF.2000/4, paras. 12-13.

[258] Final Document, Vol. 1, Part I, pp. 14-15.

banning the production of fissile material for nuclear weapons and also call upon NWS to accomplish the total elimination of nuclear arsenals[259].

235. At the 2005 Review Conference, no substantive decision was adopted, amidst continuing disappointment at the lack of progress on implementation of Article VI of the NPT, particularly in view of the "13 Practical Steps" agreed to at the 2000 Review Conference. Concerns were expressed that new nuclear weapon systems were being developed, and strategic doctrines were being adopted lowering the threshold for the use of nuclear weapons; moreover, regret was also expressed that States whose ratification was needed for the CTBT's entry into force had not yet ratified the CTBT[260].

236. Between the 2005 and the 2010 Review Conferences, there were warnings that the NPT was "now in danger" and "under strain", as the process of disarmament had "stagnated" and needed to be "revived" in order to prevent the spread of weapons of mass destruction. The concerns addressed what was regarded as the unsatisfactory stalemate in the Conference on Disarmament in Geneva, which had been "unable to adopt an agenda for almost a decade" to identify substantive issues to be discussed and negotiated in the Conference[261].

237. The "Five-Point Proposal on Nuclear Disarmament", announced by the Secretary-General in an address of 24 October 2008[262], began by urging all NPT States parties, in particular the NWS, to fulfil their obligations under the Treaty "to undertake negotiations on effective measures leading to nuclear disarmament" (para. 1)[263]. It called upon the permanent members of the Security Council to commence discussions on secu-

[259] The "13 practical steps", moreover, affirm that the principle of irreversibility should apply to all nuclear disarmament and reduction measures. At last, the 13 practical steps reaffirm the objective of general and complete disarmament under effective international control, and stress the importance of both regular reports on the implementation of NPT's Article VI obligations, and the further development of verification capabilities.

[260] NPT/CONF.2005/57, Part I, and cf. report on the 2005 Review Conference: 30 *UN Disarmament Yearbook* (2005), Chap. I, p. 23.

[261] Hans Blix, *Why Disarmament Matters*, Cambridge, Mass./London, Boston Review/MIT, 2008, pp. 6 and 63.

[262] Cf. UN Secretary-General (Ban Ki-moon), Address (at a conference at the East-West Institute): "The United Nations and Security in a Nuclear-Weapon-Free World", *UN News Centre*, of 24 October 2008, pp. 1-3.

[263] It added that this could be pursued either by an agreement on "a framework of separate, mutually reinforcing instruments", or else by negotiating "a nuclear-weapons

rity issues in the nuclear disarmament process, including by giving NNWS assurances against the use or threat of use of nuclear weapons ("Five-Point Proposal on Nuclear Disarmament", para. 5). It stressed the need of "new efforts to bring the CTBT into force", and encouraged NWS to ratify all the protocols to the treaties which established nuclear-weapon-free zones (*ibid.*, para. 6). Moreover, it also stressed "the need for greater transparency" in relation to arsenals of nuclear weapons and disarmament achievements (*ibid.*, para. 7). And it further called for the elimination also of other types of weapons of mass destruction (*ibid.*, para. 8).

238. The "Five-Point Proposal on Nuclear Disarmament" was reiterated by the UN Secretary-General in two subsequent addresses in the following three years[264]. In one of them, before the Security Council on 24 September 2009, he stressed the need of an "early entry into force" of the CTBT, and pondered that "disarmament and non-proliferation must proceed together"; he urged "a divided international community" to start moving ahead towards achieving "a nuclear-weapon-free world", and, at last, he expressed his hope in the forthcoming 2010 NPT Review Conference[265].

239. Both the 2000 and the 2010 Review Conferences made an interpretation of nuclear disarmament under Article VI of the NPT as a "positive disarmament obligation", in line with the dictum in the ICJ's 1996 Advisory Opinion of nuclear disarmament in good faith as an obligation of result[266]. The 2010 Review Conference expressed its deep concern that there remained the continued risk for humankind put by the possibility that nuclear weapons could be used, and the catastrophic humanitarian consequences that would result therefrom.

240. The 2010 Review Conference, keeping in mind the 1995 decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament" as well as the 2000 agreement on the "13 Practical Steps",

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convention, backed by a strong system of verification, as has long been proposed at the United Nations" (para. 2).

[264] On two other occasions, namely, during a Security Council Summit on Nuclear Non-Proliferation on 24 September 2009, and at a Conference organized by the East-West Institute on 24 October 2011.

[265] UN Secretary-General (Ban Ki-moon), "Opening Remarks to the Security Council Summit on Nuclear Non-Proliferation and Nuclear Disarmament", *UN News Centre*, of 24 September 2009, pp. 1-2.

[266] D. H. Joyner, "The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty", *Nuclear Weapons and International Law* (eds. G. Nystuen, S. Casey-Maslen and A. G. Bersagel), Cambridge University Press, 2014, pp. 413 and 417.

affirmed the vital importance of the universality of the NPT[267], and, furthermore, took note of the "Five-Point Proposal on Nuclear Disarmament" of the UN Secretary-General, of 2008. For the first time in the present series of Review Conferences, the Final Document of the 2010 Review Conference recognized "the catastrophic humanitarian consequences that would result from the use of nuclear weapons"[268].

241. The Final Document welcomed the creation of successive nuclear-weapon-free zones[269], and, in its conclusions, it endorsed the "legitimate interest" of NNWS to receive "unequivocal and legally binding security assurances" from NWS on the matter at issue; it asserted and recognized that "the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons"[270]. The aforementioned Final Document reiterated the 2010 Review Conference's "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons", and "the need for all States at all times to comply with applicable international law, including international humanitarian law"[271]. This key message of the 2010 Review Conference triggered the initiative, three years later, of the new series of Conferences on Humanitarian Impact of Nuclear Weapons (cf. *infra*).

242. The "historic acknowledgement" of "the catastrophic humanitarian consequences of any use of nuclear weapons" was duly singled out by the ICRC, in its statement in the more recent 2015 Review Conference[272]; the ICRC pointed out that that new series of Conferences (2013-2014, in Oslo, Nayarit and Vienna) have given the international community "a much clearer grasp" of the effects of nuclear detonations on peoples around the world. It then warned that, 45 years after the NPT's entry into force, "there has been little or no concrete progress" in fulfilling the goal of elimination of nuclear weapons. As nuclear weapons remain the only weapons of mass destruction not prohibited by a treaty, "filling this gap is a humanitarian imperative", as the "immediate risks of intentional or accidental nuclear detonations" are "too high and the dangers too real"[273].

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[267] Cf. *2010 Review Conference — Final Document*, Vol. I, doc. NPT/CONF.2010/50, of 18 June 2010, pp. 12-14 and 19-20.

[268] *Ibid.*, p. 12, para. 80.

[269] Cf. *ibid.*, p. 15, para. 99.

[270] *Ibid.*, p. 21, point (i).

[271] *Ibid.*, p. 19, point (v).

[272] ICRC, "Eliminating Nuclear Weapons", *Statement — 2015 Review Conference of the Parties to the NPT*, of 1 May 2015, p. 1.

[273] *Ibid.*, pp. 2-3.

243. The 2015 Review Conference displayed frustration over the very slow pace of action on nuclear disarmament, in addition to current nuclear modernization programs and reiteration of dangerous nuclear strategies, apparently oblivious of the catastrophic humanitarian consequences of nuclear weapons. At the 2015 Review Conference, the Main Committee I, charged with addressing Article VI of the NPT, stressed the importance of "the ultimate goal" of elimination of nuclear weapons, so as to achieve "general and complete disarmament under effective international control"[274].

244. The 2015 Review Conference reaffirmed that "the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons, including the risk of their unauthorized, unintentional or accidental detonation"[275]. It expressed its "deep concern" that, during the period 2010-2015, the Conference on Disarmament did not commence negotiations of an instrument on such nuclear disarmament[276], and then stressed the "urgency for the Conference on Disarmament" to achieve "an internationally legally binding instrument to that effect", so as "to assure" NNWS against the use or threat of use of nuclear weapons by all NWS[277].

245. After welcoming "the increased and positive interaction with civil society" during the cycle of Review Conferences, the most recent 2015 Review Conference stated that

> "understandings and concerns pertaining to the catastrophic humanitarian consequences of any nuclear weapon detonation underpin and should compel urgent efforts by all States leading to a world without nuclear weapons. The Conference affirms that, pending the realization of this objective, it is in the interest of the very survival of humanity that nuclear weapons never be used again"[278].

XVIII. The Establishment of Nuclear-Weapon-Free Zones

246. In addition to the aforementioned NPT Review Conferences, the *opinio juris communis* on the illegality of nuclear weapons finds expression

[274] *2015 Review Conference — Working Paper of the Chair of Main Committee* I, doc. NPT/CONF.2015/MC.I/WP.1, of 18 May 2015, p. 3, para. 17.
[275] *Ibid.*, p. 5, para. 27.
[276] *Ibid.*, p. 6, para. 35.
[277] *Ibid.*, p. 7, para. 43.
[278] *Ibid.*, paras. 45-46 (1).

also in the establishment, over the last half century, of nuclear-weapon-free zones, which has responded to the needs and aspirations of humankind, so as to rid the world of the threat of nuclear weapons. The establishment of those zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole. There are, in effect, references to nuclear-weapon-free zones in the arguments, in the written phase of the present proceedings, of the Marshall Islands[279] and of the United Kingdom[280] in the present case.

247. I originally come from the part of the world, Latin America, which, together with the Caribbean, form the first region of the world to have prohibited nuclear weapons, and to have proclaimed itself as a nuclear-weapon-free zone. The pioneering initiative in this domain, of Latin America and the Caribbean[281], resulted in the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean and its two Additional Protocols. Its reach transcended Latin America and the Caribbean, as evidenced by its two Additional Protocols[282], and the obligations set forth in its legal regime were wide in scope:

> "The régime established in the Treaty is not merely one of non-proliferation: it is a régime of total absence of nuclear weapons, which means that such weapons will be prohibited in perpetuity in the territories to which the Treaty applies, regardless of the State under whose control these terrible instruments of mass destruction might be."[283]

248. By the time of the creation of that first nuclear-weapon-free zone by the 1967 Treaty of Tlatelolco, it was pointed out that it came as a response to humanity's concern with its own future (given the threat of nuclear weapons), and in particular with "the survival of the humankind"[284]. That initiative[285] was followed by four others of the kind, in distinct regions of the world, conducive to the adoption of the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the

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[279] Application instituting proceedings, p. 42, para. 73; and Memorial of the Marshall Islands, pp. 40, 53 and 56, paras. 84, 117 and 122.

[280] Preliminary Objections of the United Kingdom, p. 2, para. 4.

[281] On the initial moves in the UN to this effect, by Brazil (in 1962) and Mexico (taking up the leading role from 1963 onwards), cf. United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. infra* note 286, pp. 20, 116 and 139.

[282] The first one concerning the States internationally responsible for territories located within the limits of the zone of application of the Treaty, and the second one pertaining to the nuclear weapon States.

[283] A. García Robles, "Mesures de désarmement dans des zones particulières: le traité visant l'interdiction des armes nucléaires en Amérique Latine", 133, *RCADI* (1971), p. 103, and cf. p. 71 *[translation by the Registry]*.

[284] *Ibid.*, p. 99, and cf. p. 102.

[285] Which was originally prompted by a reaction to the Cuban Missile Crisis of 1962.

1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty[286], as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty. Basic considerations of humanity have surely been taken into account for the establishment of those nuclear-weapon-free zones.

249. In fact, besides the Treaty of Tlatelolco, also the Rarotonga, Bangkok, Pelindaba, and Semipalatinsk Treaties purport to extend the obligations enshrined therein, by means of their respective Protocols, not only to the States of the regions at issue, but also to nuclear States[287], as well as States which are internationally responsible, *de jure* or *de facto*, for territories located in the respective regions. The verification of compliance with the obligations regularly engages the IAEA[288]. Each of the five aforementioned treaties (Tlatelolco, Rarotonga, Bangkok, Pelindaba and Semipalatinsk) creating nuclear-weapon-free zones has distinctive features, as to the kinds and extent of obligations and methods of verification[289], but they share the common ultimate goal of preserving humankind from the threat or use of nuclear weapons.

250. The second nuclear-weapon-free zone, established by the Treaty of Rarotonga (1985), with its three Protocols, came as a response[290] to long-sustained regional aspirations, and increasing frustration of the populations of the countries of the South Pacific with incursions of NWS in the region[291]. The Rarotonga Treaty encouraged the negotiation of a similar zone, — by means of the 1995 Bangkok Treaty, — in the neighbouring region of Southeast Asia, and confirmed the "continued relevance of zonal approaches" to the goal of disarmament and the safeguard of humankind from the menace of nuclear weapons[292].

251. The third of those treaties, that of Bangkok, of 1995 (with its Protocol), was prompted by the initiative of the Association of South-East Asian Nations (ASEAN) to insulate the region from the poli-

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[286] United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, N.Y./Geneva, UN-OPANAL/UNIDIR, 1997, pp. 9, 25, 39 and 153.

[287] Those Protocols contain the undertaking not only not to use nuclear weapons, but also not to threaten their use; cf. M. Roscini, *op. cit. infra* note 295, pp. 617-618.

[288] The Treaty of Tlatelolco has in addition counted on its own regional organism to that end, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL).

[289] Cf., in general, M. Roscini, *Le Zone Denuclearizzate*, Turin, Giappichelli Ed., 2003, pp. 1-410; J. Goldblat, "Zones exemptes d'armes nucléaires: une vue d'ensemble", *Le droit international des armes nucléaires* (Journée d'études, Ed. S. Sur), Paris, Pedone, 1998, pp. 35-55.

[290] Upon the initiative of Australia.

[291] M. Hamel-Green, "The South Pacific — The Treaty of Rarotonga", *Nuclear Weapons-Free Zones* (ed. R. Thakur), London/N.Y., MacMillan/St. Martin's Press, 1998, p. 59, and cf. p. 62.

[292] *Ibid.*, pp. 71 and 77.

cies and rivalries of the nuclear powers. The Bangkok Treaty, besides covering the land territories of all ten Southeast Asian States, is the first treaty of the kind also to encompass their territorial sea, 200-mile exclusive economic zone and continental shelf[293]. The fourth such treaty, that of Pelindaba, of 1996, in its turn, was prompted by the continent's reaction to nuclear tests in the region (as from the French nuclear tests in the Sahara in 1961), and the aspiration — deeply-rooted in African thinking — to keep nuclear weapons out of the region[294]. The Pelindaba Treaty (with its three Protocols) appears to have served the purpose to eradicate nuclear weapons from the African continent.

252. The fifth such treaty, that of Semipalatinsk, of 2006, contains, like the other treaties creating nuclear-weapon-free zones *(supra)*, the basic prohibitions to manufacture, acquire, possess, station or control nuclear explosive devices within the zones[295]. The five treaties at issue, though containing loopholes (e.g., with regard to the transit of nuclear weapons)[296], have as common denominator the practical value of arrangements that transcend the non-proliferation of nuclear weapons[297].

253. Each of the five treaties (of Tlatelolco, Rarotonga, Bangkok, Pelindaba and Semipalatinsk) reflects the characteristics of each of the five regions, and they all pursue the same cause. The establishment of the nuclear-weapon-free zones has been fulfilling the needs and aspirations of peoples living under the fear of nuclear victimization[298]. Their purpose is being served, also in withholding or containing nuclear ambitions, to the ultimate benefit of humankind as a whole.

254. Nowadays, the five aforementioned nuclear-weapon-free zones are firmly established in densely populated areas, covering most (almost

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[293] This extended territorial scope has generated resistance on the part of nuclear-weapon States to accept its present form; A. Acharya and S. Ogunbanwo, "The Nuclear-Weapon-Free Zones in South-East Asia and Africa", *Armaments, Disarmament and International Security — SIPRI Yearbook* (1998), pp. 444 and 448.

[294] United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. supra* note 286, pp. 60-61; and cf. J. O. Ihonvbere, "Africa — The Treaty of Pelindaba", *Nuclear-Weapons-Free Zones*, *op. cit. supra* note 291, pp. 98-99 and 109. And, for a general study, cf. O. Adeniji, *The Treaty of Pelindaba on the African Nuclear-Weapon-Free Zone*, Geneva, UNIDIR, 2002, pp. 1-169.

[295] M. Roscini, "Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia", 7 *Chinese Journal of International Law* (2008), p. 597.

[296] As to their shortcomings, cf., e.g., J. Goldblat, "The Nuclear Non-Proliferation Régime: Assessment and Prospects", 256 *Recueil des cours de l'Académie de droit international de La Haye* (1995), pp. 137-138; M. Roscini, *op. cit. supra* note 295, pp. 603-604.

[297] J. Enkhsaikhan, "Nuclear-Weapon-Free Zones: Prospects and Problems", 20 *Disarmament — Periodic Review by the United Nations* (1997), note 1, p. 74.

[298] Cf., e.g., H. Fujita, "The Changing Role of International Law in the Nuclear Age: from Freedom of the High Seas to Nuclear-Free Zones", *Humanitarian Law of Armed Conflict: Challenges Ahead —Essays in Honour of F. Kalshoven* (eds. A. J. M. Delissen and G. J. Tanja), Dordrecht, Nijhoff, 1991, p. 350, and cf. pp. 327-349.

all) of the landmass of the southern hemisphere land areas (while excluding most sea areas)[299]. The adoption of the 1967 Tlatelolco Treaty, the 1985 Rarotonga Treaty, the 1995 Bangkok Treaty, the 1996 Pelindaba Treaty, and the 2006 Semipalatinsk Treaty, have disclosed the shortcomings and artificiality of the posture of the so-called political "realists"[300], which insisted on the suicidal strategy of nuclear "deterrence", in their characteristic subservience to power politics.

255. The substantial Final Report of 1999 of the UN Disarmament Commission underlined the relevance of nuclear-weapon-free zones and of their contribution to the achievement of nuclear disarmament[301], "expressing and promoting common values" and constituting "important complementary" instruments to the NPT and the "international regime for the prohibition" of any nuclear-weapon explosions[302]. Drawing attention to the central role of the United Nations in the field of disarmament[303], the aforementioned Report added:

> "Nuclear-weapon-free zones have ceased to be exceptional in the global strategic environment. To date, 107 States have signed or become parties to treaties establishing existing nuclear-weapon-free zones. With the addition of Antarctica, which was demilitarized pursuant to the Antarctic Treaty, nuclear-weapon-free zones now cover more than 50 per cent of the Earth's land mass.
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> . . . . . .
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> The establishment of further nuclear-weapon-free zones reaffirms the commitment of the States that belong to such zones to honour their legal obligations deriving from other international instruments in force in the area of nuclear non-proliferation and disarmament to which they are parties."[304]

256. Moreover, the 1999 Final Report of the UN Disarmament Commission further stated that, for their part, NWS should fully comply with their obligations, under the ratified protocols to the treaties on nuclear-weapon-free zones, "not to use or threaten to use nuclear

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[299] J. Prawitz, "Nuclear-Weapon-Free Zones: Their Added Value in a Strengthened International Safeguards System", *Tightening the Reins — Towards a Strengthened International Nuclear Safeguards System* (eds. E. Häckel and G. Stein), Berlin/Heidelberg, Springer-Verlag, 2000, p. 166.

[300] Cf. United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. supra* note 286, pp. 27, 33-38 and 134.

[301] UN, *Report of the Disarmament Commission — General Assembly Official Records* (Fifty-fourth Session, supplement No. 42), UN doc. A/54/42, of 6 May 1999, Annex I, pp. 6-7, paras. 1, 6 and 9.

[302] *Ibid.*, p. 7, paras. 10-11, and 13.

[303] *Ibid.*, Annex II, p. 11, 3rd preambular paragraph.

[304] *Ibid.*, Annex I, p. 7, para. 5; and p. 8, para. 28.

weapons"[305]. It went on to encourage Member States of those zones "to share experiences" with States of other regions, so as "to establish further nuclear-weapon-free zones"[306]. It concluded that the international community, by means of "the creation of nuclear-weapon-free zones around the globe", should aim at "general and complete disarmament under strict and effective international control, so that future generations can live in a more stable and peaceful atmosphere"[307].

257. To the establishment of aforementioned five nuclear-weapon-free zones other initiatives against nuclear weapons are to be added, such as the prohibitions of placement of nuclear weapons, and other kinds of weapons of mass destruction, in outer space, on the sea-bed, on the ocean floor and in the subsoil beyond the outer limit of the territorial sea-bed zone, — "denuclearized" by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon[308].

258. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, reveals an undeniable advance of right reason, of the *recta ratio* in the foundations of contemporary international law. Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground. In recent years, proposals are being examined for the setting up of new denuclearized zones of the kind[309], as well as of the so-called single-State zone (e.g., Mongolia)[310]. That initiative further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely destructive capability, constitute an affront to right reason *(recta ratio)*.

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[305] *Op. cit. supra* note 301, p. 9, para. 36.

[306] *Ibid.*, p. 10, para. 41.

[307] *Ibid.*, para. 45.

[308] Cf. G. Venturini, "Control and Verification of Multilateral Treaties on Disarmament and Non-Proliferation of Weapons of Mass Destruction", 17 *University of California Davis Journal of International Law and Policy* (2011), pp. 359-360.

[309] E.g., in Central and Eastern Europe, in the Middle East, in Central and North-East and South Asia, and in the whole of the southern hemisphere.

[310] Cf. A. Acharya and S. Ogunbanwo, *op. cit. supra* note 293, p. 443; J. Enkhsaikhan, *op. cit. supra* note 297, pp. 79-80. Mongolia in effect declared its territory as a nuclear-weapon-free zone (in 1992), and in February 2000 adopted national legislation defining its status as a nuclear-weapon-free State. This was acknowledged by UN General Assembly resolution 55/33S of 20 November 2000.

XIX. Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014)

259. In the course of the proceedings in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, several references were made to the more recent series of Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014), and in particular to the statement made therein (in the second of those conferences) by the Marshall Islands, asserting that NWS should fulfil their obligation, "long overdue", of negotiation to achieve complete nuclear disarmament (cf. *infra*). The Marshall Islands promptly referred to its own statement in the Nayarit Conference (2014) in its Memorial in the *cas d'espèce*, as well as in its oral arguments before the ICJ.

260. In effect, the Conferences on the Humanitarian Impact of Nuclear Weapons (a series initiated in 2013) were intended to provide a forum for dialogue on, and a better understanding of, the humanitarian consequences of use of nuclear weapons for human beings, societies, and the environment, rather than a substitute of bilateral and multilateral fora for disarmament negotiations. This forum for dialogue and better understanding of the matter has counted on three Conferences to date, held, respectively, in Oslo in March 2013, in Nayarit in February 2014, and in Vienna in December 2014.

261. This recent series of Conferences has drawn attention to the humanitarian effects of nuclear weapons, restoring the central position of the concern for human beings and peoples. It has thus stressed the importance of the human dimension of the whole matter, and has endeavoured to awaken the conscience of the whole international community as well as to enhance the needed humanitarian co-ordination in the present domain. May I next proceed to a survey of their work and results so far.

1. First Conference on the Humanitarian Impact of Nuclear Weapons

262. The First Conference on the Humanitarian Impact of Nuclear Weapons took place in Oslo, Norway, on 4-5 March 2013, having counted on the participation of delegations representing 127 States, United Nations agencies, the ICRC, the Red Cross and the Red Crescent movement, international organizations, and civil society entities. It should not pass unnoticed that only two of the NWS, India and Pakistan, were present at this Conference (and only India made a statement)[311]. On the other hand, neither the Marshall Islands, nor the permanent members of the UN Security Council, attended it.

[311] Https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_india.pdf.

263. The Oslo Conference addressed three key issues, namely: *(a)* the immediate human impact of a nuclear weapon detonation; *(b)* the wider economic, developmental and environmental consequences of a nuclear weapon detonation; and *(c)* the preparedness of States, international organizations, civil society and the general public to deal with the predictable humanitarian consequences that would follow from a nuclear weapon detonation. A wide range of experts made presentations during the Conference.

264. Attention was drawn, e.g., to the nuclear testing's impact during the Cold-War period, in particular to the detonation of not less than 456 nuclear bombs in the four decades (between 1949 and 1989) in the testing ground of Semipalatinsk, in eastern Kazakhstan. It was reported (by UNDP) that, according to the Kazakh authorities, up to 1.5 million people were affected by fall-out from the blasts at Semipalatinsk; the nuclear test site was shut down in mid-1991. Other aspects were examined, all from a humanitarian outlook[312]. References were made, e.g., to General Assembly resolutions (such as resolution 63/279, of 24 April 2009), on humanitarian rehabilitation of the region. Such a humanitarian approach proved necessary, as the "historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects"[313].

265. The key conclusions of the Oslo Conference, as highlighted by Norway's Minister of Foreign Affairs in his closing statement[314], can be summarized as follows. First, it is unlikely that any State or international body (such as UN relief agencies and the ICRC) could address the immediate humanitarian emergency caused by a nuclear weapon detonation in an adequate manner and provide sufficient assistance to those affected. Thus, the ICRC called for the abolition of nuclear weapons as the only effective preventive measure, and several participating States stressed that elimination of nuclear weapons is the only way to prevent their use; some States called for a ban on those weapons.

266. Secondly, the historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects. While the international scenario and circumstances surrounding it have changed, the destructive potential of nuclear weapons

[312] For accounts of the work of the 2013 Oslo Conference, cf., e.g., *Viewing Nuclear Weapons through a Humanitarian Lens* (eds. J. Borrie and T. Caughley), Geneva/N.Y., UN/UNIDIR, 2013, pp. 81-82, 87, 90-91, 93-96, 99, 105-108 and 115-116.

[313] Norway/Ministry of Foreign Affairs, *Chair's Summary — Humanitarian Impact of Nuclear Weapons*, Oslo, 5 March 2013, p. 2.

[314] Https://www.regjeringen.no/en/aktuelt/nuclear_summary/id716343/.

remains. And thirdly, the effects of a nuclear weapon detonation, irrespective of its cause, will not be constrained by national borders, and will affect States and peoples in significant ways, in a trans-frontier dimension, regionally as well as globally.

2. Second Conference on the Humanitarian Impact of Nuclear Weapons

267. The Second Conference on the Humanitarian Impact of Nuclear Weapons took place in Nayarit, Mexico, on 13-14 February 2014, having counted on the participation of delegations representing 146 States. The Marshall Islands, India and Pakistan attended it, whereas the United Kingdom did not. In addition to States, other participants included the ICRC, the Red Cross and the Red Crescent movement, international organizations, and civil society entities. During the Nayarit Conference, the delegate of the Marshall Islands stated that NWS States were failing to fulfil their obligations, under Article VI of the NPT and customary international law, to commence and conclude multilateral negotiations on nuclear disarmament; in his words:

> "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 also would 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."[315]

268. Earlier on, the Minister of Foreign Affairs of the Marshall Islands stated, at the UN High-Level Meeting on Nuclear Disarmament, on 26 September 2013, that the Marshall Islands "has a unique and compelling reason" to urge nuclear disarmament, namely,

> "The Marshall Islands, during its time as a UN Trust Territory, experienced 67 large-scale tests of nuclear weapons. At the time of testing, and at every possible occasion in the intervening years, the Marshall Islands has informed UN Members of the devastating

[315] Marshall Islands' Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014 (http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf). The text is also quoted by the Marshall Islands in its Memorial in Marshall Islands *v.* United Kingdom, Annex 72.

impacts of these tests — of the deliberate use of our people as unwilling scientific experiments, of ongoing health impacts inherited through generations, of our displaced populations who still live in exile or who were resettled under unsafe circumstances, and then had to be removed. Even today, science remains a moving target and our exiled local communities are still struggling with resettlement.

. . . . . .

Perhaps we [the Marshallese] have one of the most important stories to tell regarding the need to avert the use of nuclear weapons, and a compelling story to spur greater efforts for nuclear disarmament." (Pp. 1-2.)[316]

269. The Marshall Islands' statement in the 2014 Nayarit Conference was thus one of a few statements in which the Marshall Islands has articulated its claim, whereon they rely in the *cas d'espèce*, *inter alia*, to substantiate the existence of a dispute, including with the United Kingdom, which was not present at the Conference[317]. The Nayarit Conference participants also heard the poignant testimonies of five *Hibakusha*, — survivors of the atomic bombings of Hiroshima and Nagasaki, — who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, killing survivors over seven decades).

270. They stressed the "moral imperative" of the abolition of nuclear weapons, as humanity and nuclear weapons cannot co-exist. A group of delegations of no less than 20 States called expressly for a ban of nuclear weapons, already long overdue; this was the sword of Damocles hanging over everyone's heads. The "mere existence" of nuclear weapons was regarded as "absurd"; attention was also drawn to the 2013 UN General Assembly High-Level Meeting on Disarmament, and to the obliga-

[316] Http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf. And the Marshall Islands' Minister of Foreign Affairs (Ph. Muller) added that:

"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 them. Further, the Republic of the Marshall Islands has recently ratified the Comprehensive Test Ban Treaty and urges other Member States to work towards bringing this important agreement into force.

The Marshall Islands is not the only nation in the Pacific to be touched by the devastation of nuclear weapon testing. (. . .) We express again our eventual aspirations to join with our Pacific neighbours in supporting a Pacific free of nuclear weapons in a manner consistent with international security." (Pp. 1-2.)

[317] Memorial of the Marshall Islands, para. 99.

tions under international law, including those deriving from the NPT as well as common Article 1 of the Geneva Conventions on IHL[318].

271. Furthermore, an association of over 60 entities of the civil society, from more than 50 countries, stated[319] that their own engagement was essential, as responsibilities fell on everyone to prevent the use of nuclear weapons; and prevention required the prohibition and ban of nuclear weapons, in the same way as those of biological and chemical weapons, landmines, and cluster munitions. Both the association, and the *Hibakusha*, condemned the dangerous strategy of nuclear "deterrence".

272. The 2014 Nayarit Conference's conclusions, building on the conclusions of the previous Oslo Conference, can be summarized as follows. First, the immediate and long-term effects of a single nuclear weapon detonation, let alone a nuclear exchange, would be catastrophic. The mere existence of nuclear weapons generates great risks, because the military doctrines of the NWS envisage preparations for the deliberate use of nuclear weapons. Nuclear weapons could be detonated by accident, miscalculation, or deliberately.

273. Delegations of over 50 States from every region of the world made statements unequivocally calling for the total elimination of nuclear weapons and the achievement of a world free of nuclear weapons. At least 20 delegations of participating States in the Conference *(supra)* expressed the view that the way forward would be a ban on nuclear weapons. Others were equally clear in their calls for a convention on the elimination of nuclear weapons or a new legally binding instrument[320].

274. Secondly, some delegations pointed out the security implications of nuclear weapons, or else expressed skepticism about the possibility of banning nuclear weapons as such. There were those which favoured a "step-by-step" approach to nuclear disarmament (within the framework of the NPT Action Plan), and called for the participation of NWS in this

[318] Mexico/Gobierno de la República, *Chair's Summary — Second Conference on the Humanitarian Impact of Nuclear Weapons*, Mexico, 14 February 2014, pp. 2-3.

[319] On behalf of the International Campaign to Abolish Nuclear Weapons (ICAN), a coalition of over 350 entities in 90 countries.

[320] For example, for its part, India favoured a step-by-step approach towards the elimination of nuclear weapons, ultimately leading to "a universal, non-discriminatory convention on prohibition and elimination of nuclear weapons"; cf. www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/India.pdf.

process. For their part, the nuclear-weapon-free States, in their majority, were however of the view that the step-by-step approach had failed to achieve its goal; they thus called for a new approach to nuclear disarmament.

275. Thirdly, for the Chairman of the Conference, a ban on nuclear weapons would be the first step towards their elimination; such a ban would also rectify the anomaly that nuclear weapons are the only weapons of mass destruction that are not subject to an explicit legal prohibition. He added that achieving a world free of nuclear weapons is consistent with States' obligations under international law, including under the NPT and common Article 1 to the Geneva Conventions on IHL. He at last called for the development of new international standards on nuclear weapons, including a legally binding instrument, to be concluded by the seventieth anniversary of the atomic bombings of Hiroshima and Nagasaki[321].

3. Third Conference on the Humanitarian Impact of Nuclear Weapons

276. The third Conference on the Humanitarian Impact of Nuclear Weapons took place in Vienna, Austria, on 8-9 December 2014, having carried forward the momentum created by the previous Conference in Mexico. It counted on the participation of delegations of 158 States, as well as the UN, the ICRC, the Red Cross and Red Crescent movement, civil society entities and representatives of the academic world. For the first time, of the NWS, the United Kingdom attended the Conference; delegates from India, Pakistan, and the Marshall Islands were present as well.

277. Once again, the Conference participants heard the testimonies of survivors, the *Hibakusha*. Speaking of the "hell on earth" experienced in Hiroshima and Nagasaki; the "indiscriminate massacre of the atomic bombing" showed "the illegality and ultimate evil of nuclear weapons"[322]. In its statement, the Marshall Islands, addressing the testing in the region of 67 atomic and hydrogen bombs, between 1946 and 1958, — the strongest one having been the Bravo test (of 1 March 1954) of a hydrogen bomb, 1000 times more powerful than the atomic bomb dropped over Hiroshima, — referred to their harmful impacts, such as the birth of "monster-like babies", the continuous suffering from "thyroid cancer,

[321] Cf. http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/chairs-summary.pdf.

[322] Cf. Vienna Conference on the Humanitarian Impact of Nuclear Weapons (8-9 December 2014), Vienna, Austria's Federal Ministry for Europe, Integration and Foreign Affairs, 2015, p. 19.

liver cancer and all types of radiogenic cancerous illnesses", extending over the years[323].

278. For its part, the ICRC stated that nuclear weapons ignore the principle of proportionality, and stand in breach of IHL (both conventional and customary) by causing unnecessary suffering to civilians; it expressed "significant concerns about the eventual spread of radiation to civilian areas and the radiological contamination of the environment" and everyone[324]. The ICRC further observed that, after "decades of focusing on nuclear weapons primarily in technical-military terms and as symbols of power", a fundamental and reassuring change has occurred, as debates on the matter now shift attention to what those weapons "would mean for people and the environment, indeed for humanity"[325].

279. The UN Secretary-General (Ban Ki-moon) sent a statement, read at the Conference, wherein he condemned expenditures in the modernization of weapons of mass destruction (instead of meeting the challenges of poverty and climate change). Recalling that the obligation of nuclear disarmament was one of both conventional and customary international law, he further condemned the strategy of nuclear "deterrence"; in his own words,

> "Upholding doctrines of nuclear deterrence does not counter proliferation, but it makes the weapons more desirable. Growing ranks of nuclear-armed States does not ensure global stability, but instead undermines it. (. . .) The more we understand about the humanitarian impacts, the more it becomes clear that we must pursue disarmament as an urgent imperative."[326]

280. The Vienna Conference contributed to a deeper understanding of the consequences and risks of a nuclear detonation, having focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons[327]. It was reckoned that the impact of nuclear weapons

[323] *Op. cit. supra* note 322, p. 34.
[324] *Ibid.*, p. 58.
[325] *Ibid.*, p. 17.
[326] *Ibid.*, p. 16.
[327] Cf. Vienna Conference on the Humanitarian Impact of Nuclear Weapons (8-9 December 2014), Vienna, Austria's Federal Ministry for Europe, Integration and Foreign Affairs, 2015, p. 19.pp. 1-88.

detonation, irrespective of the cause, would go well beyond national borders, and could have regional and even global consequences, causing destruction, death, diseases and displacement on a very large scale, as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development and social order. They could, in sum, threaten the very survival of humankind. It was acknowledged that the scope, scale and interrelationship of the humanitarian consequences caused by nuclear weapon detonation are catastrophic, and more complex than commonly understood; these consequences can be large scale and potentially irreversible.

281. States expressed various views regarding the ways and means of advancing the nuclear disarmament agenda. The delegations of 29 States called for negotiations of a legally-binding instrument to prohibit or ban nuclear weapons. A number of delegations considered that the inability to make progress on any particular step was no reason not to pursue negotiations in good faith on other effective measures to achieve and maintain a nuclear-weapon-free world. Such steps have been taken very effectively in regional contexts in the past, as evidenced by nuclear-weapon-free zones.

282. As the general report of the Vienna Conference observed, the three Conferences on the Humanitarian Impact of Nuclear Weapons (of Oslo, Nayarit and then Vienna), have contributed to a "deeper understanding" of the "actual risks" posed by nuclear weapons, and the "unspeakable suffering", devastating effects, and "catastrophic humanitarian consequences" caused by their use. As "nuclear deterrence entails preparing for nuclear war, the risk of nuclear weapon use is real". (. . .) The only assurance against the risk of a nuclear weapon detonation is the total elimination of nuclear weapons", in "the interest of the very survival of humanity"; hence the importance of Article VI of the NPT, and of the entry into force of the CTBT[328].

283. The 2014 Vienna Conference's conclusions can be summarized as follows. First, the use and testing of nuclear weapons have demonstrated their devastating immediate, mid- and long-term effects. Nuclear testing in several parts of the world has left a legacy of serious health and environmental consequences. Radioactive contamination from these tests dis-

[328] *Op. cit. supra* note 327, pp. 5-7.

proportionately affects women and children. It contaminated food supplies and continues to be measurable in the atmosphere to this day.

284. Secondly, as long as nuclear weapons exist, there remains the possibility of a nuclear weapon explosion. The risks of accidental, mistaken, unauthorized or intentional use of nuclear weapons are evident due to the vulnerability of nuclear command and control networks to human error and cyber-attacks, the maintaining of nuclear arsenals on high levels of alert, forward deployment and their modernization. The dangers of access to nuclear weapons and related materials by non-state actors, particularly terrorist groups, persist. All such risks, which increase over time, are unacceptable.

285. Thirdly, as nuclear deterrence entails preparing for nuclear war, the risk of the use of nuclear weapons is real. Opportunities to reduce this risk must be taken now, such as de-alerting and reducing the role of nuclear weapons in security doctrines. Limiting the role of nuclear weapons to deterrence does not remove the possibility of their use, nor does it address the risks stemming from accidental use. The only assurance against the risk of a nuclear weapon detonation is the total elimination of nuclear weapons.

286. Fourthly, the existence itself of nuclear weapons raises serious ethical questions, — well beyond legal discussions and interpretations, — which should be kept in mind. Several delegations asserted that, in the interest of the survival of humankind, nuclear weapons must never be used again, under any circumstances. Fifthly, no State or international organ could adequately address the immediate humanitarian emergency or long-term consequences caused by a nuclear weapon detonation in a populated area, nor provide adequate assistance to those affected. The imperative of prevention as the only guarantee against the humanitarian consequences of nuclear weapons use is thus to be highlighted. Sixthly, participating delegations reiterated the importance of the entry into force of the CTBT as a key element of the international nuclear disarmament and non-proliferation regime.

287. Seventhly, it is clear that there is no comprehensive legal norm universally prohibiting the possession, transfer, production and use of nuclear weapons, that is, international law does not address today nuclear weapons in the way it addresses biological and chemical weapons. This is

generally regarded as an anomaly — or rather, a nonsense, — as nuclear weapons are far more destructive. In any case, international environmental law remains applicable in armed conflict and can pertain to nuclear weapons, even if not specifically regulating these latter. Likewise, international health regulations would cover effects of nuclear weapons. In the light of the new evidence produced in those two years (2013-2014) about the humanitarian impact of nuclear weapons, it is very doubtful whether such weapons could ever be used in conformity with IHL.

4. Aftermath: The "Humanitarian Pledge"

288. At the 2014 Vienna Conference, although a handful of States expressed scepticism about the effectiveness of a ban on nuclear weapons, the overwhelming majority of NPT States parties expected the forthcoming 2015 NPT Review Conference to take stock of all relevant developments, including the outcomes of the Conferences on the Humanitarian Impact of Nuclear Weapons *(supra)*, and determine the next steps for the achievement and maintenance of a nuclear-weapon-free world. At the end of the Vienna Conference, the host State, Austria, presented a "Pledge" calling upon States parties to the NPT to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons[329].

289. The Pledge further called upon NWS to take concrete interim measures to reduce the risk of nuclear weapons detonations, including by diminishing the role of nuclear weapons in military doctrines. The Pledge also recognized that: *(a)* the rights and needs of the victims of nuclear weapon use and testing have not yet been adequately addressed; *(b)* all States share the responsibility to prevent any use of nuclear weapons; and *(c)* the consequences of nuclear weapons use raise profound moral and ethical questions going beyond debates about the legality of these weapons.

[329] Http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/-HINW14/HINW14Vienna_Pledge _Document.pdf. The Pledge only refers to States' obligations under the NPT and makes no mention of customary international law.

290. Shortly before the Vienna Conference, 66 States had already endorsed the Pledge; by the end of the Conference, 107 States had endorsed it, thus "internationalizing" it and naming it at the end as the "Humanitarian Pledge"[330]. On 7 December 2015, the UN General Assembly adopted the substance of the Humanitarian Pledge in the form of its resolution 70/48. As of April 2016, 127 States have formally endorsed the Humanitarian Pledge; unsurprisingly, none of the NWS has done so.

291. Recent endeavours, such as the ones just reviewed of the Conferences on the Humanitarian Impact of Nuclear Weapons have been rightly drawing attention to the grave humanitarian consequences of nuclear weapons detonations. The reframing of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of "deterrence" and the catastrophic consequences of the use of nuclear weapons. The "step-by-step" approach, pursued by the NWS in respect to the obligation under Article VI of the NPT, appears essentially State-centric, having led to an apparent standstill or deadlock.

292. The obligation of nuclear disarmament being one of result, the "step-by-step" approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The "step-by-step" approach has produced no significantly concrete results to date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. *supra*). After all, the absolute prohibition of nuclear weapons, — which is multifaceted[331], is one of *jus cogens* (cf. *supra*). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of "deterrence" unfounded and unsustainable (cf. *supra*).

293. Ever since those Conferences (2013-2014), there has been a tendency (in 2014-2016) of slight reduction of nuclear warheads[332], though NWS have kept on modernizing their respective nuclear armament programs, in an indication that nuclear weapons are likely to remain in the foreseeable future[333]. Yet, the growing awareness of the humanitarian impact of nuclear weapons has raised the question of the possibility of

[330] Http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/-HINW14/HINW14.

[331] Encompassing measures relating to any use, threat of use, development, production, acquisition, possession, stockpiling and transfer of nuclear weapons.

[332] From around 16,300 nuclear warheads in 2014 to 15,850 in 2015, and to 15,395 in early 2016.

[333] Cf. *SIPRI Yearbook 2016: Armaments, Disarmament and International Security*, Stockholm-Solna, SIPRI, 2016, Chap. 16, pp. 609-667.

developing "a deontological position according to which the uniquely inhumane suffering that nuclear weapons inflict on their victims makes it inherently wrongful to use them"[334].

294. *Tempus fugit*. There remains a long way to go to achieve a nuclear-weapon-free world. The United Nations itself has been drawing attention to the urgency of nuclear disarmament. It has done so time and time again, and, quite recently, in the convocation in October 2015, of a new Open-Ended Working Group (OEWG), as a subsidiary body of the UN General Assembly, to address concrete and effective legal measures to attain and maintain a world without nuclear weapons[335]. It draws attention therein to the importance of multilateralism, to the relevance of "inclusiveness" (participation of all UN Member States) and of the contribution, in addition to that of States, also of international organizations, of entities of the civil society, and of the academia[336]. And it reaffirms "the urgency of securing substantive progress in multilateral nuclear disarmament negotiations", in order "to attain and maintain a world without nuclear weapons"[337].

295. It should not pass unnoticed that all the initiatives that I have just reviewed in the present dissenting opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on Humanitarian Impact of Nuclear Weapons), referred to by the Contending Parties in the course of the proceedings before the ICJ in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, have gone beyond the inter-State outlook. In my perception, there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times.

XX. Final Considerations: *Opinio Juris Communis* Emanating from Conscience *(Recta Ratio)*, Well above the "Will"

296. Nuclear weapons, as from their conception, have been associated with overwhelming destruction. It may be recalled that the first atomic bombs were fabricated in an epoch of destruction and devastation, — the Second World War, — of the abominable "total war", in flagrant breach

[334] ILPI, *Evidence of Catastrophe — A Summary of the Facts Presented at the Three Conferences on the Humanitarian Impact of Nuclear Weapons*, Oslo, ILPI, 2015, p. 15.
[335] UN General Assembly doc. A/C.1/70/L.13/Rev.1, of 29 October 2015, pp. 1-3.
[336] *Ibid.*, preamble, paras. 8 and 14-15.
[337] *Ibid.*, operative part, para. 2.

of IHL and of the ILHR[338]. The fabrication of nuclear weapons, followed by their use, made abstraction of the fundamental principles of international law, moving the world into lawlessness in the current nuclear age. The strategy of "deterrence", in a "dialectics of suspicion", leads to an unforeseeable outcome, amidst complete destruction. Hence the utmost importance of negotiations conducive to general disarmament, which, — as warned by Raymond Aron [already] in the early 1960s, — had "never been taken seriously" by the superpowers[339].

297. Last but not least, may I come back to a key point which I have dwelt upon in the present dissenting opinion pertaining to the *opinio juris communis* as to the obligation of nuclear disarmament (cf. Part XVI, *supra*). In the evolving law of nations, basic considerations of humanity have an important role to play. Such considerations nourish *opinio juris* on matters going well beyond the interests of individual States. The ICJ has, on more than one occasion, taken into account resolutions of the United Nations (in distinct contexts) as a means whereby international law manifests itself.

298. In its *célèbre* Advisory Opinion (of 21 June 1971) on *Namibia*, for example, the ICJ dwelt upon, in particular, two UN General Assembly resolutions relevant to the formation of *opinio juris*[340]. Likewise, in its Advisory Opinion (of 16 October 1975) on the *Western Sahara*, the ICJ considered and discussed in detail some UN General Assembly resolutions[341]. In this respect, references can further be made to the ICJ's Advisory Opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (of 9 July 2004)[342], and on the *Declaration of Independence of Kosovo* (of 22 July 2010)[343]. In its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the ICJ admitted, even if in a rather restrictive way, the emergence and gradual evolution of an *opinio juris* as reflected in a series of resolutions of the UN General Assembly

[338] For an account, cf., e.g., *inter alia*, J. Lukacs, *L'héritage de la Seconde Guerre Mondiale*, Paris, Ed. F.-X. de Guibert, 2011, pp. 38-39, 55, 111 and 125-148; and cf. I. Kershaw, *To Hell and Back — Europe 1914-1949*, London, Penguin, 2016, pp. 7, 356, 407, 418, 518 and 521.

[339] R. Aron, *Paz e Guerra entre as Nações* [1962], Brasília, Edit. Universidade de Brasília, 1979, pp. 413, 415, 421-422 and 610. R. Aron's book contains his reflections on the new age of nuclear weapons, amidst the tensions of the Cold-War era, and the new challenges and dangers it imposed, — persisting to date, — for the future of humankind; cf., for the French edition, R. Aron, *Paix et guerre entre les nations*, 8th ed., Paris, Ed. Calmann-Lévy, 2015, pp. 13-770.

[340] On the principle of self-determination of peoples, namely, General Assembly resolutions 1514 (XV) of 14 December 1960, and 2145 (XXI) of 27 October 1966; cf. *I.C.J. Reports 1971*, pp. 31, 45 and 49-51.

[341] Cf. *I.C.J. Reports 1975*, pp. 20, 23, 26-37, 40, 57 and 67-68.

[342] Cf. *I.C.J. Reports 2004 (I)*, pp. 171-172, paras. 86-88.

[343] Cf. *I.C.J. Reports 2010 (II)*, p. 437, para. 80 (addressing a General Assembly resolution "which reflects customary international law").

(*I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70). But the ICJ could have gone (much) further than that.

299. After all, *opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Thus, already in the nineteenth century, the so-called "historical school" of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the "will" of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the "juridical conscience" of nations and peoples. With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community.

300. This had an influence on the formation of rules of customary international law, a much wider process than the application of one of its formal "sources". *Opinio juris communis* came thus to assume "a considerably broader dimension than that of the subjective element constitutive of custom"[344]. *Opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.

301. The foundations of the international legal order came to be reckoned as independent from, and transcending, the "will" of individual States; *opinio juris communis* came to give expression to the "juridical conscience", no longer only of nations and peoples — sustained in the past by the "historical school" — but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind.

[344] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, p. 137, and cf. p. 138; and cf. R. Huesa Vinaixa, *El Nuevo Alcance de la 'Opinio Juris' en el Derecho Internacional Contemporáneo*, Valencia, Tirant lo Blanch, 1991, pp. 30-31 and 36-38, and cf. pp. 76-77, 173, 192, 194, 199 and 204-205; R. E. Piza Escalante, "La *'Opinio Juris'* como Fuente Autónoma del Derecho Internacional (*'Opinio Juris'* y *'Jus Cogens'*)", 39 *Relaciones Internacionales* — Heredia/C.R. (1992), pp. 61-74; J. I. Charney, "International Lawmaking — Article 38 of the ICJ Statute Reconsidered", *New Trends in International Lawmaking — International 'Legislation' in the Public Interest* (Proceedings of the Kiel Symposium, March 1996), Berlin, Duncker & Humblot, 1997, pp. 180-183 and 189-190.

302. In 1983, Wang Tieya wrote against minimizing the legal significance of resolutions of the General Assembly, in particular the declaratory ones. As they clarify principles and rules of international law, he contended that they "cannot be said to have no law-making effect at all merely because they are not binding in the strict sense. At the very least, since they embody the convictions of a majority of States, General Assembly resolutions can indicate the general direction in which international law is developing"[345]. He added that those General Assembly resolutions, reflecting the position of "an overwhelming majority of States", have "accelerated the development of international law", in helping to crystallize emerging rules into "clearly defined norms"[346]. In the same decade, it was further pointed out that General Assembly resolutions have been giving expression, over the years, to "basic concepts of equity and justice, or of the underlining spirit and aims" of the United Nations[347].

303. Still in the 1980s, in the course I delivered at the Institute of Public International Law and International Relations of Thessaloniki, in 1988, I began by pondering that customary and conventional international law are interrelated — as acknowledged by the ICJ itself[348] — and UN General Assembly resolutions contribute to the emergence of *opinio juris communis*[349]. I stood against the "strictly voluntarist position" underlying the unacceptable concept of so-called "persistent objector", and added that dissent from "one or another State individually cannot

[345] Wang Tieya, "The Third World and International Law", *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (eds. R. St. J. Macdonald and D. M. Johnston), The Hague, Nijhoff, 1983, p. 964.

[346] *Ibid.*, pp. 964-965.

[347] B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", 58 *British Year Book of International Law* (1987), p. 80, and cf. pp. 116, 137 and 141.

[348] For example, in the course of the proceedings in the *Nuclear Tests* cases (1973-1974), one of the applicant States (Australia) recalled, in the public sitting of 8 July 1974, that the ICJ had held, in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 41), that a conventional norm can pass into the general *corpus* of international law thus becoming also a rule of customary international law; cf. *I.C.J. Pleadings, Nuclear Tests (Australia* v. *France; New Zealand* v. *France)*, Vol. I, p. 503. In effect, may I add, just as a customary rule may later crystallize into a conventional norm, this latter can likewise generate a customary rule. International law is not static (as legal positivists wrongfully assume); it is essentially dynamic.

[349] A. A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", *Sources of International Law* (*Thesaurus Acroasium*, Vol. XIX), Thessaloniki, Institute of Public International Law and International Relations, 1992, pp. 68 and 71.

prevent the creation of new customary rules" or obligations, ensuing from *opinio juris communis* and not from *voluntas*[350].

304. In the evolution of international law in time, I proceeded, voluntarist positivism has shown itself "entirely incapable" of explaining the consensual formation of customary international obligations; contrary to "the pretensions of positivist voluntarism" (with its stubborn emphasis on the consent of individual States), "freedom of spirit is the first to rebel" against immobilism, in devising responses to new challenges affecting the international community as a whole, and acknowledging obligations incumbent upon all States[351].

305. In my "repudiation of voluntarist positivism", I concluded on this point that the attention to customary international law ("incomparably less vulnerable" than conventional international law to voluntarist temptations) is in line with the progressive development (moved by conscience) of international law, so as to provide a common basis for the fulfilment of the needs and aspirations of all peoples[352]. Today, almost three decades later, I firmly restate, in the present dissenting opinion, my own position on the matter, in respect of the customary and conventional international obligation to put an end to nuclear weapons, so as to rid the world of their inhuman threat.

306. May I here, furthermore, ponder that UN General Assembly or Security Council resolutions are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs), being thus *valid for all UN Member States*. This applies to the resolutions surveyed in the present dissenting opinion. It should be kept in mind that the UN is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual Member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker

[350] *Op. cit. supra* note 349, pp. 78-79.
[351] *Ibid.*, pp. 126-129.
[352] *Ibid.*, pp. 128-129. And cf., more recently, in general, A. A. Cançado Trindade, "The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law", 376 *Recueil des cours de l'Académie de droit international de La Haye* (2014), pp. 9-92, esp. pp. 75-76.

States, such as the NNWS; in doing so, it aims — by multilateralism — at the common good, at the realization of common goals of the international community as a whole[353], such as nuclear disarmament.

307. A small group of States — such as the NWS — cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all UN Member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of UN Member States which voted in favour of them. UN General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one.

308. Conscience stands above the "will". The universal juridical conscience stands well above the "will" of individual States, and resonates in resolutions of the UN General Assembly, which find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of all humankind[354]. This — may I reiterate — is the case of General Assembly resolutions surveyed in the present dissenting opinion (cf. *supra*). The values which find expression in those *prima principia* inspire every legal order and, ultimately, lie in the foundations of this latter.

309. The general principles of law *(prima principia)*, in my perception, confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political "realism", in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous[355].

310. They have been contributing, in the last decades, to a vast *corpus juris* on matters of concern to the international community as a whole, such as nuclear disarmament. Their contribution to this effect has overcome the traditional inter-State paradigm of the international legal

[353] Cf., in this sense, A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 6th rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2014, pp. 51 and 530-531.

[354] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 120, pp. 129-138.

[355] A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte/Brazil, 2015, pp. 6-24; A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, *op. cit. supra* note 243, pp. 410-418.

order[356]. This can no longer be overlooked in our days. The inter-State mechanism of the *contentieux* before the ICJ cannot be invoked in justification for an inter-State reasoning. As "the principal judicial organ" of the United Nations (UN Charter, Article 92), the ICJ has to bear in mind not only States, but also "we, the peoples", on whose behalf the UN Charter was adopted. In its international adjudication of contentious cases, like the present one of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

XXI. Epilogue: A Recapitulation

311. Coming to the end of the present dissenting opinion, I feel in peace with my conscience: from all the preceding considerations, I trust to have made it crystal clear that my own position, in respect of all the points which form the object of the present Judgment on the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, stands in clear and entire opposition to the view espoused by the Court's split majority that the existence of a legal dispute has not been established before it, and that the Court has no jurisdiction to consider the Application lodged with it by the Marshall Islands, and cannot thus proceed to the merits of the case. Not at all: in my understanding, there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case.

312. My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the Contending Parties, but above all on issues of principle and on fundamental values, to which I attach even greater importance. As my dissenting position covers all points addressed in the present Judgment, in its reasoning as well as in its conclusion, I have thus felt obliged, in the faithful exercise of the international judicial function, to lay on the records, in the present dissenting opinion, the foundations of my dissenting position thereon. I deem it fit, at this last stage, to recapitulate all the points of my dissenting position,

[356] A. A. Cançado Trindade, *Direito das Organizações Internacionais, op. cit. supra* note 353, pp. 530-537.

expressed herein, for the sake of clarity, and in order to stress their interrelatedness.

313. *Primus*: According to the *jurisprudence constante* of the Court, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests; The existence of an international dispute (at the time of lodging a claim) is a matter for the objective determination of the Court. The existence of a dispute may be inferred. *Secundus*: The objective determination of a dispute by the Court is not intended to protect respondent States, but rather and more precisely to secure the proper exercise of the Court's judicial function. *Tertius*: There is no requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ, nor of prior "exhaustion" of diplomatic negotiations, nor of prior notification of the claim; it is, in sum, a matter for objective determination of the Court itself.

314. *Quartus*: The Marshall Islands and the United Kingdom/India/Pakistan have pursued distinct arguments and courses of conduct on the matter at issue, evidencing their distinct legal positions, which suffice for the Court's objective determination of the existence of a dispute. *Quintus*: There is no legal ground for attempting to heighten the threshold for the determination of the existence of a dispute; in its *jurisprudence constante*, the Court has expressly avoided a formalistic approach on this issue, which would affect access to justice itself. The Court has, instead, in its *jurisprudence constante*, upheld its own *objective determination* of the existence of a dispute, rather than relying— as it does in the present case — on the subjective criterion of "awareness" of the respondent States.

315. *Sextus*: The distinct series of UN General Assembly resolutions on nuclear disarmament over the years (namely, warning against nuclear weapons, 1961-1981; on freeze of nuclear weapons, 1982-1992; condemning nuclear weapons, 1982-2015; following-up the ICJ's 1996 Advisory Opinion, 1996-2015) are endowed with authority and legal value. *Septimus*: Their authority and legal value have been duly acknowledged before the ICJ in its advisory proceedings in 1995. *Octavus*: Like the General Assembly, the Security Council has also expressed its concern on the matter at issue, in its work and its resolutions on nuclear disarmament.

316. *Nonus*: The aforementioned United Nations resolutions, in addition to other initiatives, portray the longstanding saga of the United Nations in the condemnation of nuclear weapons. *Decimus*: The fact that weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed, and nuclear weapons, far more destructive, have not been banned yet, is a juridical absurdity. The obligation of nuclear disarmament has emerged and crystallized nowadays in both conventional and customary international law, and the United Nations has, over the decades, been giving a most valuable contribution to this effect.

317. *Undecimus*: In the *cas d'espèce*, the issue of United Nations resolutions and the emergence of *opinio juris communis* in the present domain of the obligation of nuclear disarmament has grasped the attention of the Contending Parties in submitting their distinct arguments before the Court. *Duodecimus*: The presence of evil has marked human existence for centuries. Ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future, and have been drawing attention to the imperative of respect for life and the relevance of humanist values. *Tertius decimus*: Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism.

318. *Quartus decimus*: The UN Charter is attentive to peoples; the recent cycle of World Conferences of the United Nations has had, as a common denominator, the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living and the well-being of peoples everywhere. *Quintus decimus*: General principles of law *(prima principia)* rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of *jus necessarium* over *jus voluntarium*.

319. *Sextus decimus*: The nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. *Septimus decimus*: The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

320. *Duodevicesimus*: The present case stresses the utmost importance of fundamental principles, such as that of the juridical equality of States, following the principle of humanity, and of the idea of an objective justice. *Undevicesimus*: Factual inequalities and the strategy of "deterrence"

cannot be made to prevail over the juridical equality of States. *Vicesimus*: "Deterrence" cannot keep on overlooking the distinct series of UN General Assembly resolutions, expressing an *opinio juris communis* in condemnation of nuclear weapons. *Vicesimus primus*: As also sustained by general principles of international law and international legal doctrine, nuclear weapons are in breach of international law, of IHL and the ILHR, and of the UN Charter.

321. *Vicesimus secundus*: There is need of a people-centred approach in this domain, keeping in mind the fundamental right to life; the *raison d'humanité* prevails over the *raison d'Etat*. Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons. *Vicesimus tertius*: In the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The universal juridical conscience stands well above the "will" of the State. *Vicesimus quartus*: The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of *jus cogens*, which have an incidence on ILHR and IHL and ILR, and foster the current historical process of humanization of international law.

322. *Vicesimus quintus*: The positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including [and starting with] nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law. *Vicesimus sextus*: Conventional and customary international law go together, in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons. *Vicesimus septimus*: The existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking.

323. *Vicesimus octavus*: Humankind, a subject of rights, has been a potential victim of nuclear weapons already for a long time. *Vicesimus nonus*: The law of nations encompasses, among its subjects, humankind as a whole (as propounded by the "founding fathers" of international law). *Trigesimus*: This humanist vision is centred on peoples, keeping in mind the humane ends of States. *Trigesimus primus*: *Opinio juris communis necessitatis*, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression in the NPT Review Conferences, in the relevant establishment of nuclear-weapon-free zones, and in the recent Conferences of Humanitarian Impact of Nuclear Weap-

ons, — in their common cause of achieving and maintaining a nuclear-weapon-free world. *Trigesimus secundus*: Those initiatives have gone beyond the State-centric outlook, duly attentive to peoples' and humankind's quest for survival in our times.

324. *Trigesimus tertius*: *Opinio juris communis* — to which UN General Assembly resolutions have contributed — has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons. *Trigesimus quartus*: UN (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for *all* UN Member States.

325. *Trigesimus quintus*: The United Nations Organization, endowed with an international legal personality of its own, upholds the juridical equality of States, in striving for the realization of common goals such as nuclear disarmament. *Trigesimus sextus*: Of the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable over the years.

326. *Trigesimus septimus*: United Nations resolutions in this domain address a matter of concern to humankind as a whole, which cannot thus be properly approached from a State voluntarist perspective. The universal juridical conscience stands well above the "will" of individual States. *Trigesimus octavus*: The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law. *Trigesimus nonus*: In sum, the ICJ has jurisdiction to consider the *cas d'espèce*, and there is a conventional and customary international law obligation of nuclear disarmament; whether there has been a breach of this obligation, the Court could only decide on the merits phase of the present case.

327. *Quadragesimus*: A world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness. In my understanding, the International Court *of Justice*, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribu-

tion to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole.

(Signed) Antônio Augusto CANÇADO TRINDADE.

DECLARATION OF JUDGE XUE

1. I have voted in favour of the Judgment because I agree with the decision of the Court to dismiss the case for lack of jurisdiction. Notwithstanding my vote, I wish to make two points on the Judgment.

2. My first point relates to the approach taken by the Court. In the Judgment, the Court finds that the evidence submitted to it fails to demonstrate that there existed between the Parties a dispute concerning the subject of the Application at the time the Marshall Islands instituted proceedings in the Court. Consequently, the condition for the Court's jurisdiction is not met. The Court reaches this conclusion primarily on the ground that, in all the circumstances, the Marshall Islands never offered any particulars to the United Kingdom, either in words or by conduct, which could have made the United Kingdom aware that the Marshall Islands held a legal claim against it for breach of its international obligation to negotiate on nuclear disarmament.

3. According to the jurisprudence of the Court, a dispute must in principle exist on the date at which the application is filed in the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44). It is for the Court to determine the matter objectively on the basis of the positions and conduct of the parties (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-27, para. 50; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear*

Tests (New Zealand v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). When the title of jurisdiction is the parties' declarations accepting compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, prior notice or a formal diplomatic Note setting out one party's complaint against the other is not taken as a requisite condition. The determination of the existence of a dispute is a matter of substance, not of form (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-27, para. 50; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). What the Court shall look at and determine is whether there was an opposition of views between the parties with regard to the legal issues in question.

4. In the present case, the Court duly follows that jurisprudence. As the Court does not deal with the other objections raised by the Respondent, but solely relies on this finding to dismiss the case, it is not unpredicted that questions arise as to the propriety of this formal and restrictive approach. Given its past practice of judicial flexibility in handling procedural defects (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83; *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28; *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14; *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34), it may be arguable that the non-existence of a dispute between the Parties at the time of the filing of the Application could by itself constitute a solid ground for the Court to reject the case; the Marshall Islands might readily come back and file a new case to the same effect, as by now the dispute is indeed crystallized. For judicial economy, realism and flexibility seem called for under the present circumstances.

5. The reason for my support of the Court's decision is threefold. First of all, in my opinion, there must be a minimum requirement for the Applicant to demonstrate to the Court that there existed a dispute between the Parties before the case is instituted. The evidence submitted by the Marshall Islands regarding the existence of a dispute between the Parties is noticeably insufficient. Apart from its two statements made at

international conferences, calling on the nuclear-weapon States to commence immediately negotiations on nuclear disarmament, which would normally be taken as political statements by other States, the Marshall Islands presents no evidence indicating bilateral contacts of any kind on the matter between the Parties before the Court is seised. The Marshall Islands heavily relies on the positions expressed by the Parties during the current proceedings to demonstrate that one Party's claim was positively opposed by the other. As is pointed out by the Court, should that argument be accepted, it would virtually render the condition of the existence of a dispute without any meaning and value. More fundamentally, in my opinion, it would undermine the confidence of States in accepting the compulsory jurisdiction of the Court.

6. Secondly, even though prior notice and diplomatic exchanges are not required as a condition for the existence of a dispute, "surprise" litigation should nevertheless be discouraged. Any peaceful means of settlement, including judicial recourse, is aimed at the resolution of the dispute. Whenever the circumstances permit, a clear demonstration of a legal claim to the responsible party would facilitate the process of negotiation and settlement. The Marshall Islands, being a victim of nuclear weapons development, has every reason to criticize the nuclear-weapon States for failing to make joint efforts in pursuing negotiations on the cessation of nuclear arms race and nuclear disarmament. That legitimacy, nevertheless, does not override the legal conditions for the exercise of the Court's jurisdiction.

7. Although the meaning of a dispute has never formally been defined and the test for the determination of its existence is usually low, the State against whom proceedings are instituted should at least be aware beforehand that it had had a legal dispute with another State who may submit the dispute to the compulsory jurisdiction of the Court for settlement. The Court may take into account the post-application conduct of the parties as supplementary evidence to satisfy itself for the purpose of jurisdiction and admissibility, but judicial flexibility has to be exercised within a reasonable limit.

8. Thirdly, the Court's jurisdiction is built on mutuality and reciprocity. The present case, in my opinion, is different in character from the previous cases where the Court took a flexible approach in dealing with some procedural defects. The Marshall Islands' statements at international conferences are of themselves insufficient to demonstrate that there existed a legal dispute in its bilateral relations with each nuclear-weapon State; indeed, the Marshall Islands could not have meant that this was a bilateral issue. The Marshall Islands did not institute the proceedings merely for the protection of its own interest, albeit a victim of nuclear weapons. Rather the case serves more the interest of the international community. Although the Court recognized obligations *erga omnes* in international law in the *Barcelona Traction* case (*Barcelona Traction,*

Light and Power Company, Limited (New Application: 1962) (Belgium v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33), it did not address the question of standing, *locus standi*, an issue that is yet to be developed in international law.

9. That brings me to the second point I wish to make on the Judgment. I regret very much that the Court does not proceed further to deal with some other objections raised by the Respondent. In its Preliminary Objections, the United Kingdom raises objections to the jurisdiction of the Court and the admissibility of the Application. It argues, *inter alia*, that

> "the specific allegations advanced against the United Kingdom by the Marshall Islands are such that they directly and unavoidably engage the interests of States which are not before the Court. In consequence, the Marshall Islands' Application is inadmissible and/or the Court lacks jurisdiction to address the claim in the absence of these essential parties." (Preliminary Objections of the United Kingdom, para. 83.)

In its view, the interests of other nuclear-weapon States do "form the very subject-matter" of the Marshall Islands' claim and, consequently, the *Monetary Gold* principle should apply in this case (*ibid.*, para. 101).

10. It further contends that the Marshall Islands acknowledges that a State cannot conduct and conclude negotiations by itself; the United Kingdom's conduct in such negotiations can thus only be properly assessed in the context of the attitude and actions of other States, particularly the nuclear-weapon States (CR 2016/3, p. 46, para. 9). Moreover, according to the United Kingdom, any judgment on the Marshall Islands' claims would have no practical consequence and would therefore not be within the proper judicial function of the Court (*ibid.*, pp. 31-32, para. 57).

11. These objections, in my opinion, deserve an immediate consideration of the Court at the preliminary stage, as the answer to them would have a direct effect on the jurisdiction of the Court and the admissibility of the Application. Had it done so, the Court would be in a better position to demonstrate that, so far as the questions of jurisdiction and admissibility are concerned, the Marshall Islands' Application is not merely defective in one procedural form.

12. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, having examined the current state of affairs with nuclear weapons in international law, the Court states that to achieve the long-promised goal of complete nuclear disarmament, all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons (the "NPT") bear an obligation to negotiate in good faith a nuclear disarmament. It underscores that, "[i]ndeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of *all States*" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 100; emphasis added).

13. It further refers to the Security Council's resolution 984 (1995) dated 11 April 1995, where the Council reaffirmed "the need for *all States parties* to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations" and urged

> "*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" (*I.C.J. Reports 1996 (I)*, p. 265, para. 103; emphasis added).

14. In its Opinion, the Court particularly highlights that the obligation under Article VI of the NPT is a twofold obligation. It states:

> "The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." (*Ibid.*, p. 264, para. 99.)

15. It has been 20 years since the Court pronounced this solemn statement. To achieve that ambition, as the Court said, it is necessary to have the co-operation of all States. Clearly, there has been a collective failure to deliver, but the issue for the present case is whether such a failure can be turned into a series of bilateral disputes, and addressed separately.

16. There could be little doubt some nuclear-weapon States, on the one hand, and non-nuclear-weapon States, on the other, take opposite views on the cessation of nuclear arms race and the negotiation process on nuclear disarmament. However, can such disagreement be characterized as a dispute that falls within the meaning of Articles 36 and 38 of the Statute? In other words, is a dispute as such, assuming existent at the time of the filing of the Application or crystallized subsequently, justiciable for the Court to settle through contentious proceedings? Apparently, the question before the Court is not a procedural defect that may be amended subsequently in the course of the proceedings, as was the situation in the previous cases. I am afraid that the Court emphasizes a bit too much the way in which a dispute may be materialized, but does not give sufficient consideration to the nature of the dispute that the Marshall Islands alleges to have existed between the United Kingdom and itself.

(Signed) XUE Hanqin.

DECLARATION OF JUDGE DONOGHUE

1. In contentious cases, the Court settles disputes between States (Article 36, paragraph 2, and Article 38, paragraph 1, of the Statute of the Court). When the Court finds the absence of a dispute in respect of a claim contained in an application, the consequence is dismissal of the claim. However, the Statute of the Court does not define the term "dispute". Instead, the meaning of that term has been developed in the jurisprudence of this Court and its predecessor. Thus, the sound administration of justice calls for clarity in the criteria that the Court applies in determining whether there is a dispute and for consistent application of those criteria.

2. Beginning with the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 81-120, paras. 23-114), and continuing through the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Judgment, I.C.J. Reports 2012 (II)*, pp. 441-445, paras. 44-55) and the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-34, paras. 49-79), the Court's inquiry into the existence of a dispute has been more exacting than it had been in the earlier jurisprudence of the Court and its predecessor. In my consideration of the Application in the present case, I have been guided by the reasoning of the Court in these recent cases, thus promoting procedural consistency.

3. As is well known, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11) between two States. A dispute exists only if "the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The existence (or not) of a dispute is "a matter for objective determination by the Court" (paragraph 39 of today's Judgment).

4. Direct diplomatic exchanges between the parties prior to the filing of an application can provide clear evidence of one party's opposition to the other party's claim against it. There were no such exchanges in the present case, so the Marshall Islands asserts the existence of a dispute by relying on two key propositions. The first is the contention that the statements of parties during proceedings, taken alone, can suffice to demonstrate an opposition of views in respect of the claim underlying an application. The second proposition, on which the Marshall Islands

places greater emphasis, is that the Court can infer the existence of a dispute in the present case from the juxtaposition of the Marshall Islands' statements in multilateral fora, on the one hand, with the Respondent's conduct and assertion of legality, on the other hand. I submit this declaration in order to comment on each of these points.

5. To support its contention that opposing statements of parties in proceedings before the Court (and thus after the application) can suffice to establish the existence of a dispute, the Marshall Islands relies in particular on three Judgments of the Court (see paragraph 54 of today's Judgment). Of these, the Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* provides the strongest support for the position of the Marshall Islands, because the Court there invoked statements in the proceedings in that case to support its conclusion that a dispute between the Parties "persist[ed]", without citing any specific evidence that a dispute existed prior to the Application (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 27-29). However, in its subsequent Judgments (see cases cited in paragraph 2 above), the Court has not found the existence of a dispute based solely on the parties' statements in Court, but instead has adhered to the principle that the evidence must show that a dispute existed as of the date of an application, as it does today. This principle is sound. An application in a contentious case initiates proceedings to settle a dispute that is "submitted to [the Court]" (Article 38, paragraph 1, of the Statute of the Court). It is not a means to elicit a respondent's opposing views in order to generate a dispute during those proceedings.

6. I turn next to the Marshall Islands' contention that the Court should infer the existence of a dispute from the juxtaposition of the Marshall Islands' statements with the Respondent's statements and conduct. With regard to this proposition, I offer some observations about the recent cases before the Court in which the respondent sought dismissal of the applicant's claims due to the absence of a dispute. In these cases, the Court has examined the content and context of statement(s) made by one party prior to the application, in comparison with any reaction by the other party, in order to determine whether there was, prior to the application, a difference of views on the matter that would later be presented to the Court in the application. Although the Court has used various formulations to describe its inquiry and, of course, the facts of each case differ, I see a great deal of consistency in the objective standard that the Court has applied to scrutinize the evidence presented to it.

7. In the case concerning *Application of the International Convention on*

the Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation)*, the Court stated that exchanges between the parties must refer to the subject-matter of the claim made in the application "with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). It found a dispute to exist (as of August 2008), taking into account claims that the Applicant made directly against the Respondent, which were denied by the Respondent, in the United Nations Security Council (*ibid.*, pp. 118-119, para. 109 and p. 120, para. 113). In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the Court found that diplomatic correspondence in which the Applicant set out its allegations that the Respondent had breached a treaty sufficed to establish the existence of a dispute as to the Applicant's claim of treaty breach by the Respondent. By contrast, the Court concluded that there was no dispute between the Parties in respect of violations of customary international law that were also alleged in that Application, because there had been no mention in diplomatic correspondence between the parties of this claim. "Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law." (*I.C.J. Reports 2012 (II)*, p. 445, para. 54.) When the Court concluded that there was a dispute concerning Colombia's alleged violation of Nicaragua's rights in maritime zones in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, it observed that, in light of public statements by the highest representatives of the two States, the Respondent "could not have misunderstood" the position of the Applicant (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 33, para. 73).

8. The Court's reasoning in these recent Judgments carries forward to the approach that the Court takes today. The essential question is not whether the Respondent knew of statements made by the Applicant; we can assume such knowledge, for present purposes. Instead, the Court asks whether the Applicant's statements referred to the subject-matter of its claim against the Respondent — i.e., "the issue brought before the Court" in the Application — with sufficient clarity that the Respondent "was aware, or could not have been unaware", of the Applicant's claim against it (paragraphs 41 and 49 of today's Judgment). If so, there would have been reason to expect a response from the Respondent, and thus, even in the absence of an explicit statement of the Respondent's opposition to the claim, there would have been a basis for the Court to infer opposition from an unaltered course of conduct. For the reasons set forth in the Judgment, however, the statements on which the Marshall Islands relies did not set out the Applicant's claim against the Respondent with sufficient clarity to allow the Court to draw such an inference. Accord-

ingly, as of the date of the Application, there was no opposition of views, and thus no dispute, in respect of the claims against the Respondent contained in the Application.

(Signed) Joan E. DONOGHUE.

DECLARATION OF JUDGE GAJA

In the three Judgments concerning the cases filed by the Republic of the Marshall Islands the Court finds for the first time that it cannot entertain a case because there was no dispute between the Parties on the date when the Application was filed. Having reached this conclusion, the Court decides that it does not need to examine the other objections raised by the respondent States. This approach may be viewed as an application of the principle of judicial economy. However, judicial economy may also require the Court to take a decision on certain issues that were raised by the respondent States and which are likely to have to be litigated again in new proceedings between the same Parties, when these proceedings are a distinct possibility.

As Judge Sir Hersch Lauterpacht noted in his separate opinion in the *Certain Norwegian Loans* case,

> "[t]here may be force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious. However . . . such considerations are not, for this Court, the only legitimate factor in the situation." (*Judgment, I.C.J. Reports 1957*, p. 36.)

With regard to the matters addressed in the present cases, disputes have clearly arisen since April 2014 as a result of the Applications and of the respondent States' reactions. The Judgments of the Court thus leave the Marshall Islands with the apparent option to start new judicial proceedings concerning the same matters.

Should one of the other objections raised by a respondent State have been upheld, the Court's Judgment would have in practice induced the Marshall Islands not to file a new application against that State.

On the other hand, if the Court had rejected other objections, the Court's Judgment would have prevented the formulation of the same objections in new proceedings. In the best scenario for the Marshall Islands, the case could then have to be examined on the merits.

The discussion in the written and oral proceedings in the present cases would not have to be repeated. It would have therefore been preferable for the Court to continue its examination of the objections after finding that there were no disputes at the time of filing the Applications.

(*Signed*) Giorgio Gaja.

SEPARATE OPINION OF JUDGE SEBUTINDE

Object and purpose of the United Nations Charter — Maintenance of international peace and security — Role of the Court in the peaceful settlement of disputes — The Court's compulsory jurisdiction derives from the optional clause declarations pursuant to Article 36, paragraph 2, of the Court's Statute and not from the existence of a dispute — The existence of a dispute is merely the precondition for the exercise of that jurisdiction — Article 38 of the Statute of the Court — The objective determination of the existence of a dispute is the prerogative of the Court and is a matter of substance, not of form or procedure — Conduct of the Parties is relevant evidence — The new legal prerequisite of "awareness by the Respondent that its views were positively opposed" is formalistic and alien to the Court's jurisprudence.

Introduction

1. I have voted against the operative paragraph of the Judgment because I am unable to agree with the decision of the Court upholding the first preliminary objection of the United Kingdom, as well as the underlying reasoning. In my view, the majority of the Court has unjustifiably departed from the flexible and discretionary approach that it has consistently hitherto adopted in determining the existence of a dispute, choosing instead, to introduce a new rigorous and formalistic test of "awareness" that raises the evidentiary threshold and that is bound to present the Court with difficulties in future. Furthermore, given the importance of the subject-matter of this case not only to the Parties involved but to the international community as a whole, I find it regrettable that the Court has opted to adopt an inflexible approach that has resulted in summarily disposing of this case at this early stage. I explain my views in more detail in this separate opinion.

Responsibility for the Maintenance of International Peace and Security

2. If there is one lesson that the international community learnt from the human catastrophes that were the First and Second World Wars, it was the need for a concerted, global effort

> "[t]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth

> of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . ."[1].

3. It is also important to recollect the purpose for which the United Nations was created, namely,

> "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"[2].

Under the Charter, although the primary responsibility for the maintenance of international peace and security lies with the Security Council[3], and to a lesser extent, the General Assembly[4], the International Court of Justice, as the principal judicial organ of the United Nations[5] does contribute to the maintenance of international peace and security through its judicial settlement of such inter-State disputes as are referred to it for adjudication[6] and through the exercise of its advisory role in accordance with the Charter and the Statute of the Court[7]. Today there is no greater threat to international peace and security, or indeed to humanity, than the threat or prospect of a nuclear war.

The NPT and Nuclear Disarmament

4. It may also be useful to briefly recall the historical background to the present case. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which entered into force in 1970[8] and whose objectives are, to prevent the spread of nuclear weapons and weapons technology; to promote co-operation in the peaceful use of nuclear energy and to further the goal of achieving nuclear disarmament, currently has 191 States parties

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[1] United Nations, Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI, Preamble (hereinafter the "UN Charter").

[2] UN Charter, Art. 1.

[3] *Ibid.*, Art. 24 (1).

[4] *Ibid.*, Art. 11.

[5] *Ibid.*, Art. 92.

[6] United Nations, Statute of the International Court of Justice, 18 April 1946 (hereinafter the "Statute"), Art. 38.

[7] UN Charter, Art. 96 and Statute, Arts. 65-68.

[8] Treaty on the Non-Proliferation of Nuclear Weapons, 729 *UNTS* 161, opened for signature at London, Moscow and Washington on 1 July 1968 and entered into force 5 March 1970.

including the Marshall Islands[9] and the United Kingdom[10]. However, contrary to the NPT objectives, State practice demonstrates that for the past nearly 70 years, some States have continued to manufacture, acquire, upgrade, test and/or deploy nuclear weapons and that a threat of possible use is inherent in such deployment. Furthermore, State practice demonstrates that far from proscribing the threat or use of nuclear weapons in all circumstances, the international community has, by treaty and through the United Nations Security Council, recognized in effect that in certain circumstances the use or threat of use of nuclear weapons may even be justified.

5. In December 1994 the United Nations General Assembly sought an advisory opinion from the Court regarding the legality of the threat or use of nuclear weapons[11]. The question posed by the General Assembly was quite simply "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" In response, the Court considered that it was being asked "to determine the legality or illegality of the threat or use of nuclear weapons"[12]. After taking into account the body of international law (including Article 2, paragraph 4, and Article 51 of the United Nations Charter) as well as the views of a vast number of States that filed their written submissions before the Court, the Court opined that:

— there is no specific authorization of the threat or use of nuclear weapons in either customary or conventional international law[13];

— there is no comprehensive and universal prohibition of the threat or use of nuclear weapons as such, in either customary or conventional international law[14];
— a threat or use of nuclear weapons that was contrary to Article 2, paragraph 4, or that failed to meet all the requirements of Article 51 of the United Nations Charter; or that is incompatible with the prin-

[9] The Republic of the Marshall Islands (RMI) acceded to the NPT on 30 January 1995. See United Nations Office of Disarmament Affairs, Marshall Islands: Accession to Treaty on the Non-Proliferation of Nuclear Weapons, available at: http://disarmament.un.org/treaties/a/npt/marshallislands/acc/washington.

[10] The United Kingdom signed the NPT on 1 July 1968 in London, Moscow and Washington and it ratified it on 27 November 1968 in London and Washington and on 29 November 1968 in Moscow. See United Nations Office of Disarmament Affairs, United Kingdom of Great Britain and Northern Ireland: Ratification of the NPT, available at: http://disarmament.un.org/treaties/a/npt/unitedkingdomofgreatbritainandnorthernireland/rat/london.

[11] UN General Assembly resolution A/RES/49/75 K, 15 December 1994, Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons.

[12] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 238, para. 20.

[13] *Ibid.*, p. 266, para. 105 (2) A.

[14] *Ibid.*, para. 105 (2) B.

ciples and rules of international humanitarian law applicable in armed conflict or that is incompatible with treaties specifically dealing with nuclear weapons, is illegal[15].

6. However, the Court did make one exception to its findings (albeit in an evenly divided manner[16]) when it opined that:

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"[17].

7. Finally, although this does not appear to have been in direct answer to the question posed by the General Assembly, the Court went an extra mile in what, in my view, is the real contribution of the Court to world peace and security as far as the question of nuclear weapons is concerned. It stated in paragraphs 98 to 100 of the Advisory Opinion, as follows:

> "Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.
>
> In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.
>
> In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament . . . The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.
>
> This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the [NPT], or, in other words, the vast majority of the international community . . . Indeed

[15] *Op. cit. supra* note 12, p. 266, para. 105 (2) C and D.

[16] By seven to seven votes with the President having to use his casting vote.

[17] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 266, para. 105 (2) E.

any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 263-264, paras. 98-100.)

8. The Court then unanimously opined in the operative clause that, "There exists an obligation to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[18] The Advisory Opinion of the Court, although not legally binding, was well received by the vast majority of NPT States parties, although it was less welcome by those nuclear-weapon States that were of the view that the Court had over-stepped its judicial function by rendering this opinion. In December 1996, the General Assembly passed a resolution endorsing the conclusion of the Court relating to the existence of "an obligation to pursue in good faith and to bring to a conclusion, negotiations leading to disarmament in all its aspects under strict and effective international control" and calling upon all States to immediately commence multilateral negotiations leading to a nuclear weapons convention prohibiting "the development, production, testing, deployment, stockpiling, threat or use of nuclear weapons" and providing for their elimination[19].

9. Regrettably, since the adoption of the Court's Advisory Opinion 20 years ago, the international community has made little progress towards nuclear disarmament and even the prospect of negotiations on the conclusion of a nuclear weapons convention seems illusory. It is in this context that, on 24 April 2014, the Republic of the Marshall Islands (RMI) filed an Application against each of the nine respondent States (United States, Russia, United Kingdom, France, China, India, Pakistan, Israel and North Korea) which the Applicant maintains currently possess nuclear weapons, alleging a failure by the respondent States to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. Of the nine respondent States, only Pakistan, India and the United Kingdom formally responded to the RMI Application, each of the three States having

[18] *I.C.J. Reports 1996 (I)*, p. 267, para. 105 (2) F.

[19] UN General Assembly resolution A/RES/51/45 M, 10 December 1996, Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. The General Assembly has been adopting an almost identical resolution every year, since the handing down of the *Nuclear Weapons* Advisory Opinion. See UN General Assembly resolutions 52/38 O of 9 December 1997; 53/77 W of 4 December 1998; 54/54 Q of 1 December 1999; 55/33 X of 20 November 2000; 56/24 S of 29 November 2001; 57/85 of 22 November 2002; 58/46 of 8 December 2003; 59/83 of 3 December 2004; 60/76 of 8 December 2005; 61/83 of 6 December 2006; 62/39 of 5 December 2007; 63/49 of 2 December 2008; 64/55 of 2 December 2009; 65/76 of 8 December 2010; 66/46 of 2 December 2011; 67/33 of 3 December 2012; 68/42 of 5 December 2013; 69/43 of 2 December 2014; 70/56 of 7 December 2015.

previously filed declarations pursuant to Article 36, paragraph 2, of the Statute of the Court recognizing the compulsory jurisdiction of the Court (Judgment, para. 22).

The Threshold for Determining the Existence of a Dispute and the New Criterion of "Awareness"

10. The Marshall Islands bases the jurisdiction of the Court on its optional clause declaration pursuant to Article 36, paragraph 2, of the Statute of the Court dated 15 March 2013 and deposited on 24 April 2013, recognizing the compulsory jurisdiction of the Court[20], and that of the United Kingdom made on 5 July 2004, and deposited on 5 July 2004 (Judgment, para. 1)[21], which declarations the Marshall Islands claims are "without pertinent reservations"[22]. Paragraph 23 of the Judgment outlines the five preliminary objections raised by the United Kingdom against the Marshall Islands claim. In support of its preliminary objection based on the absence of a dispute, the United Kingdom argues that *(a)* prior to filing its Application, the Marshall Islands never brought its claim to the United Kingdom's attention[23], nor attempted to hold diplomatic negotiations with the United Kingdom regarding its claims[24]; and *(b)* that claim of the Marshall Islands is artificial and political in nature.

11. The United Kingdom further points out that the RMI Memorial only made reference to two statements as proof of the existence of a dispute between the Parties, and that neither the content of these statements nor the circumstances in which they were made provide any evidence of the existence of a dispute between the Marshall Islands and the United Kingdom on the date of the filing of the Application[25]. The first statement was made in the aforementioned United Nations High-Level Meeting, and was addressed to "all nuclear weapon States"[26]. The Respondent observes this statement did not specifically mention the United Kingdom and that it could not in any way be viewed as invoking the latter's responsibility under international law for any breach of the NPT or of customary international law[27]. The Respondent further observes that the second

[20] Optional Clause Declaration of the Marshall Islands, 24 April 2013, available at: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=MH.

[21] Optional Clause Declaration of the United Kingdom, 5 July 2004, available at: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB.

[22] Application of the Marshall Islands (AMI), para. 114 and Memorial of the Marshall Islands (MMI), paras. 93-94.

[23] Preliminary Objections of the United Kingdom (POUK), p. 14, para. 29, citing Article 43 of the ILC Articles on State Responsibility.

[24] CR 2016/3, p. 19, para. 25 and CR 2016/7, p. 13, paras. 17-18.

[25] *Ibid.*, and CR 2016/3, p. 26, para. 41 (Bethlehem).

[26] POUK, p. 22, para. 47, citing MMI, p. 98, Ann. 71.

[27] *Ibid.*, and CR 2016/3, pp. 26-27, para. 42 (Bethlehem).

statement relied upon by the Marshall Islands was made at an international conference at which the United Kingdom was not present[28]. The United Kingdom argues that the Marshall Islands took no steps to bring this statement to the attention of the United Kingdom[29]. Accordingly there could be no conflict of legal positions between the two Parties, and as such no legal dispute between them[30].

12. During oral arguments the United Kingdom affirmed that it views the obligation established in Article VI of the NPT as the "cornerstone" of that treaty[31], and that as a nuclear-weapon State, it has acted unilaterally, significantly reducing not only its own stockpile of weapons but also their delivery systems[32]. The United Kingdom also cited statements made by then Prime Minister Gordon Brown, accepting the disarmament obligations established in the NPT[33], and those made by the Preparatory Committees leading to the 2015 NPT Review Conference as proof that the United Kingdom is in fact committed to fulfilling its obligations regarding nuclear disarmament[34].

13. The Marshall Islands requests the Court to overrule the United Kingdom's preliminary objections, maintaining that a dispute did exist at the time it filed its Application, the subject-matter of which is "the United Kingdom's non-compliance with its legal obligations under Article VI of the NPT and under customary international law to pursue in good faith, and bring to a conclusion, negotiations leading to the cessation of the nuclear arms race at an early date and to nuclear disarmament"[35]. The Marshall Islands further submits that prior notification to the United Kingdom of its intention to commence proceedings is not a necessary requirement. The Marshall Islands argues further that it has repeatedly called for nuclear-weapon States, including the United Kingdom, to comply with their international obligations and to negotiate nuclear disarmament[36]. In particular it refers to two of its statements made publicly in multilateral international conferences before the Application was filed. First, on 26 September 2013, at the United Nations High-Level Meeting on Nuclear Disarmament, the Minister of Foreign Affairs of the Marshall Islands called

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[28] POUK, p. 23, para. 48 and CR 2016/3, p. 27, para. 44.
[29] POUK, p. 23, para. 48.
[30] *Ibid.*, para. 52.
[31] CR 2016/7, p. 14, para. 20.
[32] *Ibid.*
[33] *Ibid.*, p. 15, paras. 21-22.
[34] *Ibid.*, para. 22, the cited statement reads:

> "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."

[35] MMI, pp. 17-18, para. 42.
[36] *Ibid.*, p. 9, para. 16.

upon "all nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament"[37]. Secondly, on 13 February 2014, during the Second Conference on the Humanitarian Impact of Nuclear Weapons at Nayarit, Mexico, the Marshall Islands representative made similar remarks[38].

14. The Marshall Islands submits that these and other public statements illustrate "with extreme clarity the content of the claim" and that these statements were "unequivocally directed against *all States possessing nuclear arsenals*, including the United Kingdom"[39] (emphasis added). The fact that the United Kingdom participated in at least one of those conferences was, according to the Marshall Islands, sufficient to consider it notified of the claim of the Marshall Islands, in particular, because the Marshall Islands statements were very clear on the subject-matter of the dispute as well as its legal basis, namely, the failure of nuclear-weapon States to seriously engage in multilateral negotiations leading to nuclear disarmament arising under the NPT and/or customary international law.

15. In its Judgment, the Court upholds the United Kingdom's preliminary objection to jurisdiction on the ground that there was no dispute between the Parties prior to the filing of the RMI Application (Judgment, para. 59). I respectfully disagree with that decision as well as the underlying reasoning, and set out my reasons in this separate opinion. In my view, the evidence on record, when properly tested against the criteria well-established in the Court's jurisprudence, shows that a dispute did exist, albeit in a nascent form, between the Parties before the filing of the Application and that this dispute crystallized during the proceedings. I particularly disagree with the new criterion of "awareness" that the majority introduces, as well as the formalistic and inflexible approach taken in the determination of whether or not a dispute exists (*ibid.*, paras. 41-53).

16. First, as the Judgment rightly points out, the Court's function under Article 38 of its Statute, is to decide such inter-State disputes as are referred to it (Judgment, para. 36). In cases such as this one, where States have made declarations (with or without reservations) recognizing the compulsory jurisdiction of the Court under Article 36, paragraph 2, of that Statute, the jurisdiction of the Court emanates from those very declarations rather than from the existence of a dispute as such

[37] MMI, Vol. I, Ann. 4: Statement by Honourable Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013.

[38] *Ibid.*, Vol. II, Ann. 72: Marshall Islands statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014; CR 2016/1, pp. 18-19, para. 14 (deBrum), and CR 2016/1, p. 37, para. 20 (Condorelli).

[39] Written Statement of the Marshall Islands (WSMI), p. 16, para. 34.

(Judgment, para. 36). The existence of a dispute between the contending States is merely a precondition *for the exercise of that jurisdiction*.

17. Secondly, the Judgment rightly defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between parties" (*ibid.*, para. 37). The Judgment also correctly states that it is for the Court and not the Parties to determine objectively whether a dispute exists after examining the facts or evidence before it (*ibid.*, para. 39) and that such determination is a matter of substance and not procedure or form (*ibid.*, para. 38). Thirdly, it is clear from the Court's jurisprudence that neither prior notification by the applicant, of its claim to the respondent, nor a formal diplomatic protest by the applicant, are necessary prerequisites for purposes of determining the existence of a dispute *(ibid.)*. This is particularly so since the NPT, to which both the United Kingdom and Marshall Islands are party, contains no provision requiring prior notification or diplomatic negotiations.

18. While the Judgment correctly rehearses the Court's jurisprudence regarding the definition of a "dispute" and the fact that determination of the existence of a dispute is "a matter of substance, and not a question of form or procedure", I disagree with the approach and analysis that the majority has employed in arriving at the conclusion that there is no dispute between the Parties. I find that approach not only to be both formalistic and procedural, but also lacking in addressing the substantive aspects of the Applicant's claim, such as the conduct of the Respondent. Given the importance of the subject-matter of nuclear disarmament to the international community at large, I believe that this is not a case that should have been easily dismissed on a formalistic or procedural finding that no dispute exists between the contending Parties. Instead, a more substantive approach that analyses the conduct of the contesting States right up until 24 April 2014 should have been undertaken in determining whether the Parties had "clearly opposite views"[40]. The Court's jurisprudence clearly demonstrates the Court's consistent preference for a flexible approach that steers clear of formality or procedural rigour, right from the days of the Permanent Court of International Justice[41], and until more recently in *Croatia* v. *Serbia*[42].

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[40] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50.

[41] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 428-441, paras. 80-85; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

19. Under Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court, an applicant is required to indicate the "subject of the dispute" in the Application and to specify therein the "precise nature of the claim"[43]. The Marshall Islands did specify its claim or subject-matter of the dispute in its Application and Memorial as

> "the failure of the United Kingdom to honour its obligation towards the Applicant (and other States) 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"[44].

However, it is not sufficient, for purposes of demonstrating the existence of a dispute, for the Marshall Islands to articulate its claims in its Application and Memorial. Nor is it sufficient merely for one party to assert that a dispute exists or for the other to deny that it does. It must, in this case, be demonstrated that the claims of the Marshall Islands are positively opposed by the United Kingdom or that there is *"a disagreement on a point of law or fact, a conflict of legal views or of interests"* between the two Parties[45] and that this was the case at the time the Application was filed.

20. In order for the Court to determine on an objective basis, whether or not an international dispute exists between the parties, it must examine the facts or evidence before it, "isolate[ing] the real issue in the case and identify[ing] the object of the claim"[46]. As previously emphasized, the matter is one of substance, not form[47]. Although the dispute must in principle exist at the time the Application is submitted to the Court[48], there have been cases in which the Court has adopted a more flexible

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[43] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment*, *I.C.J. Reports 2015 (II)*, p. 602, para. 25; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29.

[44] AMI, Parts III and IV and MMI, para. 2.

[45] *Mavrommatis Palestine Concessions, 1924, Judgment No. 2, P.C.I.J., Series A, No. 2*, p. 11; emphasis added. It has also been repeated by the ICJ in: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, pp. 28-30, paras. 37-44.

[46] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.

[47] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

[48] *Ibid.*; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom),*

position, considering that facts arising *after* the application has been filed may be taken into account. For example, in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case, the Court held that:

> "It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period."[49]

21. Furthermore, although the Court has stated in the *South West Africa* cases that in order for a dispute to exist, the claim of one party must be "positively opposed" by the other[50], such "positive opposition" should not be perceived as a formal or procedural disagreement on a point of law or fact only. In my view, the Court should, consistent with its jurisprudence rehearsed in the Judgment (paras. 37-40), adopt a substantive approach whereby if one State adopts *a course of conduct* to achieve its own interests, which conduct is then protested by the other, a positive opposition of views or interests is demonstrated. The perspective that takes into account the conduct of the contesting parties in determining the existence or otherwise of a dispute, and with which I agree, was aptly expressed by Judge Gaetano Morelli in his dissenting opinion in the *South West Africa* cases when he stated as follows:

> "As to a disagreement upon a point of law or fact, it is to be observed that, while such a disagreement may be present and commonly (but not necessarily) is present where there is a dispute, the two things (disagreement and dispute) are not the same. In any event it is abundantly clear that a disagreement on a point of law or fact, which may indeed be theoretical, is not sufficient for a dispute to be regarded as existing.
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> . . . . . .
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> In my opinion, a dispute consists, not of a conflict of interests as such, but rather in a contrast between the respective attitudes of the parties in relation to a certain conflict of interests. The opposing attitudes of the parties, in relation to a given conflict of interests, may respectively consist of the manifestations of the will by which each of

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Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44.

[49] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 95, para. 66.

[50] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa) Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

> the parties requires that its own interest be realized. It is the case of a dispute resulting, on one side, from a claim by one of the parties and, on the other side, of the contesting of that claim by the other party. But it may also be that one of the opposing attitudes of the parties consists, not of a manifestation of the will, but rather of a course of conduct by means of which the party pursuing that course directly achieves its own interest. This is the case of a claim which is followed not by the contesting of the claim but by the adoption of a course of conduct by the other party inconsistent with the claim. And this is the case too where there is in the first place a course of conduct by one of the parties to achieve its own interest, which the other party meets by a protest."[51]

22. In order to determine with certainty what the situation was at the date of filing of the RMI Application, it is necessary to examine the conduct of the Parties over the period prior to that date, and during the subsequent period. The conduct and position of each of the Parties over the years regarding the possession of nuclear weapons is not in dispute. The United Kingdom, on the one hand, maintains that as one of the nuclear-weapon States, it has significantly reduced its nuclear arsenal[52], but is entitled, in the interests of national security to maintain a minimum level of nuclear arsenal for "primarily deterrent purposes" whose use would only be contemplated in "extreme circumstances of self-defence"[53]. Further, the United Kingdom accepts that it is bound by the NPT and in particular Article VI thereof, but considers that the maintenance of nuclear arsenal for the stated purposes is not in any way incompatible with its obligations under the NPT[54]. The United Kingdom also remains committed to multilateral negotiations under the NPT towards nuclear disarmament. However, the conduct of the United Kingdom that the Marshall Islands has raised issue with, not only in its statements in the multilateral conferences but also in its Application and Memorial, is "the United Kingdom's non-compliance with its legal obligations under the NPT and customary international law to pursue in good faith, and bring

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[51] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa) Preliminary Objections, Judgment, I.C.J. Reports 1962*; dissenting opinion of Judge Morelli, pp. 566-567, Part II, paras. 1-2.

[52] MMI, Ann. 15: Security Britain in an Age of Uncertainty: The Strategic Defence and Security Review, 19 October 2010, Cm 7948, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62482/strategic-defence-security-review.pdf; AMI, pp. 14-15, para. 34.

[53] Statement by Defence Secretary of the United Kingdom, Des Browne, in the House of Commons, on 22 May 2006, available at: http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060522/text/60522w0014.htm#06052325002261.

[54] The United Kingdom's position is evident from the statements of high-ranking Government officials made both domestically and during international conferences, some of which statements have been referred to by the Parties in their pleadings.

to a conclusion, negotiations leading to nuclear disarmament"[55]. Furthermore, the Marshall Islands has also objected to the United Kingdom's qualitative and quantitative improvement of its nuclear arsenal[56].

23. The Marshall Islands maintains that the United Kingdom's course of conduct, consisting on the one hand, its participation in the nuclear arms race and, on the other hand, its failure to pursue multilateral negotiations towards nuclear disarmament, is inconsistent with its obligations under the NPT and customary international law. Without prejudging the issue of whether or not the United Kingdom's conduct referred to above actually constitutes a breach of an obligation under the NPT or customary international law (an issue clearly for the merits), the question for determination is whether, before filing its Application against the United Kingdom on 24 April 2014, the Parties held clearly opposite views concerning the United Kingdom's performance or non-performance of certain international obligations.

24. In this regard, I have taken into account relevant statements of high-ranking officials of each of the Parties. The Marshall Islands specifically mentions the statements it made when it joined the NPT[57], and those made during the 2010 NPT Review Conference; the 2013 United Nations High-Level Meeting on Nuclear Disarmament[58], and the 2014 Conference on the Humanitarian Impact of Nuclear Weapons[59]. The Marshall Islands argues that those statements were sufficient to make each and every one of the nuclear-weapon States, including the United Kingdom, aware of the Marshall Islands position on the matter[60].

25. First, on 6 May 2010 at the NPT Review Conference where the United Kingdom was well represented, the Marshall Islands representative declared: "We have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT."[61] On another occasion, the views of the Marshall Islands on nuclear disarmament were clearly communicated to all nuclear-weapon States present in New York on 26 September 2013, at the UN High-Level Meeting on Nuclear Disarmament, when the Minister of Foreign Affairs of the Marshall Islands called upon: "*all nuclear weapon States* to intensify efforts to address their responsibilities in moving towards an effective and secure

[55] MMI, pp. 17-18, para. 42.
[56] AMI, p. 39, paras. *(a)* to *(d)*.
[57] CR 2016/5, p. 9, paras. 9-11 (deBrum), citing: 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.
[58] MMI, p. 43, para. 98 and CR 2016/9, p. 18, para. 7 (Condorelli).
[59] WSMI, p. 16, para. 34 and CR 2016/5, p. 27, para. 18 (Condorelli).
[60] WSMI, p. 16, para. 35.
[61] *Ibid.*, p. 15, para. 32.

disarmament"[62]. Again the United Kingdom was well represented at this conference. The United Kingdom was represented at that meeting by Mr. Alistair Burt, Parliamentary Under-Secretary of State of the United Kingdom and Northern Ireland, who also made a joint statement on behalf of the United Kingdom, France and the United States[63]. In that statement, Mr. Burt emphasized the need for a methodical, step-by-step approach towards the ultimate goal of nuclear disarmament, including the negotiation of a Fissile Material Cut-off Treaty and the entry into force of the Comprehensive Test Ban Treaty (an approach preferred by the three States), as opposed to initiatives such as "the humanitarian consequences campaign" (favoured by the Marshall Islands). In my view, the content of the two statements at this conference (i.e., that of the United Kingdom and that of the Marshall Islands) further demonstrate the opposing views of the Parties regarding the United Kingdom's performance or non-performance of international obligations.

26. Furthermore, the views of the Marshall Islands on nuclear disarmament were clearly communicated to all nuclear-weapon States present on 13 February 2014, at the Second Conference on the Humanitarian Impact of Nuclear Weapons, when the Marshall Islands made the so-called "Nayarit Declaration" stating that:

> "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."[64] (Emphasis added.)

27. However, the United Kingdom made a deliberate decision not to attend this Conference. Its absence was explained as follows:

> "The United Kingdom Government outlined its general position towards the Conference in a letter to Jeremy Corbyn on 12 Febru-

[62] MMI, pp. 18-19, para. 45, citing statement by Honourable Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013; emphasis added.

[63] POUK, Ann. 9: Statement of the Parliamentary Under Secretary of State of the United Kingdom of Great Britain and Northern Ireland, Alistair Burt, on behalf of France, the United Kingdom and the United States at the UN General Assembly High-Level Meeting on Nuclear Disarmament on 26 September 2013.

[64] MMI, Vol. II, Ann. 72; Marshall Islands Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014.

> ary 2014. This was in relation to the question of United Kingdom attendance at the Conference in Mexico in February . . .
>
> In that letter, Mr. Robertson explained that the United Kingdom 'shares deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, expressed by the NPT State parties at the 2010 Review Conference'. He added, however, that after careful consideration, the Foreign and Commonwealth Office had decided against attending the Mexico conference because of concerns that 'some efforts under the humanitarian consequences initiative appear increasingly aimed at pursuing a Nuclear Weapons Convention prohibiting nuclear weapons outright'. He went on to state that 'the United Kingdom believes the NPT should remain the cornerstone of the international nuclear non-proliferation regime and the essential foundation for the pursuit of nuclear disarmament and for peaceful uses of nuclear energy'. As such the best way to achieve the goal of a world without nuclear weapons is 'through gradual disarmament negotiated using the NPT Step-by-Step process and Review cycle'."[65]

28. The United Kingdom's decision not to participate in this conference was clearly consistent with its long-standing position on multilateral negotiations towards nuclear disarmament. It is also clear that the United Kingdom was wary of what it describes as "efforts under the humanitarian consequences initiative aimed at pursuing a Nuclear Weapons Convention prohibiting nuclear weapons outright", as this is clearly not the kind of approach to nuclear disarmament the United Kingdom favours. Based on the above explanation, it cannot be said that the United Kingdom was totally oblivious of the Nayarit agenda or of the fact that non-nuclear-weapon States like the Marshall Islands would be taking a view opposed to that of the United Kingdom as far as multilateral negotiations on nuclear disarmament are concerned. Quite to the contrary, the United Kingdom anticipated the thrust of the discussions at Nayarit and decided it was not meaningful for it to attend the conference. Thus, far from proving the United Kingdom's ignorance or "unawareness" (to use the new criterion adopted by the majority) of what transpired at Nayarit, this tactical or deliberate avoidance of the Nayarit conference is further demonstration of the opposing views between the United Kingdom and the Marshall Islands. The Court should have taken into account the United Kingdom's conduct in this regard instead of taking a formalistic approach and concluding that it was "unaware" of the Marshall Islands position at Nayarit.

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[65] Conference on the Humanitarian Impact of Nuclear Weapons, House of Commons Research Note prepared by Claire Mills, 3 December 2014, p. 7.

29. In my view, those statements also represent the Marshall Islands' claim that nuclear-weapon States, including the United Kingdom, are obliged under the NPT and/or customary international law, to pursue negotiations leading to nuclear disarmament. Furthermore, I do not subscribe to the view that in the context of these multilateral conferences, it was necessary for the Marshall Islands to single out and name each of the nine nuclear States in order for it to validly express its claim against each of them (Judgment, paras. 49-50). A distinction ought to be drawn between a purely bilateral setting where the applicant must single out the respondent and articulate to that respondent the particular conduct to which the applicant is opposed, and a setting involving multilateral exchanges or processes such as the present case, where it is well known throughout the international community, that amongst the over 191 member States to the NPT, only nine possess nuclear weapons. To insist that the Marshall Islands should have identified each of these States by name and mentioned the conduct of each one that it objects to, is to apply form over substance.

The New Criterion of "Awareness" in Determining the Existence of a Dispute Is Alien to the Court's Jurisprudence

30. Hitherto, the Court has not made it a legal prerequisite for an applicant to prove that before the application was filed, the respondent State "was aware or could not have been unaware that its views are positively opposed by the applicant" State, before making a determination that a dispute exists (Judgment, para. 41). This new test is not only alien to the established jurisprudence of the Court but also directly contradicts what the Court has stated in the past and with no convincing reasons. On every occasion that the Court has had to examine the issue of whether or not a dispute exists, it has emphasized that this is a role reserved for its objective determination[66] (not that of the parties) and that that determination must involve an examination in substance and not form, of the facts or evidence before the Court[67]. For example, the Court has categorically stated in the *South West Africa* cases that:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be

[66] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

[67] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

> shown that the claim of one party is positively opposed by the other."[68]

Also in *Nicaragua* v. *Colombia* the Court stated that, "although a formal diplomatic protest may be an important step to bring the claim of one party to the attention of the other, such a formal protest is not a necessary condition [for the existence of a dispute]"[69].

31. By introducing proof of "awareness" as a new legal requirement, what the majority has done was to raise the evidentiary threshold that will from now on require not only an applicant, but the Court itself, to delve into the "mind" of a respondent State in order to find out about its state of awareness. In my view, this formalistic requirement is not only problematic but also directly contradicts the principle in *Nicaragua* v. *Colombia* quoted above, since the surest way of ensuring awareness is for an applicant to make some form of formal notification or diplomatic protest. The test also introduces subjectivity into an equation previously reserved "for the Court's objective determination".

32. It is also pertinent to note that paragraph 73 of *Nicaragua* v. *Colombia* cited by the majority at paragraph 41 of the Judgment as the basis for the new "awareness" test, merely sets out the factual assessment conducted by the Court to determine whether a dispute existed in that case[70], and not the legal test applicable. In paragraph 72 of *Nicaragua* v. *Colombia*, immediately preceding, the Court had just observed that,

> "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition . . . in determining whether a dispute exists or not, '[t]he matter is one of substance, not of form'"[71].

It is clear that the Court in that case was not prepared to turn a specific factual finding into a formalistic legal requirement for prior notification. In my view, it would be inappropriate to turn what was clearly a factual observation into a rigid legal test that was rejected by the Court in that case.

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[68] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[69] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia) Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72.

[70] The exact quotation of paragraph 73 is "Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua". The applicable legal framework regarding the existence of the dispute is quoted at: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-27, paras. 49-52.

[71] *Ibid.*, para. 72.

33. Similarly, *Georgia* v. *Russian Federation*[72], also cited in the Judgment at paragraph 41 in support of the majority view, is inapplicable and should be distinguished. That case involved the interpretation and application of a specific treaty (the Convention on the Elimination of All Forms of Racial Discrimination) to which both Georgia and Russia were party. Article 22 of that treaty (the compromissory clause conferring jurisdiction on the Court) has an express requirement that, prior to filing a case before the Court, the contending parties must first try to settle the dispute by negotiation or by other processes stipulated in the Convention[73]. It was imperative in that case for the Applicant to prove that prior to seising the Court, it had not only notified the Respondent of its claims but that the two had attempted negotiating a settlement. It was therefore logical that the respondent formally be made "aware" of the applicant's claim before negotiations could take place. That case is in stark contrast to the present case where no such compromissory clause exists requiring prior negotiations or formal notification or "awareness". Accordingly *Georgia* v. *Russian Federation* is, in my view, distinguishable and inapplicable as an authority for the "awareness" test.

CONCLUSION

34. Based on the evidence examined above, my view is that, as at the date on which the Application was filed, there existed a dispute between the Parties concerning the alleged violation by the United Kingdom, of an obligation under Article VI of the NPT and under customary international law 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.

(Signed) Julia SEBUTINDE.

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

[73] Article 22 of the Convention stipulated that:

> "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

SEPARATE OPINION OF JUDGE BHANDARI

Concur with the conclusions of the majority — Existence of a dispute is central to the exercise of the Court's jurisdiction — On the basis of documents and pleadings of the Parties, no dispute existed — ICJ lacks jurisdiction — Greater emphasis ought to have been given that no dispute existed and lesser on the Respondent's awareness — Other preliminary objections should have been adjudicated in the facts of this case — Monetary Gold *principle — Judgment falls outside the judicial functions of the Court.*

1. I concur with the conclusions of the majority Judgment upholding the objection to jurisdiction raised by the United Kingdom based on the absence of a dispute. However, I wish to append a separate opinion to expand the basis of the reasoning of the Judgment. I also propose to deal with another aspect of this case, that in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by the United Kingdom because the issues raised in the case affect not only the Parties, but also the entire humanity. Additionally, adjudicating these objections would have further crystallized the controversy involved in the case, particularly when all documents, pleadings and submissions were placed on record *in extenso*.

2. The question, which needs to be decided, is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of filing the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence.

3. Under Article 36, paragraph 2, and Article 38, paragraph 1, of the Statute of the Court, it can only exercise its jurisdiction in case of a dispute between the parties. The concept of "dispute", and more specifically "legal dispute", is thus central to the exercise of the Court's jurisdiction. The majority Judgment acknowledges this and reflects on certain key aspects from the Court's jurisprudence on this concept.

4. Any analysis of the existence of a dispute should start with a definition of the term "dispute". *Black's Law Dictionary* offers the following definitions, which may help in guiding the analysis:

> "Dispute: A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."
>
> "Legal dispute: Contest/conflict/disagreement concerning lawful existence of (1) a duty or right, or (2) compensation by extent

or type, claimed by the injured party for a breach of such duty or right."

5. In *Georgia* v. *Russian Federation*, in determining whether a legal dispute existed between the Parties at the time of the filing of the Application, the Court undertook a detailed review of the relevant diplomatic exchanges, documents and statements. The Court carried out an extensive analysis of the evidence, covering numerous instances of official Georgian and Russian practice from 1992 to 2008. The Court found that most of the documents and statements before it failed to evidence the existence of a dispute, because they did not contain any "direct criticism" against the Respondent, did not amount to an "allegation" against the Respondent or were not otherwise of a character that was sufficient to found a justiciable dispute between the Parties, and in this case the Court also held that it is a matter of substance and not a question of form or procedure (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-91, paras. 30-46).

6. In *Belgium* v. *Senegal*, the Court similarly carried out a systematic review of the diplomatic exchanges that had preceded the filing of the Application in order to ascertain if the dispute had been properly notified to Senegal. The Court, in that case, concluded that at the time of the filing of the Application, the dispute between the parties did not relate to breaches of obligation under customary international law and that it had thus no jurisdiction to decide Belgium's claims (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 433-435, paras. 24-26).

7. In another important case, *Mavrommatis Palestine Concessions*, the Court considered that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In the *South West Africa* cases, the Court laid down the criterion for the existence of a dispute, which is that the claim of one party be positively opposed by the other (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

8. On application of the Court's Statute and its jurisprudence to the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, the Court lacks jurisdiction to deal with this case.

9. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute. The Judgment considers that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was

aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41).

10. The Court has the freedom to choose any preliminary objection when examining its own jurisdiction. In doing so, it usually chooses the most "direct and conclusive one". Christian Tomuschat summarized the situation in clear terms in his contribution on Article 36 to the handbook *The Statute of the International Court of Justice — A Commentary* (Second Edition). He stated:

> "The Court is free to choose the grounds on which to dismiss a case either for lack of jurisdiction or as being inadmissible. It does not have to follow a specific order, nor is there any rule making it compulsory to adjudge first issues of jurisdiction before relying on lack of admissibility. The Court generally bases its decisions on the ground which in its view is 'more direct and conclusive'. In pure legal logic, it would seem inescapable that the Court would have to rule by order of priority on objections related to jurisdiction. However, such a strict procedural regime would be all the more infelicitous since the borderline between the two classes of preliminary objections is to some extent dependent on subjective appreciation. The Court therefore chooses the ground which is best suited to dispose of the case ('direct and conclusive')."[1]

11. This freedom of the Court was first stated in the *Certain Norwegian Loans (France* v. *Norway)* case, where the Court considered that its jurisdiction was being challenged on two grounds, and that the Court is free to base its decision on the ground which in its judgment is more direct and conclusive (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 25).

12. This position has consistently been taken by the Court in the years since the *Certain Norwegian Loans* matter (see, for example, *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 146; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, pp. 16-17; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 24, para. 26; and *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 298, para. 46).

13. In the instant case, by choosing the lack of awareness on the part of the Respondent as the main ground for the dismissal of the claim, it appears, with respect, that the Court has chosen not to give emphasis to the most "direct and conclusive" element of that ground for the dismissal of the claim. The consequence is serious: lack of awareness on the part of the Respondent can be easily cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the Marshall Islands

[1] Christian Tomuschat, *The Statute of the International Court of Justice — A Commentary* (Second Edition), p. 707, para. 138, footnotes omitted.

could simply bring the case again before the Court. In my view, that would be an undesirable result and should be discouraged. The real ground for the dismissal of the case ought to have been the absence of a dispute between the Parties. The majority Judgment has only dealt with preliminary objection number one, and even while dealing with that objection greater emphasis was not placed on the analysis of the documents and pleadings of the Parties, which reveals that there is no dispute between them.

14. The Parties have already submitted documents, pleadings and submissions *in extenso*. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in adjudicating this matter.

15. On careful consideration of all documents, pleadings and submissions the irresistible conclusion is that no dispute exists between the Parties. The majority Judgment ought to have rejected the Marshall Islands' Application mainly on this ground.

Other Preliminary Objections

16. In the facts of this case the Court should have examined the other preliminary objections taken by the Respondent. All five preliminary objections advanced by the United Kingdom are reproduced below:

(i) The Court lacks jurisdiction because "there is no justiciable 'dispute' between the Marshall Islands and the United Kingdom . . . within the meaning of this term in Articles 36 (2), 38 (1) and 40 (1) of the Court's Statute, Article 38 (1) of the Rules, and relevant applicable customary international law and jurisprudence" (Preliminary Objections of the United Kingdom of Great Britain and Northern Ireland of 15 June 2015, hereinafter "POUK", para. 6).

(ii) The Court lacks jurisdiction "pursuant to the Optional Clause Declarations of the United Kingdom and the Marshall Islands, these Declarations being the sole basis relied upon by the Marshall Islands to found the jurisdiction of the Court" (POUK, para. 7).

(iii) Additionally or alternatively, "the Marshall Islands, by its Optional Clause Declaration of 24 April 2013, accepted the compulsory jurisdiction of the Court only 'for the purpose of the dispute' that it now alleges with the United Kingdom. As such disputes are excluded from the jurisdiction of the Court by operation of paragraph 1 (iii) of the United Kingdom's Optional Clause Declaration, the Court has no jurisdiction to decide on the claims in question" (*ibid.*, para. 8).

(iv) The Application is inadmissible and/or that the Court lacks jurisdiction to address the claim on the ground of the absence from the proceedings of States whose essential interests are engaged by it (POUK, para. 9).
(v) Any judgment of the Court would have no practical consequences, the Application falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction in any event (POUK, para. 10).

17. Out of these five preliminary objections, in my considered view, some preliminary objections are direct and conclusive, which in the facts and circumstances should have been adjudicated by the Court so that the Applicant may not be able to re-open the same proceedings later on. These are:

(a) *Monetary Gold* principle, i.e., the absence of essential parties not party to the instant proceedings;
(b) the Marshall Islands claim is excluded in consequence of the Optional Clause Declaration of the Parties; and
(c) the Marshall Islands' claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the Claim.

Monetary Gold *Principle*

18. As to *Monetary Gold*, the Applicant in its Application submitted a chart, which indicates that India, Pakistan and the United Kingdom, Respondents in these three proceedings put together, possess less than 3 per cent of the total nuclear weapons in the world (Application of the Marshall Islands, p. 9). The other countries, who possess the other more than 97 per cent of the nuclear weapons in the world, are not before the Court and consequently the Court is precluded from exercising its jurisdiction in this matter with respect to those States (the States possessing 97 per cent of the nuclear weapons). Therefore, it is indispensable to have the participation of the other countries who possess such a large quantity of the world's nuclear weapons.

19. The Court considered in its 1996 Advisory Opinion on nuclear weapons that any realistic search for general and complete disarmament would require the co-operation of all States (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 100).

20. This preliminary objection is substantial in character and it ought to have been adjudicated by the Court.

The Parties' Optional Clause Declarations

21. In its submission on preliminary objections, the United Kingdom argued that, if the Court were to find that there was a justiciable dispute between the Parties (which it denies), in that case it would not be a dis-

pute "that is properly amenable to adjudication by the Court simply by reference to situations or facts subsequent to 17 September 1991", as required by the Marshall Islands' Optional Clause Declaration. This is so because any dispute that could be found to exist would necessarily turn on the alleged continuous conduct of the United Kingdom stretching from the entry into force of the NPT on 5 March 1970 until the present. The Respondent argues that given that "a material component of the dispute falls outside the Court's jurisdiction *ratione temporis*, the Marshall Islands' claim against the United Kingdom falls outside the jurisdiction of the Court *in toto*" (POUK, para. 64).

22. This is a substantial objection in character, and it should have been considered by the Court.

The Claim Falls Outside the Jurisdiction of the Court

23. The United Kingdom argues that the claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the claim (POUK, paras. 104-112). In its Counter-Memorial, the Respondent submitted that "even if the Court finds that it has jurisdiction in a particular case, it may decline to exercise that jurisdiction if it considers that to do so would be incompatible with its function" (*ibid.*, para. 104). Reliance was placed on this Court's decision in the *Northern Cameroons* case, where the Court considered that

> "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore . . . The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

In application of this concept of judicial integrity, the Respondent argued that the Court should decline to exercise its jurisdiction in circumstances where it would not be in a position to "render a judgment capable of effective application" (*ibid.*, p. 33).

24. This preliminary objection also deserved adjudication.

25. The majority Judgment ought to have held clearly that, on the basis of documents and pleadings of the Parties, no dispute existed between the Parties at the time of filing the Application while upholding the United Kingdom's first preliminary objection.

(*Signed*) Dalveer BHANDARI.

DISSENTING OPINION OF JUDGE ROBINSON

I disagree with the majority's conclusion that there is no dispute in this case — Role of the Court as envisaged by the United Nations Charter — Linear development of the Court's case law stressing objectivity, flexibility and substance over form in the determination of dispute — The Court's enquiry is empirical and pragmatic, focused simply on whether or not the evidence reveals clearly opposite views — Court's case law does not support criterion applied by the majority that the Respondent was aware or could not have been unaware that its views were "positively opposed" by the Applicant — Awareness may be confirmatory, but is not a prerequisite for determining the existence of a dispute — The Court has previously relied upon post-Application evidence as determinative of the existence of a dispute — Even if the test set out by the majority is applied to the facts of the case, there is a dispute between the Parties.

1. In this opinion, I explain why I have dissented from the majority decision that there was no dispute between the Marshall Islands and the United Kingdom.

I. Introduction

2. In the period of twenty months that I have served on this Court, I have been privileged to consider the interpretation and application of five treaties in cases before the Court. But I dare say that, were I to examine another fifty treaties in the rest of my term, none would be, by virtue of the existential threat to mankind posed by nuclear weapons, as critically important for the work of the Court and the interests of the international community as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) that is the subject of the *Marshall Islands* v. *United Kingdom* case.

3. The United Nations Charter has assigned the Court a special role, giving it a particular relevance in the maintenance of international peace and security through the exercise of its judicial functions. It is regrettable that the majority did not seize the opportunity presented by this case to demonstrate the Court's sensitivity to that role. It is even more regrettable that this failure could have been avoided had the Court simply followed its own case law. The Court's case law has been consistent in the approach to be adopted in determining

the existence of a dispute; an approach that is not reflected in the Judgment.

4. The jurisprudence of the Court calls for an objective, flexible and pragmatic approach in determining the existence of a dispute. It is firmly established in the Court's jurisprudence that a dispute arises where, examined objectively, there are "clearly opposite views concerning the question of the performance or non-performance"[1] of a State's obligations. There is not a single case in the Court's case law that authorizes the majority's proposition that the determination of the existence of a dispute requires a finding of the respondent's awareness of the applicant's positive opposition to its views; that is, that the absence of evidence of the respondent's awareness of the other party's opposing view is fatal to a finding that a dispute exists.

5. The requirement that there be a "dispute" is designed to ensure that what the Court is being asked to decide is susceptible to its authority and competence, or, as Judge Fitzmaurice in his separate opinion in *Northern Cameroons* said, the dispute must be "capable of engaging the judicial function of the Court"[2]. It is a question of the *nature* and *character*, determined objectively, of the claim presented to the Court. It is not about mandating that an applicant State jump through various hoops suggesting a formal approach before it can appear in the Great Hall of Justice.

6. The Court and its predecessor, the Permanent Court of International Justice (PCIJ), have developed a significant body of jurisprudence interpreting the requirement that the Court can only decide a "dispute" or "legal dispute", as discussed in the next section of this opinion. However, it is important to note, that while many respondents have raised the objection that the Court does not have jurisdiction because there is no dispute, the Court has more often than not rejected this objection[3]. This is in keeping with a flexible approach to finding a dispute — the criteria

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[1] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

[2] Judge Fitzmaurice, separate opinion to case concerning the *Northern Cameroons* (*Cameroon* v. *United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 98.

[3] See, for example, the cases cited later in this opinion. In *Alleged Violations*, the Court determined that "Nicaragua makes two distinct claims — one that Colombia has violated Nicaragua's sovereign rights and maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force". The Court found that there was a dispute in respect of the first claim and no dispute in respect of the second. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 31, 33, paras. 67, 74, 78. See also Christian Tomuschat, Commentary to Article 36, Andreas Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edition, 2012), p. 642, para. 9:

> "[w]ith this limitation [that the applicant must advance a legal claim], the concept of jurisdiction has always been interpreted in a truly broad sense. As far as can be seen, no case has been rejected as not encapsulating a dispute."

for determining the existence of a dispute are not intended to create a high bar.

Before examining the Court's case law, I look briefly at the Court's role under the United Nations Charter.

II. The Role of the Court as Envisaged by the United Nations Charter

7. An objective, flexible and pragmatic approach to finding a dispute is called for by the role envisaged for the Court by the United Nations Charter. As I explained in my separate opinion in the case concerning *Certain Activities/Construction of a Road* issued in December 2015:

> "The United Nations Charter also highlights the important role the Court has in the peaceful settlement of disputes, 'the continuance of which is likely to endanger the maintenance of international peace and security' and thus undermine the purposes of the United Nations Charter[4]. Article 92 of the United Nations Charter identifies the Court as the principal judicial organ of the United Nations and provides that its Statute — annexed to the United Nations Charter — is an integral part of the United Nations Charter. Article 36 (3) of the United Nations Charter provides that the Security Council 'should also take into consideration that legal disputes, as a general rule, be referred by the parties to the International Court of Justice'. It is thus clear that the Court is expected, through its judicial function, to contribute to the maintenance of international peace and security. Therefore, the discharge by the Court of its judicial functions is not peripheral to, but is an integral part of the post-World War II system for the maintenance of international peace and security."[5]

8. The Court has a different relationship with the United Nations Charter from that between the PCIJ and the Covenant of the League of Nations. Although the latter provided for the establishment of the PCIJ, it gave that Court no pre-eminence in relation to other methods of international dispute resolution[6]. The United Nations Charter, on the

[4] Article 33 of the UN Charter.

[5] Judge Robinson, separate opinion in the case concerning *Certain Activities Carried Out in Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 815, para. 30.

[6] Article 14 of the Covenant of the League of Nations reads:

"[t]he Council shall formulate and submit to the Members of the League for adoption

other hand, identifies the Court as the "principal judicial organ of the United Nations"[7]. Each party to the United Nations Charter is *ipso facto* party to the ICJ Statute. This is logically linked to (i) Article 36 (3) — that while States may choose between a variety of dispute resolution methods, Article 36 (3) envisages that legal disputes should — as a general rule — be referred to the ICJ; and (ii) Article 1 (1), identifying the purposes of the United Nations as including "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"[8]. "Having recourse to the ICJ, whose function is to decide disputes in accordance with international law . . . is the most obvious way to realize that purpose."[9] Therefore the Court's exercise of its judicial functions cannot be divorced from the architecture of the system established to respond to the atrocities of World War II. The Court was intended to play a positive role in the maintenance of international peace and security. It is difficult to see how the Court can discharge its responsibility to contribute to the maintenance of international peace and security through the peaceful settlement of disputes, if it establishes additional criteria that have no basis in its case law, thus making it more difficult for parties to avail themselves of its jurisdiction.

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plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

Article 13 states:

"Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them."

[7] Article 92 of the UN Charter.

[8] Thomas Giegerich, Commentary to Article 36 (above note 3), p. 154, para. 52.

[9] *Ibid.* See also *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 22, para. 40.

"It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute."

III. The Court's Jurisprudence

9. In paragraph 41 of the Judgment, the majority states:

> "The evidence must show that the parties 'hold clearly opposite views' with respect to the issue brought before the Court . . . As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104)."

It is on the basis of this finding that the majority upholds the Respondent's objection that there is no dispute in this case. The burden of this opinion is that this holding is, as is shown by the analysis of the Court's case law below, incorrect, as a matter of doctrine, of law, and of fact.

1. The Mavrommatis Palestine Concessions

10. Mavrommatis was a Greek national who owned "concessions for certain public works to be constructed in Palestine" under contracts and agreements signed with the Ottoman Empire. The Government of the Greek Republic, espousing the claim of its national, claimed that the Government of Palestine and the Government of His Britannic Majesty (Great Britain), by virtue of its power as a Mandate, failed to recognize the extent of Mavrommatis's rights under two groups of concessions, and requested that the PCIJ order the payment of compensation as a result. The claim was brought under Article 9 of Protocol XII annexed to the Peace Treaty of Lausanne 1923, and Articles 11 and 26 of the Mandate for Palestine conferred on Britain 1922.

11. The British Government objected to the PCIJ's jurisdiction, and the PCIJ proceeded to examine whether or not it had jurisdiction under Article 26 of the Mandate. Article 26 gave the PCIJ jurisdiction over disputes "between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate", that could not "be settled by negotiation". In determining that there was a dispute susceptible to its jurisdiction, the PCIJ proceeded to set out its famous dictum on the definition of a dispute:

"[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[10].

12. The PCIJ found that the dispute "certainly possess[ed] these characteristics"[11]. The Greek Republic was asserting that the Palestinian or British authorities had treated one of its citizens in a manner incompatible with international law obligations by which they were bound, and had requested an "indemnity" on this basis[12].

13. In this case, which is very much the Alpha in the Court's examination of the criteria for the existence of a dispute, and which is cited in the Judgment at paragraph 37, there is no reference, express or implied, to the mental state of the respondent State, as a criterion for the existence of a dispute. The focus of the case is simply on a disagreement or conflict between the Parties. Implicit in the dictum from *Mavrommatis* is that, in determining the existence of a dispute, the Court carries out an analysis of the facts that may show a conflict of legal views or interests; there is no suggestion that this analysis is in any way influenced by the respondent's awareness of the applicant's position.

14. The *Mavrommatis* definition has been frequently relied upon by the Court, as the brief survey of jurisprudence below reveals. Although the definition of a dispute has been developed and consolidated over time, these developments have, for the most part, followed a path that is in line with the position taken in *Mavrommatis*. The addition of awareness as a prerequisite for a finding of a dispute, on the other hand, is not a minor deviation, but represents a seismic change in what the Court requires before it will proceed to examine the merits of a claim[13]. Attempts to debunk *Mavrommatis* from its pedestal will fail. *Mavrommatis* will always retain its significance when considering what constitutes a "dispute" for the purposes of Article 36 of the Statute, not merely because it was the first case to set out a definition, but more importantly because it identifies the parameters of a dispute between States.

[10] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[11] *Ibid.*

[12] *Ibid.*, p. 12.

[13] See, for example, Robert Kolb's examination of the Court's jurisprudence up until [2009], where he notes that the Mavrommatis definition has been followed "in a remarkably consistent and continuous way", although it "has now and then been subjected to subtle minor variations, and also to some rather questionable additions". Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 302.

2. Interpretation of Peace Treaties *Case*

15. By means of a resolution dated 22 October 1949, the General Assembly decided to request an advisory opinion on two questions relating to the Treaties of Peace signed with Bulgaria, Hungary and Romania.

16. The first question put before the Court was whether or not diplomatic exchanges between Bulgaria, Hungary and Romania and "certain Allied and Associated Powers signatories to the Treaties of Peace" regarding the implementation of certain provisions in those treaties disclosed "disputes" subject to the dispute settlement provisions of those treaties. The diplomatic exchanges included concerns and accusations regarding the observance of human rights and fundamental freedoms by the three Governments. In order to determine this question, the Court divided the issues, and examined, first, whether or not the diplomatic exchanges disclosed any disputes per se.

17. The Court started by setting out its now oft-repeated mantra: "[w]hether there exists an international dispute is a matter for objective determination"[14]. In my view, this is one of the Court's most important dicta in determining the criteria for a dispute. The logical result of objective determination is that: "[t]he mere denial of the existence of a dispute does not prove its non-existence"[15].

18. In its application to the facts, the Court noted that the diplomatic exchanges included allegations that the Governments of Bulgaria, Romania and Hungary had violated various provisions of the Peace Treaties and requested that they take remedial measures. Bulgaria, Romania and Hungary, on the other hand, denied the charges. The exchanges thus showed that "[t]here has . . . arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations"[16]. On this basis, the Court concluded that international disputes had arisen[17].

19. Here again, as in *Mavrommatis*, the question of the awareness of the respondent, was not a factor. The focus was not on Bulgaria, Hungary and Romania's awareness of the dispute. The Court's formulation, that a dispute was present where "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", is a classic illustration of the application of an

[14] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*, pp. 74-75.

objective approach. It requires no more than that the Court simply look at the parties' positions, and determine whether they "have shown themselves as holding opposite views"[18]; in doing so there is not the slightest suggestion of the need to resort to any question of the respondent's awareness of the applicant's position.

3. South West Africa Cases

20. Liberia and Ethiopia both brought cases against South Africa, which were joined by order of the Court on 20 May 1961. The applicants alleged that South Africa was acting in violation of various provisions of the Covenant of the League of Nations and the Mandate for South West Africa, including by practising apartheid in its administration of South West Africa. As a preliminary matter, the Court examined whether or not the subject-matter of the Applications filed by Liberia and Ethiopia constituted a dispute between the Applicants and South Africa. The Court repeated its definition of a dispute from the case of *Mavrommatis Palestine Concessions* (as set out above), and noted that it is not sufficient for one party to assert or deny that a dispute exists, a position consistent with the objective task that the Court has set itself:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."[19]

Applying this test to the facts of the case before it, the Court noted that there could "be no doubt" about the existence of a dispute between the parties in the *South West Africa* cases. A dispute was "clearly constituted" by the opposing attitudes of the parties to South Africa's performance of its international obligations as Mandatory[20].

21. Judge Morelli, in his dissenting opinion, drew a distinction between a dispute and a disagreement; and between a dispute and a conflict of interests. He noted that the opposing attitudes of the parties may consist

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[18] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.

[19] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[20] *Ibid.*

of a "manifestation of the will" or a "course of conduct by means of which the party pursuing that course directly achieves its own interest" which is "inconsistent with the claim. And this is the case too where there is in the first place a course of conduct by one of the parties to achieve its own interest, which the other party meets by a protest."[21] The Judgment, at paragraphs 40 and 57, also acknowledges the evidentiary value of a party's conduct in the determination of a dispute.

22. Here, again, the Court made no explicit or implicit reference to awareness as a criterion for finding the existence of a dispute. Rather, the Court's stress was on the Parties' "opposing attitudes relating to the performance of the obligations"[22]. In searching for positive opposition, the Court was reaffirming the test that it had set out in *Interpretation of Peace Treaties*, that a dispute was constituted where the parties held "clearly opposite views concerning the question of the performance or non-performance" of international obligations. It was not developing a new test nor establishing any additional criteria; whether States hold "clearly opposite views" or whether "the claim of one party is positively opposed by the other" is essentially the same question, inviting the same objective determination, without recourse to any mental element, such as awareness, on the part of the respondent.

IV. Paragraph 41 of the Judgment

23. The manner in which the Court considers opposition of views in the current case calls for close examination. As noted above, paragraph 41 provides:

> "The evidence must show that the parties 'hold clearly opposite views' with respect to the issue brought before the Court (see paragraph 37 above). As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v.

[21] Dissenting opinion of Judge Morelli, *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 567.
[22] *Ibid.*, p. 328.

Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 32, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104)."

24. The first point to note about this paragraph is that it plunges us, quite unnecessarily, into the murky legal world of the state of mind of a State. The emphasis placed on awareness would seem to introduce through the back door a requirement that the Court has previously rejected[23], i.e., an obligation on the applicant to notify the other State of its claim.

25. It is a misinterpretation of the approach set out by the Court in its prior case law (and discussed earlier in this opinion) to state that the determination that a dispute exists requires a showing of the respondent's awareness of the applicant's positive opposition to its views. To establish whether the parties hold clearly opposite views, it is sufficient to examine the positions of the parties on the issue as objectively revealed by the evidence before the Court, without regard to their awareness of the other party's position. It is, of course, perfectly possible to conduct an objective examination of a subjective factor; however, the issue in this case is whether there is any legal basis for that subjective element.

26. In paragraph 41, the majority refers to two cases in support of its position: *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua* v. *Colombia) (Alleged Violations)* and *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) (Application of the CERD)*. In paragraph 73 of *Alleged Violations*, cited by the majority, the Court was responding to Colombia's argument that Nicaragua had not

[23] See paragraph 38 of the Judgment. In *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72, the Court stated:

"Concerning Colombia's argument that Nicaragua did not lodge a complaint of alleged violations with Colombia through diplomatic channels until long after it filed the Application, the Court is of the view that although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition. As the Court held in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, in determining whether a dispute exists or not, '[t]he matter is one of substance, not of form' (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30)."

"indicate[d] . . . by any modality, that Colombia was violating . . ."[24] its international obligations vis-à-vis Nicaragua, and had not raised any complaints until it sent a diplomatic Note after the Application had been filed. The Court noted:

> "[A]lthough Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged violations of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of the Parties, such as those referred to in paragraph 69, Colombia could not have misunderstood the position of Nicaragua over such differences." (*I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73.)

27. The Court's statement represents the application of an objective standard, with the Court eschewing formalities as a particular bar to finding a dispute. The Court examined the evidence presented and emphasized by the parties, including statements and conduct, to conclude that there was positive opposition. Far from establishing awareness as a criterion of the dispute, the references to awareness and understanding are factual statements made in the specific circumstances of the case in support of the Court's conclusion. There is no suggestion that these references are an expression of a legal test. While the element of awareness may sharpen the positive opposition, it is not expressed as a prerequisite for that opposition. Moreover, the Court emphasized that the finding of a dispute is a matter of substance and not of form[25].

28. The majority's reliance on *Application of the CERD* is as unsatisfactory as the use it made of *Alleged Violations*. The Court's primary purpose in carrying out an examination of the documents and exchanges presented by the applicant as evidence of a dispute was to establish whether, in light of the specific objections raised, Russia was the intended addressee of the documents, and, if so, whether the documents related to the application or interpretation of the Convention on the Elimination of

[24] *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 28, para. 55 *et seq*.

[25] *Ibid.*, para. 50 and 72.

All Forms of Racial Discrimination (CERD). In many instances, the Court found that the documents were not addressed to Russia and, in any event, that they did not reveal a dispute concerning the application and interpretation of the CERD, as per Article 22.

29. At the outset, it is worth noting the particular circumstances before the Court in *Application of the CERD*. The Court upheld Russia's second preliminary objection in this case because it decided that Georgia had not satisfied the negotiations and procedures expressly provided for in the CERD before a dispute could be brought under Article 22. This decision is of limited value as a precedent in the circumstances of this case.

30. In any case, the passages relied upon by the majority do not support its conclusion that, the Court, in *Application of the CERD*, invoked awareness as a requirement in the finding of a dispute. Given the Court's cautionary statement as to the significance of the analysis it carried out in Section II (4) of the Judgment, it is not at all clear how reliance on the finding in paragraph 61 becomes helpful to the position of the majority. Section II (4) is devoted to documents and statements from the period before the CERD entered into force between the parties on 2 July 1999. The Court was careful to explain in paragraph 50 that it was only carrying out an examination of documents and statements in that period because Georgia contended that its dispute with the Russian Federation was "long-standing and legitimate and not of recent invention". The Court then went on to say that those earlier documents "may help to put into context those documents or statements which were issued or made after the entry into force of CERD between the Parties"[26]. Why anyone would rely on a dictum from that section in relation to the question of the existence of a dispute is difficult to understand, since, for the purposes of that case, there could be no dispute which fell within the terms of CERD between the parties at the time under examination, and the Court had explained the limited and very specific context in which it was examining documents and statements from that period.

31. Paragraph 61 relevantly reads: "There is no evidence that this Parliamentary statement, directed at 'separatists' and alleging violations of agreements which could not at that time have included CERD, was known to the authorities of the Russian Federation." One of the issues

[26] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 94, para. 50.

before the Court was Russia's argument that it was not a party to a dispute with Georgia; that and it was nothing more than a facilitator and that the real disputants were Abkhazia and South Ossetia[27]. Thus, the reference to Russia's lack of knowledge should also be viewed in light of the fact that much of the evidence pointed to by Georgia as relevant to the question of the existence of a dispute was actually directed to other parties. The reference to Russia's lack of knowledge was a factual statement highlighting that Russia was not the addressee of the Parliamentary statement. There is nothing, either in express or implied terms, in paragraph 61 to suggest that the Court was setting up awareness or knowledge that its views were positively opposed on the part of the respondent as a requirement for a finding of a dispute. The Court dismissed the statement on the basis that it did not have any legal significance in the determination of the dispute.

32. In paragraph 87, the Court notes that Russia was aware of a Georgian Parliamentary action relating to Russia's peacekeeping operations. However, the Court makes this statement without seeking to develop it and with no suggestion that this was a vital element in its consideration of the question of the existence of a dispute. Indeed, the Court went on to dismiss the documents as not having any legal significance in the determination of the dispute. Again, the Court's analysis must be viewed in light of the disagreement about the proper parties to the dispute and, more particularly, whether Georgia's claims were made against Russia. The difficulty for the majority in relying upon paragraph 87 in support of its position that awareness is a condition for the finding of a dispute is that the Court in the *Application of the CERD* does not state this explicitly, nor is there anything in the text that allows the reader to infer awareness as such a condition. In fact, the Court does not develop its analysis in any way beyond a factual statement of the particular circumstances surrounding the documents in question. Moreover, the majority decision itself offers no explanation as to how paragraph 87 is an authority for the proposition that awareness is a prerequisite for the finding of the existence of a dispute.

[27] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 87, para. 38.

33. The discussion in paragraph 104 of the *Application of the CERD* as to whether a press release was brought to Russia's attention is cited by the majority as evidence that previous decisions set down awareness as a condition of finding the existence of a dispute. The Court, in paragraph 104, does not make clear the significance to be attached to this statement. It is expressed in terms that show that it is nothing more than a simple statement of fact, which does not expressly or impliedly set out an additional limb for the legal test for the finding of a dispute. Again, the Court's statement must be seen in the context of the particular facts of the case: whether Russia was truly a party to the dispute, or whether Georgia's grievances lay elsewhere, and whether the dispute concerned the interpretation and application of the CERD. In any event, the Court dismissed the press release as having no legal significance in the determination of the dispute.

34. An inescapable comment on the four citations taken from *Application of the CERD* and *Alleged Violations* in paragraph 41 is that, surely, if the Court intended to set up awareness as a criterion for determining the existence of a dispute, it would have spent much more time examining and explaining the basis and rationale for its approach, including looking at its case law. There would have been no need for the Court to introduce an additional limb of the test in such an indirect and non-transparent manner.

35. The paragraphs relied upon by the majority as establishing awareness as a criterion of a dispute should be contrasted with the establishment of an "awareness" or "knowledge" test in other decisions of the Court, and the care the Court takes in setting up a test of this nature. For example, in the Bosnia *Genocide* case, the Court stated:

> "But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator.[28]"

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 218, para. 421.

Even though the element of knowledge or awareness is necessarily a part of complicity in genocide, it is nonetheless noteworthy how assiduously and explicitly the Court approaches the construction of a test which contains the criterion of awareness.

36. Moreover, if the three passages in *Application of the CERD* were intended to set up an additional limb of the test for the existence of a dispute, it is strange that they were not cited in paragraph 73 of *Alleged Violations*. This is all the more peculiar as passages from *Application of the CERD* were cited five times in the treatment of Colombia's second preliminary objection as authority for various other propositions in relation to the finding of a dispute.

37. Significantly, in Section II (6), where the Court did find that the evidence established the existence of a dispute between Russia and Georgia, there is not a single reference to Russia's awareness of Georgia's opposing views. The Court was content to conclude that the exchanges showed that there was a dispute between the two countries about Russia's performance of its obligations under CERD. In fact, the Court continued to be most concerned about the parties to the dispute and whether or not the dispute was about the interpretation and application of CERD[29]. It is also noteworthy that, in the many instances in which the Court discounted the documents and exchanges as having any legal value, it did so without any reliance on Russia's lack of awareness, including in relation to the documents cited in paragraphs 61, 87 and 104[30]. What this shows is that the reference to awareness or knowledge in those three instances is nothing more than a mere happenstance, similar to the references to awareness and understanding in paragraph 73 of *Alleged Violations*. The irresistible conclusion in the analysis of the four cited passages is that the majority has confused the incidental with the essential.

38. It is indeed striking that among the many cases in the Court's jurisprudence on the existence of a dispute the majority has only been able to cite two cases in support of its position, one of which — *Application of the CERD* — is of limited value as a precedent given the peculiarities of Article 22 of the CERD, the other — *Alleged Violations* — clearly wrongly

[29] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113.
[30] *Ibid.*, paras. 62, 89 and 104.

construed by the majority, and both of which were handed down in the last six years. Implicit in these citations — from 2011 and 2016 — is an acceptance that the jurisprudence prior to April 2011 does not support the majority's position. In reaching this conclusion, it should be recalled that the passages cited by the majority do not contain references to prior jurisprudence because they are, themselves, no more than factual statements.

39. In *Application of the CERD*, the Court importantly confirmed that the finding of a dispute is a matter of substance and not of form (as the Judgment notes at paragraph 38). This is consistent with the pragmatic, flexible approach that has already been discussed in the context of former jurisprudence. It follows that the Court's case law has eschewed a formal approach, including suggestions that formalities are a precondition of the existence of a dispute, such as notice of the intention to file a case, formal diplomatic protest and negotiations (unless specifically required by the optional declaration) (see paragraph 38 of the Judgment) and any specific mental element.

40. On the basis of the examination of the jurisprudence set out above, it is clear that:

(1) the development of the Court's case law in this area has been linear in the stress that it has placed on objectivity, flexibility and substance over form; whether or not a dispute exists is a matter for *objective determination by the Court* on the basis of the evidence before it;

(2) the enquiry, which is empirical and pragmatic, is focused on whether or not the States concerned have shown themselves as holding opposite views, i.e., whether the evidence reveals a difference of views, regarding the performance or non-performance of an international obligation;

(3) the positive opposition that is required by case law does not have to be manifested in a formal manner, for example, that the positions be set out in a diplomatic Note. Further, there is no need for notice and/or response. The opposition of positions may be evidenced by a course of conduct and evidence of the parties' attitudes, and this is the enquiry that the Court must undertake. There is no particular *way* in which a claim must be made. Moreover, the case law establishes that the requirement that a dispute exist is not intended to set a high threshold for the Court's exercise of its jurisdiction, a conclusion that is entirely consistent with the role of the Court as described in Section II;

(4) properly seen, therefore, awareness may be confirmatory of positive opposition of views, but it is not, as paragraph 41 suggests, a prerequisite for, nor decisive in determining the existence of a dispute.

V. The Date at which a Dispute Must Exist

41. Another conundrum raised by the Judgment relates to the date at which the dispute must exist. Paragraph 42 reads "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court". Similar formulations with the words "in principle" are to be found in cases cited in the same paragraph. However, the plain meaning of the sentence beginning with "in principle" is that it admits of the possibility that the date at which the dispute is determined may be a date other than the date on which the Application was submitted to the Court, i.e., that post-Application evidence may be determinative of the existence of a dispute rather than simply confirmatory as is stated in paragraph 42. Consequently, the entire analysis in paragraphs 42 and 43 fails to acknowledge the nuance and flexibility that is denoted by the phrase "in principle".

42. That post-Application evidence may be determinative of the existence of a dispute is entirely consistent with the flexible, pragmatic approach that is the hallmark of the Court's jurisprudence on this question.

43. Paragraph 42 cites two cases in support of its statement that —"[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court" — *Alleged Violations* and *Application of the CERD*. The relevant paragraphs of both cases cite *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*[31] and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*[32]. The cited paragraphs from these cases begin: "Libya furthermore dr[ew] the Court's attention to *the principle* that '[t]he critical date for determin-

[31] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-45.

[32] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44.

ing the admissibility of an application is the date on which it is filed'" (my emphasis) and reflect the Court's conclusion that it would uphold Libya's submission in this regard. The Court concluded that "[t]he date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application"[33]. It may be that the difficulty arising from the phrase "in principle" could be traced to Libya's reference to "the principle" that the critical date was the date on which the Application was filed. The two phrases are, of course, totally different in meaning.

44. In paragraph 54, the majority rejected the Marshall Islands' contention that the Court had, in prior cases, relied upon statements made by the parties during proceedings as evidence of the existence of a dispute. The majority discussed the three cases cited by the Marshall Islands in support of its contentions: *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*. However, the majority's analysis of these three cases is too categorical and does not allow for the flexibility that the Court has given itself in this regard. These cases show that the Court has afforded significant weight to statements made during proceedings in its determination of whether or not a dispute exists, and, at times, did so, to the exclusion of other evidence.

45. In *Certain Property*, the Court's analysis indicates that it relied primarily on the positions taken by the parties before the Court in finding a dispute. At paragraph 54, the majority states that in *Certain Property* "the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application". However, Germany submitted a preliminary objection on the basis that there was no dispute between the parties. While Liechtenstein and Germany characterized the subject of the dispute differently, Germany's preferred characterization suggested that it was not a true party to the dispute and thus that there was no dispute between the parties.

[33] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 130, para. 43.

46. After setting out the positions of the parties, the Court proceeded to note:

> "[T]he Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence . . . the Court concludes that '[b]y virtue of this denial, there is a legal dispute' between Liechtenstein and Germany (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 615, para. 29)."[34]

The Court then added that pre-Application consultations and exchanges had "evidentiary value" in support of a finding of positive opposition. The Court therefore relied on Germany's denial during the proceedings as determinative of the existence of a dispute and merely had recourse to the pre-Application consultations and exchanges as supporting evidence.

47. In *Land and Maritime Boundary*, Nigeria's submission was that there was no dispute as such throughout the length of the boundary and therefore Cameroon's request to definitively settle the boundary was inadmissible (more specifically that there was no dispute, subject, within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula)[35]. The Court concluded that in the oral proceedings it had become clear that there was also a dispute over the boundary at the village of Tipsan[36].

48. The Court noted that Nigeria had not indicated whether or not it agreed with Cameroon's position on the course of the boundary or its legal basis. In reaching this conclusion, the Court relied particularly on Nigeria's response to a question posed by a Member of the Court. The Court decided that, while Nigeria did not have to advance arguments pertaining to the merits, "[the Court] cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States"[37]. While it is true, as stated in paragraph 54, that the Court was concerned with the scope of the dispute (i.e., the extent to which the boundary was in dispute between the parties)[38], the Court did examine the submissions of the parties and their positions before the Court in

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[34] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25.

[35] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 313-314, 316.

[36] *Ibid.*, p. 313, para. 85.

[37] *Ibid.*, p. 317, para. 93.

[38] The Court's examination of materials showed that there was a dispute "at least as regards the legal bases of the boundary". The Court was not able to determine "the exact scope of the dispute"; *ibid.*

determining that Nigeria had not indicated its agreement, and thus that it could not uphold Nigeria's objection.

49. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* is, perhaps, the strongest case in support of the position taken by the Marshall Islands because the only evidence on which the Court relied in relation to the existence of a dispute was Yugoslavia's denial of Bosnia and Herzegovina's allegations during the proceedings: "that, by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between them (*East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 100, para. 22)"[39]. The majority's attempt to distinguish this case is far from satisfactory.

50. The Court's approach to this question has been less definitive and uncompromising than the majority would like to suggest. The Court has given itself room to afford significant weight to statements made during the proceedings, particularly the denial of allegations by the Respondent, not just to confirm but to establish a dispute.

51. I note that the majority has advanced the view that: "[i]f the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct"[40]. This appears to be nothing more than a reflection of the majority's doctrinal attachment to the awareness criterion. It is inconsistent with the case law that notification of a dispute is not required. A respondent's opportunity to react is more properly addressed as a question of procedural due process rather than as an element of the dispute criterion. If a party is embarrassed by hearing for the first time, through the commencement of Court proceedings, a claim against it, it is surely open to the Court to address that matter by recourse to the rules of procedure.

VI. The Principle of the Sound Administration of Justice

52. Another reason for rejecting the majority decision is that it militates against the sound administration of justice, a principle that the

[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29.

[40] Paragraph 43 of the Judgment.

Court has emphasized on more than one occasion. In *Mavrommatis*, the PCIJ held:

> "Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications."[41]

53. This dictum is in keeping with the rejection of formalism in determining access to international justice, as discussed throughout the opinion. It is a principle that promotes judicial economy, and thus the sound administration of justice. In *Upper Silesia*, in considering whether there was a "difference of opinion" for the purposes of Article 23 of the Geneva Convention (the 1922 Convention between Germany and Poland relating to Upper Silesia), the PCIJ held:

> "Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned."[42]

54. This principle was also cited by the Court in the *Paramilitary Activities* case, refusing to reject Nicaragua's claim when it could remedy a defect unilaterally (to have expressly invoked a treaty in its negotiations) and refile the case[43]. The Court continued as follows:

> "It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned.' (*Certain German Interests in*

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[41] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.

[42] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 427-429, paras. 81-83.

Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.)"

55. Further, in *Croatia* v. *Serbia*, the Court cited the passage from *Mavrommatis* and held that:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled."[44]

The Court spoke against an approach that would lead to, what it termed the "needless proliferation of proceedings"[45] or what Judge Crawford in his dissent calls a "circularity of procedure"[46]. An odd result of the majority Judgment is that, given the basis on which the claim has been dismissed, the Marshall Islands could, in theory, file another Application against the United Kingdom. Any objection based on lack of awareness of "opposite views" could not be upheld. The "unmet condition" would have already been remedied. The formal approach adopted by the majority Judgment is incongruous with previous dicta on this point, and militates against judicial economy and the sound administration of justice.

VII. Facts

56. The subject-matter of the dispute with the United Kingdom is the failure of the respondent to fulfil its conventional and customary obligations to pursue in good faith and bring to a conclusion nuclear disarmament in all its aspects under strict and effective control; the phrase "in all its aspects" includes negotiations on effective measures for the cessation of the arms race and a treaty on general and complete disarmament.

The subject-matter of the dispute reflects the bargain at the heart of the NPT, the package deal: the *quid* is that non-nuclear-weapon States will

[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85.
[45] *Ibid.*, p. 443, para. 89.
[46] See dissenting opinion of Judge Crawford in this case, para. 8.

not acquire nuclear weapons; the *quo* is that nuclear-weapon States may keep their nuclear weapons but must negotiate in good faith for nuclear disarmament.

57. In my view, the United Kingdom's first preliminary objection should be dismissed. This conclusion flows from application of the facts to the analysis of the law set out above. However, even when the facts are assessed against the criterion set out by the majority, this conclusion still stands[47]. An objective examination of the evidence reveals a fundamental difference (or views that are positively opposed) between the Applicant and Respondent on the date of the Application in relation to the United Kingdom's performance of its obligations under Article VI of the NPT, both because of the latter's negotiating position and the action it has taken in respect of its nuclear arsenal, as evidenced by the statements of the parties and the conduct of the United Kingdom.

58. The Marshall Islands made three statements that are relevant to the consideration of the existence of a dispute with the United Kingdom. On 6 May 2010, at an NPT Review Conference, at which the United Kingdom was present, the Marshall Islands stated:

> "We are alarmed that, although almost all NPT members are achieving obligations, there are a small few who appear to be determined to violate the rules which bind them, and whose actions thus far appear evasive, particularly in testing or assembling nuclear weapons. We have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT."[48]

On 26 September 2013, at the High-Level Meeting of the General Assembly on Nuclear Disarmament, it "urge[d] all nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament"[49]. While these statements did not allege any breach by nuclear-weapon States specifically of their responsibilities, they are indicative of the general posture of the Marshall Islands on the subject of nuclear disarmament. In my view, they can certainly be seen as placing nuclear-weapon States on notice that the Marshall Islands was concerned about the discharge by those States of their responsibilities relating to disarmament. The United Kingdom's expression of regret at the High-Level Meeting of the General Assembly on Nuclear Disarmament about the "energy" being directed towards initiatives such as this

[47] See paragraphs 62 and 63 of the Judgment.

[48] Statement by H.E. Mr. Phillip H. Muller, Ambassador and Permanent Representative, Permanent Mission of the Republic of the Marshall Islands, to the United Nations at the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 6 May 2010, as referred to in the Marshall Islands' Statement of Observations on the Preliminary Objections of the United Kingdom (WSMI), para. 32.

[49] Memorial of the Marshall Islands (MMI), p. 43, para. 98; Ann. 71.

High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention"[50] may be taken as a sign of a nascent dispute between the parties about the steps to be adopted to discharge the obligations under Article VI of the NPT.

59. At the Second Conference on the Humanitarian Impact of Nuclear Weapons in Nayarit, Mexico, 13-14 February 2014, the Marshall Islands was more explicit:

> "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."

60. This statement alleges a breach by nuclear-weapon States of their international obligations. It is immaterial that the Marshall Islands did not cite each of the nuclear-weapon States by name, since those States are constituted by a small number of countries (nine) and the identity of those States is common knowledge. The United Kingdom explicitly recognizes itself as a nuclear-weapon State. Contrary to what is stated in paragraph 50 of the Judgment, this statement does identify the conduct that has given rise to a breach by the United Kingdom; as a failure to fulfil its obligations under Article VI of the NPT, specifically in relation to the negotiations required by that Article. The statement not only identifies the breach, but also indicates how it is to be remedied.

61. The Judgment also comments negatively, in paragraph 50, on the place and context in which the statement was made, indicating that it was at a conference not directly concerned with negotiations seeking nuclear disarmament — at the Second Conference on the Humanitarian Impact of Nuclear Weapons — as distinct from a conference on negotiating nuclear disarmament. This is a strange criticism because the questions that arise from the humanitarian impact of nuclear weapons cannot be divorced from the fulfilment of obligations under Article VI of the NPT,

[50] Statement by Minister Alistair Burt, Parliamentary Under-Secretary of State, United Kingdom of Great Britain and Northern Ireland, to the UN General Assembly on Nuclear Disarmament, 26 September 2013, as referred to in POUK, p. 43, para. 98, and Ann. 6; see also MMI, para. 90 and Ann. 69.

as is indicated clearly in the first line of the Preamble to the NPT, which notes that the States parties were mindful of "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".

62. The absence of the United Kingdom from the meeting is immaterial. While awareness is not a requirement for the finding that there is a dispute, it is reasonable to assume that the United Kingdom was aware of the Marshall Islands' statements. The United Kingdom argues that the Marshall Islands made no attempts to bring the statements to its attention. The majority has dismissed the United Kingdom's argument that there must be a record of bilateral exchanges. It is beyond question that modern technological developments have made communication more certain, quicker and, in many cases, instantaneous. It has done away with classic images of how statements and positions of one State may be brought to the attention of another. In today's world, statements of this nature are rapidly reported and made widely available in various media. Given the importance that the United Kingdom has confirmed that it attaches to this question[51], it is hard to believe that the Marshall Islands' statement escaped its attention. It is safe to assume that, by the very next day at the latest, a copy of the statement would have been on the desk of an officer in the United Kingdom's Foreign and Commonwealth Office.

63. I make it clear that the thesis advanced by this opinion is that awareness is not a prerequisite for determining the existence of a dispute, but it is certainly noteworthy that, in any case, the United Kingdom's position would fall within the parameters of the test set out by the majority. The latter part of the test in paragraph 41 — "could not have been unaware" — invites an objective examination based upon a standard of reasonableness. In the modern world of communications technology, it is reasonable to conclude that the Marshall Islands' statement would not have escaped the United Kingdom's attention. Thus the United Kingdom could not have been unaware that its views and conduct here were opposed by the Marshall Islands.

64. I now turn to look at whether an objective assessment of the Parties' statements and conduct evidenced positive opposition as at the date of the Application. As noted by Judge Morelli, a course of conduct, inconsistent with the other party's position, may evidence positive opposition. Consistent with the position taken in this dissenting opinion, this assessment is made on the basis that awareness is not a requirement for

[51] Sir Daniel Bethlehem on behalf of the United Kingdom confirmed: "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" (CR 2016/7, p. 9, para. 3 (Sir Daniel Bethlehem)).

finding a dispute, and that positive opposition may be deduced without reference to any mental element.

65. At the date of the Application, there was clearly a dispute about the manner in which the United Kingdom's obligation was to be discharged: whereas the Marshall Islands favoured a comprehensive multilateral approach at that time, calling for "total nuclear disarmament"[52], the United Kingdom prioritized a step-by-step approach. The following evidence presented to the Court are indicia of these positions:

(i) the public position taken by the United Kingdom on the Open-Ended Working Group *(OEWG)* when it was established by the General Assembly in December 2012, when the United Kingdom noted several concerns, including relating to working methods and budgetary impact, and that, as a result, the United Kingdom would not support "the establishment of the OEWG and any outcome it may produce", as well as its refusal to participate in the working group's deliberations[53], which the Marshall Islands views as evidence of the United Kingdom's "systematic opposition" to the commencement of multilateral negotiations on complete nuclear disarmament[54];

(ii) the statements of the Parties on 26 September 2013, at the High-Level Meeting of the General Assembly on Nuclear Disarmament, where the Marshall Islands "urge[d] all nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament", and the United Kingdom's expression of regret about the "energy . . . being directed towards initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention";

(iii) the statement of the Marshall Islands at Nayarit in 2014.

And the following evidence after the date of the Application confirms this position:

(i) the United Kingdom delegation's statement on 9 December 2014 at the third International Conference on the Humanitarian Impact of Nuclear Weapons, hosted by the Austrian Foreign Ministry in Vienna:

[52] MMI, p. 18, para. 25, where the Marshall Islands argues that the United Kingdom has "continuously and actively oppos[ed] efforts of a great majority of the States of the world to initiate negotiations that are to lead to total nuclear disarmament".

[53] Explanation of Vote, 6 November 2012, MMI, p. 38, para. 77 and Ann. 60.

[54] CR 2016/5, pp. 46-47, paras. 6-8 (Grief).

"The United Kingdom agrees that we must also pursue the goal of a world without nuclear weapons, and we are active here too. Some have argued that the way to this goal is to ban nuclear weapons now, or to fix a timetable for their elimination. The United Kingdom considers that this approach fails to take account of, and therefore jeopardises, the stability and security which nuclear weapons can help to ensure. The United Kingdom believes that the step-by-step approach through the NPT is the only way to combine the imperatives of disarmament and of maintaining global stability."

(ii) On 14 January 2015, in answer to a question in Parliament about the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Foreign and Commonwealth Office minister, Tobias Ellwood, declared: "as stated at the Conference, the United Kingdom will continue to follow the step-by-step approach to disarmament through the existing UN disarmament machinery and the Nuclear Non-Proliferation Treaty."

(iii) The United Kingdom's Report on the implementation plan of the 2010 NPT Review Conference, dated 22 April 2015, in which the United Kingdom stated that it:

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

. . . . . .

We remain determined to continue to work with partners across the international community to prevent proliferation and to make progress on multilateral nuclear disarmament, to build trust and confidence between nuclear and non-nuclear weapon States, and to take tangible steps towards a safer and more stable world, in which countries with nuclear weapons feel able to relinquish them.

The United Kingdom has a strong record on nuclear disarmament. We have steadily reduced the size of our own nuclear forces by well over 50 per cent since our Cold War peak and since 1998 all of our air-delivered nuclear weapons have been withdrawn and dismantled."[55]

[55] National report on the implementation of actions 5, 20, and 21 of the action plan of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Report submitted by the United Kingdom, 22 April 2015, pp. 1-2.

66. The Parties also take opposite views as to whether or not the United Kingdom's conduct in respect of its nuclear arsenal complies with the United Kingdom's international obligations. The United Kingdom has confirmed its view that the replacement of the Trident System is in compliance with its NPT obligations, for example:

(i) David Cameron, during a Parliamentary Debate on 19 October 2010, stating the Government's position on whether the replacement of the Trident nuclear system was to be regarded as illegal under the terms of the NPT: "[o]ur proposals are within the spirit and the letter of the non-proliferation treaty"[56].

(ii) Letter from the Ministry of Defence, dated 27 September 2013: "[t]he renewal of our nuclear deterrent is fully consistent with our obligations under this treaty [i.e., the NPT]"[57].

(iii) In a Research Paper of the House of Commons, entitled "The Trident Successor Programme: An Update", it is stated:

> "Successive Governments have insisted that replacing Trident is compatible with the UK's obligations under the NPT, arguing that the treaty contains no prohibition on updating existing weapons systems and gives no explicit time frame for nuclear disarmament"[58].

The Marshall Islands argues the contrary: that the United Kingdom's qualitative improvement and maintenance and extension of its nuclear weapons system are in breach of Article VI. The substantiation of the Marshall Islands' allegations, and the legality of the United Kingdom's actions vis-à-vis Article VI of the NPT, are issues for the merits. However, the divergent positions of the Parties on this issue are sufficient to effect a dispute between the two countries. In this respect, the most important aspect of the obligation under Article VI of the NPT is that States should pursue negotiations in good faith.

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[56] HC Deb., 16 October 2010, cl 814, cited at WSMI, p. 17, para. 38, http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101019/debtext/101019-0001.htm.

[57] Letter sent by the Minister for State for the Armed Forces, Andrew Robathan, 27 September 2013, cited at WSMI, p. 17, para. 39, https://www.gov.uk/government/publications/mod-response-about-the-uks-nuclear-deterrent.

[58] The Trident Successor Programme: An Update, Commons Briefing papers SN06526, 10 March 2015, p. 14, cited at WSMI, p. 17, para. 39, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06526#fullreport.

67. The analysis in this opinion shows that there was a dispute between the Parties as at the date of the Application. It is clear that the Parties had different views as to the content of and the United Kingdom's compliance with its obligations. This includes the speed and manner in which negotiations were to take place, as well as the United Kingdom's actions in respect of its nuclear arsenal. This conclusion is confirmed by the position taken by the Parties during the proceedings. The United Kingdom, in its preliminary objections, noted that it "considers the allegations [of the Marshall Islands regarding the United Kingdom's breach of Article VI of the NPT and parallel customary obligations] to be manifestly unfounded on the merits"[59].

VIII. Conclusion

68. The majority decision in this case represents a conspicuous aberration and an unwelcome deviation from the Court's long-applied position on this question. International law, like any other branch of law, is not static and some of the greatest developments in history would not have taken place but for the dynamism of law. But where current law can be applied to serve the interests of the international community as a whole, such a dramatic change is only warranted if there is a compelling consideration in favour of doing so. Indeed such an approach is confirmed by the Court's own holding that:

> "To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."[60]

69. The majority has advanced no such reasons. Its holding today has placed an additional and unwarranted hurdle in the way of claims that may proceed to be examined on the merits. In so doing, it has detracted from the potential of the Court to play the role envisaged for it as a standing body for the peaceful settlement of the disputes and through this function, as an important contributor to the maintenance of international peace and security. This conclusion is rendered even more telling by the subject-matter of the dispute before us today.

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[59] POUK, p. 3, para. 5. Discussed by Marshall Islands, e.g., CR 2016/9, p. 17.

[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 428, para. 53.

70. Seen in the light of the considerations set out in Sections I and II of this opinion, one would be forgiven for concluding that, with this Judgment, it is as though the Court has written the Foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive issues such as nuclear disarmament.

(Signed) Patrick ROBINSON.

DISSENTING OPINION OF JUDGE CRAWFORD

Jurisdiction of the Court under Article 36 (2) of Statute — Existence of a dispute — Awareness or objective awareness not a legal requirement — No prior negotiations or notice necessary before seising the Court — Dispute in principle to exist at the time of Application — Flexible approach — Finding of dispute may be based on post-Application conduct or evidence — Mavrommatis *principle — Existence of multilateral dispute — Existence of dispute between Marshall Islands and the United Kingdom.*

Monetary Gold *objection — Issue for the merits.*

I. Introduction

1. This is the first time that the International Court of Justice (or its predecessor) has rejected a case outright on the ground that there was no dispute at the time the Application was lodged. In determining whether there was then a dispute, the Judgment imposes a new requirement of "objective awareness", which I shall use as a shorthand for the rather awkward phrase "aware, or could not have been unaware" (Judgment, para. 41). But a requirement of objective awareness is not to be found in the case law of the Court. The established test for a dispute does not require a high formal threshold to be met, nor an analysis of that indefinite object, the state of mind of a State. It simply requires, as the Permanent Court put it early on, a "conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). A more recent formulation is that one party's claim must be "positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; see Judgment, para. 37).

2. In this opinion, I first discuss the case law on the meaning of "dispute" within Article 36 (2) of the Court's Statute. The key point is that the test for a dispute has always been a minimum one, not a demanding threshold. The Court has been flexible about the ways in which it can be satisfied, and has referred to post-Application conduct for various purposes of jurisdiction and admissibility. In the case of what I will term a "multilateral dispute", such flexibility is particularly called for. I will then

explain why, applying this test, a dispute existed here between the Marshall Islands and the United Kingdom at the time the Application was lodged.

II. The Threshold for a "Dispute" and the Objective Awareness Requirement

3. The case law of the Court and its predecessor clearly shows that the threshold for establishing a dispute is a low one. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court held that "a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views . . . this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14). Similarly, in the *Factory at Chorzów* case, the Court stated

> "that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 11).

In East Timor, this Court reasoned simply, "Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute." (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100.) In none of these cases was there any analysis of whether the Respondent was aware of the Applicant's claim before it was filed. The rationale behind requiring a legal dispute is to ensure that the Court has something to determine: it protects the Court's judicial function which, in a contentious case, is to determine such disputes.

4. The Court now adopts a requirement of objective awareness, but for no persuasive reason. It relies heavily on a judgment which had not been delivered at the time of oral argument in this case: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 March 2016. But that decision is not authority for the objective awareness requirement: the Court simply observed that, as a matter of fact, Colombia knew of the existence of the dispute. It said:

> "The Court notes that, although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged viola-

> tions of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of the Parties . . . Colombia could not have misunderstood the position of Nicaragua over such differences." (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73.)

5. At no point did the Court say that awareness was a legal requirement. Rather it repeated that it must objectively determine whether there is a dispute based on "an examination of the facts. The matter is one of substance, not of form" (*ibid.*, p. 27, para. 50). It is instructive to compare this short statement of law on the requirement of a dispute with the lengthy statement in the present case (Judgment, paras. 36-43), which effectively transforms a non-formalistic requirement into a formalistic one through the use of the term "awareness".

6. While the term "awareness" has sometimes been used in other cases in deciding whether there was a dispute, it has never been stated as a legal requirement, only as a description of the factual situation (see, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 109-110, para. 87; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 253, para. 30). Awareness is relevant as a matter of fact in determining whether a dispute exists. But that does not mean that it is a necessary legal component without which a dispute cannot exist.

III. The Court's Flexible Approach to the "Dispute" Requirement: in Principle

7. In its earlier case law, the Court has shown flexibility in deciding on the existence and scope of a dispute. *Mavrommatis* marks the beginning of this tradition, holding that "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). I pause to note that this generalized reference to municipal law is hardly accurate today. While approaches to civil jurisdiction and civil

process of course vary, they are undoubtedly less formalistic than they were 90 years ago[1]. But the Court appears to be proceeding in the opposite direction.

8. The flexibility principle was best expressed in its modern form in *Croatia* v. *Serbia*:

> "However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81, hereinafter "*Croatia* v. *Serbia*".)

This has led the Court to adopt a broad discretion, applied in *Mavrommatis Palestine Concessions* and in many cases since, which allows it to overlook defects in the Application when to insist on them would lead to circularity of procedure. This was formulated in *Croatia* v. *Serbia* in the following terms:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Ibid.*, p. 441, para. 85.)

9. Accordingly, the Court applied the *Mavrommatis* principle (as I will call it) and decided to proceed to the merits, even though the Respondent, Serbia, was not a member of the United Nations, and thus Article 35 (1) of the Court's Statute was not satisfied at the time Croatia filed its Application. This condition was subsequently met by Serbia's admission to the United Nations. The decision is all the more remarkable in that it applies the *Mavrommatis* principle to a situation where, because of a subsequent Serbian reservation to Article IX of the Genocide Convention, it was likely no longer open to the applicant State to recommence proceedings. It was enough that, at some time in the interim, the applicant could have re-filed its application (see the separate opinion of Judge Abraham, *ibid.*, pp. 539-542, paras. 49-55). Evidently the decision puts the emphasis on the "sound administration of justice", prioritizing substance over form (*ibid.*, p. 442, para. 87).

[1] See, e.g., J. A. Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000), esp. Chaps. 2, 17.

10. The Court in the present case discards this tradition of flexibility. As well as insisting on a stringent requirement of "awareness", it departs from past holdings that "the Court must *in principle* decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings" (*Croatia* v. *Serbia*, p. 438, para. 80 (emphasis added)); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). The words "in principle" allow for some nuance in the application of the rule. By contrast, the approach of the majority would give no meaning to them.

11. None of the cases dealing with the question of a dispute has treated the date of the application as fatal. Rather, the Court has relaxed the rule, referring to evidence before the date of the application and to the position of the parties during the proceedings without distinction, or relying only on the position of the parties during the proceedings, even though pre-application evidence was available (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 99, para. 22; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). While the Court here rejects the Marshall Islands' reliance on *Certain Property* with the explanation that the "dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application" (Judgment, para. 54), the Court in that case was clear that the conclusion that there was a dispute was reached solely on the basis of the statements made "in the present proceedings", and that the position of Germany in a letter and in bilateral consultations was only of "evidentiary value *in support* of the proposition that Liechtenstein's claims were positively opposed by Germany and that this was recognized by the latter" (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25, emphasis added). In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held there was a *broader* dispute between the parties by reference to Nigeria's equivocation with respect to the Cameroonian claim (pre- and post-application) and in particular its answer to a question asked by a judge at the oral hearing (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 316-317, paras. 91, 93). The Judgment here also fails to explain its departure from *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*. While the Court in that case was focused on whether the dispute fell within the scope of the compromissory clause, it could not get to this question before first determining that there was such a dispute, which it did so solely on the basis of post-application conduct: "by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between

them." (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 28-29; see Judgment, para. 54).

12. Commentators on the Statute endorse the flexible view. According to Rosenne, the Court's jurisdiction must normally be assessed as at the date of the filing of the Application instituting the proceedings, but he and Kolb both agree that the *Mavrommatis* principle applies to the question whether a dispute exists as at the critical date.

> "The Court will not allow itself to be hampered by a mere defect of form the removal of which depends solely on the party concerned, for example where proceedings are instituted shortly before the entry into force of the title of jurisdiction for the parties concerned, so that a new application in identical terms could be filed after the relevant date had come." (Shabtai Rosenne, *The Law and Practice of the International Court: 1920-2005* (4th ed., 2006), pp. 510-511.)

Similarly, Kolb says:

> "before the parties seise the Court, there must at least be the beginnings of a dispute. The definitive dispute can, however, crystallize later, in the course of the proceedings. And it can equally well be modified or evolve as the case progresses.
>
> . . . . . .
>
> It is certainly right to say that the institution of proceedings does not automatically create a dispute. If it did, the distinct requirement that a dispute exists would be devoid of all justification and value.
>
> . . . . . .
>
> [T]he *Mavrommatis* principle discussed above also applies . . . It remains necessary to consider whether the conditions for bringing a case are satisfied at the moment the case is brought to the Court, although 'it would always have been possible for the applicant to re-submit his application in the same terms after.'. . . It is however, unnecessary to oblige the claimant to start again the case by a new application, for want of a dispute at the initial critical date. This would be an excessively formalistic exercise, with no significant effects except to increase the administrative burden on the Court and the parties." (Robert Kolb, *The International Court of Justice* (2013), p. 315.)

13. Since 1922, there have been three occasions on which the absence of a dispute has resulted in the Court or its predecessor determining that

it could not hear part of a claim. In each, there had been prior correspondence or statements but the applicant later sought to add other issues or claims. In such a case, it was open for the Court to focus on what the parties had previously treated as the gist of the dispute. The absence of any discussion of the additional claim, in a context in which the parties were conducting bilateral discussions on a closely related matter, showed that there was in truth no dispute over the additional claim.

14. In *Electricity Company of Sofia*, the Permanent Court considered that the claim by Belgium against a Bulgarian tax was inadmissible (*Electricity Company of Sofia and Bulgaria [Belgium* v. *Bulgaria], Preliminary Objection, 1939, P.C.I.J., Series A/B, No. 77*, p. 83). In that case, there had been a letter sent by Belgium to Bulgaria on 24 June 1937 clearly notifying it of the other matters that were ultimately brought to the Court but ignoring the tax claim. In that context, it was open to the Court to determine that there was no dispute on the additional issue.

15. In *Belgium* v. *Senegal*, the Court determined that there was no dispute as to whether Senegal had breached a customary international law obligation to bring criminal proceedings against Mr. Habré for crimes of humanity allegedly committed by him, including torture, war crimes and genocide. The Court concluded that "[i]n the light of the diplomatic exchanges between the Parties . . . the Court considers that such a dispute did not exist on that date". (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 444, para. 54.) In particular, it noted that those exchanges did not refer to any customary international law obligation, but only to the treaty obligation under the Convention against Torture. Moreover, in a Note Verbale sent two months before filing its Application, Belgium did not mention any customary international law obligation, even though the Note Verbale otherwise set out clearly the dispute between the parties "regarding the application and interpretation of the obligations resulting from the relevant provisions of the [Convention against Torture]" (*ibid.*, p. 445, para. 54). Belgium had thus used the diplomatic channel to define the subject-matter and scope of its dispute with Senegal. In this context, it was open for the Court to infer that there was no dispute on the additional issue. Moreover, there was no need for the Court to apply a flexible approach, since it had already determined that it had jurisdiction over the treaty dispute as to the obligation to charge or extradite Mr. Habré, a matter closely related to the alleged customary international law obligation.

16. More recently, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court held that there was no dis-

pute over Nicaragua's claim that Colombia had violated Article 2 (4) of the United Nations Charter and the customary international law obligation prohibiting the use or threat of use of force. The Court there had relied on statements made by the highest representatives of the Parties to support its conclusion that a closely related dispute existed over Colombia's alleged breaches of Nicaragua's maritime rights (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 31-33, paras. 69, 73). As to the use of force, the Court stressed that Nicaraguan officials had expressly said that there was no issue, stating just eight days before the application was filed that the two countries "have not had any conflicts in those waters" (*ibid.*, p. 33, para. 76). Taking into account the conduct of the parties, it was open for the Court to conclude that no such dispute existed. As in *Belgium* v. *Senegal*, the Court may also have been influenced by the fact that the substance of the dispute as to the maritime rights of Nicaragua in the Caribbean Sea would be dealt with, so that it was not necessary to apply the *Mavrommatis* principle to find that a dispute had subsequently come into existence.

17. The United Kingdom itself accepted that some flexibility must be shown in certain types of cases. It said it did not

> "contend that there is an immutable, inflexible rule of international law applicable in any and all cases that requires the prior written notification of a claim as a precondition for the crystallization of a dispute . . . It is possible to conceive of cases in which the acute urgency of the matter, the nature and severity of the conduct that is the subject-matter of the claim, the character of the breach that is alleged, and a manifest appreciation of notice derived from the circumstances in issue of the opposing views of the parties, may suffice to crystallize a dispute." (CR 2016/3, p. 28, para. 47 (Bethlehem)).

It gave the example of a provisional measures application in a death penalty case. This makes good sense. Egregious conduct can create a dispute *ipso facto*, without the need for a letter before action or other communication.

18. Moreover, as the Court says here (but does not seem to apply), there is no requirement for formal notification. This was confirmed by the Court in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, where it rejected Colombia's argument based on the failure of Nicaragua to notify it through diplomatic channels (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72).

19. The Court here relies on the series of cases discussed above to bolster its conclusion and also relies on *Georgia* v. *Russian Federation*. Although this case is in line with the recent rise of formalism, it cannot be seen in the same terms as the Optional Clause cases. It involved a set of specific issues in relation to the Convention for the Elimination of Racial Discrimination (CERD), notably its compromissory clause, Article 22, which provides:

> "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

That clause stipulates a requirement of prior negotiation and/or other procedures (including arbitration) before the "dispute" can be submitted to the Court. Evidently the dispute must have existed, and have been the subject of negotiation, before that time. Moreover, in *Georgia* v. *Russian Federation* there could be no doubt that a longstanding dispute existed between the parties. Rather, the doubt was whether that dispute really concerned racial discrimination, however broadly defined, or whether Article 22 was being used as a device to bring a wider set of issues before the Court.

IV. Multilateral Disputes

20. In the present case, the Marshall Islands does not suggest that there were any of the normal indicators of a bilateral dispute, most obviously because there had not been any correspondence between the States or any bilateral discussion on the subject. Rather it argues that a dispute had arisen through statements made in multilateral fora.

21. *South West Africa* (preliminary objections) is crucial in this regard. There, the Court held that:

> "diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation. The number of parties to one side or the other of a dispute is of no

> importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346.)

That case involved a requirement for prior negotiation in the relevant compromissory clause. But the passage cited is also authority for the broader point that disputes can crystallize in multilateral fora involving a plurality of States. The Court in 1962 was sharply divided between those holding that a dispute in a multilateral framework is simply an aggregate of disputes, each to be assessed in its own right, and a broader view that some disputes can be genuinely multilateral. In the present Judgment, the Court does not deny that a dispute between two States may be demonstrated by multilateral exchanges, but it states that they must demonstrate that the claim of one party is opposed by the other (Judgment, paras. 39, 48). No doubt any multilateral dispute must ultimately be fitted within the bilateral mode of dispute settlement. But this does not require the Court to treat the underlying relations as bilateral *ab initio*.

22. It is now established — contrary to the inferences commonly drawn from the merits phase of *South West Africa* — that States can be parties to disputes about obligations in the performance of which they have no specific material interests. This much is clear from Article 48 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles). It is the case here, notwithstanding the Marshall Islands' historic connection as the location of nuclear weapons testing by the United States, and the resulting concerns of its Government and people about nuclear issues. The importance of the *South West Africa* cases lies in the recognition that a multilateral disagreement can crystallize for adjacent purposes as a series of individual disputes coming within the Statute.

23. Finally, I should say a word about Article 43 of the ILC Articles, on which the Respondent rather insistently relied. It is true, as the Court notes (Judgment, para. 45) and as the ILC's Commentary confirms, that Article 43 does not address the jurisdiction of courts or the admissibility of disputes. It nonetheless deals with an analogical question: notice in relation to a claim of responsibility of a State. But, as the Marshall Islands argued, there is nothing in the Commentary that prevents such notice

being given by filing an application. Article 43 is not a pre-notification requirement, it is a notification requirement.

24. The ILC Commentary relies in part on *Certain Phosphate Lands* to support the idea that there is flexibility in how notification may occur (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240). According to paragraph (4) of the Commentary on Article 43, "it is not the function of the articles to specify in detail the form which an invocation of responsibility should take"[2]. Nothing in *Certain Phosphate Lands* supports the proposition that a dispute must be notified (or that the respondent must be objectively aware of it) before it can be said to exist. Australia did not contest that the dispute existed, rather it queried whether the dispute had been submitted within a reasonable time, and sought to infer that Nauru's rehabilitation claim had been waived. In that context, it was relevant that Nauru had taken steps (limited and informal) to bring the matter again to Australia's attention.

V. The Present Case

25. Turning to the present case, I share the Court's view that a dispute cannot be created simply by the filing of an application (see Judgment, paras. 43, 54), because otherwise the requirement that a dispute exist would be completely nullified. Rather, the question is whether enough of the dispute was in existence prior to the Application here and whether the Court has enough flexibility to recognize it as a dispute.

26. To put it at its lowest, there was an incipient dispute between the Marshall Islands and the nuclear-weapon States at the time of Nayarit. This was not an accidental development, but the expression of a real underlying disagreement of a legal character as to the trajectory of Article VI and a corresponding legal obligation at customary international law (if one exists). The Marshall Islands is a very small State, with compelling individual interests vis-à-vis several of the nuclear-weapon States. But by the time of Nayarit, by stages, tentatively, but in time, the Marshall Islands had associated itself with one side of that multilateral disagreement, revealing sufficiently for present purposes a claim in positive opposition to the conduct and claims of the nuclear-weapons States, including the respondent State.

[2] The ILC rejected the Special Rapporteur's proposal that notification be in writing.

27. The Court here says the Nayarit statement was insufficient because (i) it did not name the opposing States, (ii) it did not specify the conduct that had given rise to the alleged breach by the Respondent, and (iii) it was delivered in a context not strictly relating to nuclear disarmament, since the title of the Conference was the "Humanitarian Impact of Nuclear Weapons", such that nothing can be inferred from the lack of reply by the United Kingdom (Judgment, paras. 48, 50, 57). These arguments impose too high a threshold for determining the existence of a dispute. There is no doubt that the United Kingdom is one of the "States possessing nuclear weapons": the United Kingdom publicly acknowledges that it has such weapons. Moreover, in a context in which the very scope of Article VI of the NPT and a corresponding customary international law obligation is the subject-matter of a disagreement articulated by a group of States, the Marshall Islands should not be required at this stage to particularize further the specific steps the United Kingdom should take or have taken. Finally, the Conference title itself included the words "Nuclear Weapons"; and one of its purposes was to discuss nuclear disarmament in order to prevent the devastating humanitarian impacts that nuclear weapons could cause. This is an appropriate multilateral context, and it does not dilute the force of what the Marshall Islands said, which was not limited to a single forgettable sentence:

> "As stated by representatives of our Government during the High-Level Meeting on Nuclear Disarmament, the United Nations must stop the spread of nuclear weapons, while securing peace in a world without nuclear weapons. We urgently renew our call to all States possessing nuclear weapons to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament.
>
> It has been almost 68 years since the General Assembly in its very first resolution established a mechanism for the elimination from national arsenals of nuclear weapons and other weapons adaptable to mass destruction. It has been more than 45 years since the conclusion of the Treaty on Non-Proliferation of Nuclear Weapons. Yet today, we still fear the day where we are forced to relive the horrors. We do not want other people to suffer the same consequences we did!
>
> Mr. Chairman, the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that States possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non Proliferation Treaty and customary international law. It also would 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."

28. Although the United Kingdom was not present at that Conference, the Court does not treat this as a significant factor. Both India and Pakistan *were* present, but the Court nonetheless concludes that neither State was objectively aware of the existence of a dispute with the Marshall Islands.

29. Moreover, the Nayarit statement must also be seen in the context of an earlier statement made by the Marshall Islands at the NPT Review Conference in 2010, at which the United Kingdom was present:

> "It should be our collective goal as the United Nations to stop the spread of nuclear weapons and to pursue the peace and security of a world without them.
>
> . . . . . .
>
> We are alarmed that, although almost all NPT members are achieving obligations, there are a small few who appear to be determined to violate the rules which bind them, and whose actions thus far appear evasive, particularly in testing or assembling nuclear weapons. We have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT — we urge, and expect, an appropriate international response . . . we urge nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament."

30. It is not necessary — and indeed would be inappropriate at this stage — to go into the substance of the conflict over Article VI of the NPT. However, the fact of that conflict is public knowledge, to which the Court need not be blind. Thus, for instance, the "New Agenda" Coalition, which currently comprises Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa, has, at least since 2013, condemned the failure by all State parties, particularly the nuclear-weapon States, to comply with the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. A 2014 Working Paper stated that it was "not acceptable" that the nuclear-weapon States

> "have refused to engage in or support meaningful discussions about the humanitarian impact of nuclear weapons, the follow-up process to the High-Level Meeting of the General Assembly on nuclear dis-

armament, or the Open-Ended Working Group on taking forward nuclear disarmament negotiations"[3].

The statement of the Marshall Islands should be viewed in the context of this broader multilateral disagreement.

31. For these reasons, in my view there was, as at the date of the Application in the present case, a dispute between the Marshall Islands and the respondent State as to the latter's compliance with Article VI of the NPT. That being so, it is unnecessary to consider whether any deficiency in that regard can and should be remedied in the exercise of the Mavrommatis discretion, recognized in *Croatia* v. *Serbia*.

VI. The *Monetary Gold* Principle

32. Finally, I should say something about what was perhaps the most plausible of the other objections to jurisdiction and admissibility made by the Respondent. This is the proposition that the Court lacks competence in a contentious case between State A and State B to determine that an extant third State, State C, is in breach of its legal obligations; if the case cannot be decided in consequence, because State C has not consented to jurisdiction, State A's claim is inadmissible. That proposition, originating in *Monetary Gold*, is now well-established (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America), Preliminary Question, I.C.J. Reports 1954*, p. 32; see also: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 114-116, paras. 54-56; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 259-262, paras. 50-55; *East Timor (Portugal* v. *Australia) Judgment, I.C.J. Reports 1995*, pp. 104-105, paras. 34-35). The case law has however set firm limits to the *Monetary Gold* principle. It applies only where a determination of the legal position of a third State is a necessary prerequisite to the determination of the case before the Court (see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 57-58, para. 116). An inference or

[3] Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 2 April 2014, available at: http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom14/documents/WP18.pdf, last visited, 14 September 2016.

implication as to the legal position of that third State is not enough: its position is protected by Article 59 of the Statute (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 260-262, paras. 54-55).

33. The *Monetary Gold* ground of inadmissibility is particularly sensitive to the precise basis of the Applicant's claim. The decision of a given case may or may not rest on a prior determination of the legal position of a third State depending on how the case is put. In the present case, *Monetary Gold* may well impose limits on the consequences that can be drawn from the Respondent's conduct, if indeed it is held to involve a breach of international law. But precisely what those limits are will depend on the ground of decision. It is true, for example, that the Court cannot order third States to enter into negotiations, and that one cannot negotiate alone. But a third State could breach an obligation to negotiate by its own conduct and the Court could determine as much. Everything depends on what the precise scope and application of Article VI of the NPT, or any parallel customary international law obligation, entail. This is at the heart of the dispute in the present case. But these are all issues for the merits.

(*Signed*) James CRAWFORD.

DISSENTING OPINION OF JUDGE *AD HOC* BEDJAOUI

[Translation]

Traditionally less formalistic jurisprudence — Reversal of jurisprudence — Excessive formalism — Lack of flexibility — Loss of clarity — Notification/"awareness" — Date of the existence of a dispute — Procedural defects — Silence of the Respondent — Exchanges before the Court — Sui generis *nature of nuclear disputes — Obligation to negotiate and to achieve nuclear disarmament — Objection not of an exclusively preliminary character — Undesirable consequences of formalism — International community — Sound administration of justice — Subjectivity.*

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I. Introduction

1. In six of its nine Applications, the Republic of the Marshall Islands asked the respondent States concerned to consent to the Court's jurisdiction for the purposes of those cases, the substance of which concerns major issues relating to no less than the survival of humankind. None of those six States responded to that invitation. That left only the three States — the United Kingdom, India and Pakistan — which are bound by their respective declarations recognizing the jurisdiction of the Court. And today those three remaining States, in their turn, by the grace of

these three decisions of the Court, have the satisfaction of being fully relieved of their duty to account for their conduct with regard to the nuclear arms race and disarmament. This latter outcome in respect of the three States, whereby they are declared to have no involvement in any dispute concerning nuclear disarmament, is in my view even more regrettable than the former, whereby the six other States, by their very silence, are spared from explaining themselves. In sum, however, either way, all the nine States possessing nuclear weapons today escape independent review of their conduct by human justice. That is deplorable. And it is all the more so since the Court had the vision, 20 years ago, to give the international community a strong incentive to believe that nuclear weapons are fundamentally and radically incompatible with international humanitarian law and that there is a twofold obligation, incumbent on all States, to negotiate and achieve nuclear disarmament.

* * *

2. In the proceedings introduced by the Marshall Islands against the United Kingdom, the Court has reached the conclusion that it does not have jurisdiction in the absence of a legal dispute between the Parties prior to the filing of the Application. According to its reasoning:

(a) it is not evident that the Marshall Islands and the United Kingdom hold clearly opposite views;
(b) this is especially so if the alleged dispute between them must exist at the date on which the Marshall Islands' Application was filed;
(c) the Court's tendency to show a large degree of flexibility when faced with procedural defects has no place in this case.

* * *

3. It has long been the practice of the Court to lay down the details of its procedure for determining the existence of a justiciable dispute. It repeated this practice just recently in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. Thus we know that the salient criterion is the making of a claim by one party to which the other party is positively opposed. We also know that the date to be taken into account in verifying the existence of a clear opposition of views between the two parties is that on which the application is submitted to the Court. Finally, we know that the existence of a dispute is a matter for *"objective"* determination by the Court: the matter is one of substance, not of form. Indeed, the Court itself summarized its jurisprudence as follows, in the above-mentioned case:

> "50. The existence of a dispute between the parties is a condition of the Court's jurisdiction. Such a dispute, according to the estab-

lished case law of the Court, is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons' (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). 'It must be shown that the claim of one party is positively opposed by the other.' (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.) It does not matter which one of them advances a claim and which one opposes it. What matters is that 'the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

The Court recalls that '[w]hether there exists an international dispute is a matter for objective determination' by the Court (*ibid.*; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58). 'The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form.' (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.)

. . . . . .

52. In principle, the critical date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44)." (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Car-*

ibbean Sea (Nicaragua v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-27, paras. 50 and 52.)

* * *

4. Although the Court has always adhered to a standard general definition of a legal dispute, it has not shown the same level of consistency in respect of the criteria for determining the existence of that dispute. A legal dispute continues to be defined as a *"clear difference of opinion or of interests"*, a *"disagreement on a point of law or fact"*, or a *"conflict of legal views or of interests"*. This definition is self-explanatory: the emergence of conflicting opinions, rights or interests setting two States at odds and placing them in opposition to one another, gives rise to a justiciable legal dispute within the meaning of Article 36, paragraph 2, of the Statute of the Court.

5. This uniformly calibrated definition having been established, however, the criteria for determining the existence of a dispute appear, especially in recent years, to be somewhat ambiguously applied. The most significant break from its jurisprudence can be seen in the Judgment of 1 April 2011 in the case between Georgia and the Russian Federation, in which the Court conducted a detailed examination of the parties' exchanges and identified an extremely narrow time frame for the dispute. Although the Court formally concluded that it lacked jurisdiction on the basis of an absence of negotiations between the parties — a condition contained in the relevant compromissory clause — it was, however, the restrictive approach adopted towards the criteria for determining the existence of a dispute which brought about that finding. In fact, the Court first precisely established the date on which the dispute arose, fixing it as 9 August 2008, that is to say, three days before the institution of the proceedings (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113) — the first time in its history that it had conducted such an exercise — and then declared that "it was only possible for the Parties to be negotiating the matters in dispute . . . [in] the period during which the Court found that a dispute capable of falling under CERD had arisen between the Parties" (*ibid.*, p. 135, para. 168).

6. The Court continued — and even reinforced — this tendency in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, when it declined to hear one part of the case, relating to obligations under customary international law, even though there was clearly a dispute on this point on the date of delivery of the Court's Judgment (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 445, para. 55; see also Judge Abraham's separate opinion in that case).

* * *

II. A Traditionally less Formalistic Jurisprudence

7. The Court's present approach, which pays a heavy price for a certain degree of formalism, could rightly be regarded as a move away from its traditional jurisprudence.

8. The latter clearly shows that the Court has maintained sight of the fact that it is the *"principal judicial organ"* of the United Nations, at the disposal of States for the settlement of their disputes. Since its establishment, the Court has sought to carry out its mission while *"keeping in step"* with the Organization, in order to remain faithful to its vocation of promoting peace and harmony among States.

9. In this respect, it has never considered itself to be inescapably bound by a formalism which might prevent it from reaching the just and reasonable solution that is desired. There was certainly good reason to praise the Court's clarity and its resourcefulness when it stated, in 1949, that it considered the United Nations to possess *"international personality"*; when it gave its opinion, in 1950, on the *Competence of the General Assembly for the Admission of a State to the United Nations*; when it expressed its view, in 1951, on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*; and, finally, when it stated in 1962 that, in its opinion, *Certain Expenses* incurred in the Congo and by the United Nations Force in the Middle East constituted expenditure of the Organization, to be borne by all Member States.

10. On its ever calm and confident path in the service of the international community, the Court would once again eloquently demonstrate, with its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, just how much finesse and skill it could employ in order to support the international organization to which it belongs, as well as the international community as a whole, which it has an overriding duty to protect.

11. While the effective practice of States creates international custom, the Court has also known exactly when to bear in mind that States in breach of a legal principle will always do their utmost to reassure the international community that they are in fact merely applying that principle. The Court thus interprets such an untruth, which is nothing more than the homage that vice pays to virtue, as the expression of an *opinio juris*, since even States which breach this principle recognize its existence.

12. This secularization of the Court, in the noblest sense of the term, is also apparent in the exercise of its contentious function. What stands out for me in the Court's 1970 Judgment in the *Barcelona Traction* case are its *obiter dicta* concerning *erga omnes* obligations which are binding on States and which therefore serve the international community as a whole. And how could I fail to mention the resounding Judgments of 1984 and 1986 in the case between Nicaragua and the United States, in which the Court broke away so spectacularly from any paralyzing formalism. Its 1986 Judgment on the merits is an academic handbook, better still, a major *"treatise of international customary law"*, and an extremely useful substitute for treaty law, when required.

13. Was it hoped to frustrate the Court's primary goal of applying the Charter to the subject of the non-use of force and self-defence? Such efforts were in vain. The Vandenberg reservation, invoked by the Respondent, aimed to undermine the Court's paths to the Charter, a multilateral treaty, which, the Respondent argued, the Court could not interpret in the absence of all the other parties to that instrument. The Court then took pleasure in elegantly and convincingly overcoming the obstacle in its path to deliver a judgment which was both beautifully constructed and a model of legal soundness.

14. Nor was the 1984 Judgment on jurisdiction and admissibility in that Nicaragua case the damp squib that was feared. The solution was certainly not to be found in the narrow confines of strict formalism. Making use of its ability to enforce a dynamic and concrete vision of what is just and reasonable, the Court acknowledged and confirmed the validity of Nicaragua's recognition of its compulsory jurisdiction by means of the optional clause in 1929, in spite of the uncertainty that appeared to surround it.

15. In short, the Court successfully avoided falling prisoner to the letter of the Charter and the lacunae of international law. It gave that law the vibrant colours of a true law of nations. Our Court, which nowadays enjoys a rich heritage more prestigious than words can say, has the necessary imagination to ensure that it always serves this enlightened form of justice.

16. Perhaps the Court did place some emphasis on maintaining a certain degree of what it considered worthwhile formalism at the end of the twentieth century: in 1994, in the case between Libya and Chad concerning the *"Aouzou strip"*, and in 1995, in the *East Timor* case. In the first, the Court strictly adhered to the 1955 Franco-Libyan Treaty, which delimited the zone; in the second, it focused just as sharply on the absence of the *"indispensable party"*.

17. However, it cannot be argued that the Court made a definitive move towards formalism in those cases, since its jurisprudence from the same era also includes the 1992 *Certain Phosphate Lands in Nauru* case, in which it threw off any shackles of that kind.

18. This quick and simplified overview of the Court's jurisprudence since its establishment leaves me somewhat saddened at the impression that might be left by today's decision in the present case.

* * *

19. In my view, it is all the more vital that the Court should endeavour to clarify how it determines the existence of a dispute, since this is a fundamental question on which both its jurisdiction and the exercise of its jurisdiction directly depend. Indeed, the Court has often stated that:

> "[t]he Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary

condition for the Court to exercise its judicial function." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55, and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.)

20. It thus seems to me absolutely essential for the Court to show greater consistency when determining the criteria for establishing the existence of a dispute and when applying those criteria to each individual case. No one would venture to question the Court's power to fix the objective criteria for determining the existence of a justiciable dispute or to apply those criteria to each particular case. The Court is perfectly entitled — indeed, it is the essence of its judicial function — to apply those criteria in either a strict or a flexible manner, according to the merits of the individual cases before it. But does it do so systematically? It does not appear so to me. Being entirely at liberty to apply the criteria it has itself identified, the Court is sometimes strict in its application and sometimes flexible, without fully justifying its choice; this creates a certain amount of legal uncertainty for States and a certain level of confusion for readers, none of them knowing why one case may benefit from the Court's understanding, when another cannot aspire to do so.

21. This first duty of consistency, while highly necessary, is not sufficient. In my opinion, the Court must also guard against fossilization. Being committed to the rational application of criteria does not preclude simultaneously remaining open to changing global concerns. The Court must therefore, on the one hand, ensure that it is keeping pace with its times by listening carefully to the world's dull clamour, and, on the other, maintain consistency in its jurisprudence, which demonstrates the difficulty of its mission. It is by no means a case of the Court accepting every new idea. That is the last thing it would do. *It is about knowing when and how to limit, or, alternatively, to expand, the application of the criteria at the root of the* "Mavrommatis" *and* "South West Africa" *Judgments*, and, *above all, explaining each time why it is necessary to favour flexibility or formalism in that particular case*. The jurisprudence would thus be readily understood.

22. For the moment, however, the greatest danger remains excessive formalism. Because in my view, the damage caused by the jurisprudence it inspires is immense when, as is the case here, it combines with a jurisprudence which is entirely unclear for the future. Moreover, no longer knowing whether tomorrow the Court will apply stricter or more relaxed criteria than today when determining the existence of a dispute does not simply constitute a loss of clarity: it evidently increases the risk of the arbitrary.

* * *

III. Notification/"Awareness"?

23. If we consider the question of the applicant's *"notification"* of the dispute to the respondent, it is clear from all of its traditional jurisprudence that the Court is genuinely reticent to make notification a precondition for the institution of proceedings. But today we are stepping into what is now a minefield. The clear skies that prevailed when the Court consistently recalled that there is no principle or rule in international law requiring the applicant to notify its claim to the respondent prior to filing its application are now filled with the menacing clouds of the 2011 decision — even though that was based on an optional compromissory clause — creating uncertainty and obscuring the general view.

24. It should first be noted that the United Kingdom does not seem to be far from sharing the Court's view when the latter states that:

(a) "[p]rior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides"; and

(b) "'although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition' for the existence of a dispute" (Judgment, para. 38).

25. We are thus perfectly assured that international law does not require prior negotiations or advance notification. But it is not on these points alone that the Court and the United Kingdom share their views.

Leaving this legal territory and turning to the facts, the United Kingdom observes that if these prior negotiations and notification had taken place, they would at least have provided material proof that the dispute exists. That is entirely true, and there is nothing to prevent the Court from acknowledging that the United Kingdom is factually correct, but this does not in any way alter the legal situation, which is characterized by the absence of any precondition for the institution of proceedings by the Marshall Islands.

For its part, the Court went beyond these shared views and added the following remark, which in itself appears problematic:

> "The evidence must show that the parties 'hold clearly opposite views' with respect to the issue brought before the Court . . . As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists *when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant.*" (*Ibid.*, para. 41; emphasis added.)

26. I would point out that the Court thus seems to establish a direct and — it would appear — automatic correlation between *awareness* of an

opposition of views and the existence of a dispute. With this paragraph, the Court seems to suggest that it is not imposing an additional condition. The "awareness" element is nothing more than a simple observation that is inevitably inferred from the evidence. Yet the Court is not content to mention this purported causal link in paragraph 41 only; it also refers to it on two further occasions, in paragraphs 52 and 57 of its decision. I would also point out that, in the Court's reasoning, what is essential is the fact that the respondent should *"be aware"*. The Court has not attempted to explain how or from what source the respondent should obtain its information. It is careful not to state that the respondent must be informed by the applicant, which would directly revive the concept of *"notification"* as a precondition for the existence of a dispute. Yet nor does it exclude the possibility of this information coming from the applicant! These two things — *"no prior notification (by the applicant), but prior knowledge (by the respondent)"* — can only ever form a difficult and uncertain partnership.

27. Whether we like it or not, today's Judgment establishes the *"awareness"* of the presence of opposing views as a sort of precondition. This new requirement is so vaguely and imprecisely defined that it is open to all manner of interpretations. Are we not thus witnessing the resurrection by degrees of the *"notification"* concept? With today's decision, we seem to be agreeing to reduce the most salient features of the formal and quasi-notarial notification process by simply requiring proof that the respondent was *"aware"* or had somehow become conscious of the existence of the dispute. I find it difficult to understand why, in its reasoning, the Court has conceived of something which inevitably and regrettably becomes a kind of precondition that forms an obstacle to its jurisdiction.

28. However, if we accept the existence of this additional precondition, then why not apply it correctly? How can it be argued that the United Kingdom was not *"aware"* of the Marshall Islands' anti-nuclear views in opposition to its own nuclear conduct? Did the Respondent not know at that time that the Applicant had on 67 occasions suffered the radioactive fall-out from weapons testing on its islands by the United States; that, on account of that fact, it had instituted numerous legal proceedings in the United States; and that it had made its 2013 and 2014 statements at international events which were open to all?

29. Of course, neither the 2013 nor the 2014 statement of the Marshall Islands condemned the United Kingdom by name. They were aimed at all States possessing nuclear weapons, without distinction, as everyone knows. They did not, however, exclude the United Kingdom. Was it really reasonable to think that the Marshall Islands had omitted the United Kingdom from its general statement against nuclear States? An exclusion of this nature and importance cannot be the result of such a hazardous assumption.

30. To make a show of consistency, one could of course argue here that this *"awareness"* can be obtained by means other than notification.

But that would involve becoming mired in the complexities of a painstaking reasoning, to no avail. Extricating oneself from this difficulty would mean resorting to the clear reinstatement of the *"notification"* concept. And there would be little glory in worshipping today what was consigned to the flames yesterday.

31. Furthermore, how can the Respondent's level of *"awareness"* be assessed? Will the International Court, the expert in law, now also be required to become adept in psychology, so that it can probe the heart and mind not of an individual, but of a State, the respondent? And how could this unusual excursion into subjectivity be reconciled with the stated *"objective"* search for the existence of a dispute? And yet, until recently the Court had considered that "in determining whether a dispute exists or not, '[t]he matter is one of substance, not of form'" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72).

* * *

IV. Date of the Existence of a Dispute

32. In the present Judgment, the Court appears to follow its traditional jurisprudence closely, according to which: "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court" (para. 42).

33. This was decided in particular by the Court in the case between Georgia and the Russian Federation (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30), in which it declared: "[t]he dispute must in principle exist at the time the Application is submitted to the Court".

34. It seems to me, however, that in its traditional jurisprudence, the Court has avoided obsessively worshipping the critical date, if we consider that its decisions include the expressions *"as a general rule"* and *"in principle"*, which relativize the scope and importance which this date could have. It has thus examined the events *before* and *after* the critical date — to which I shall return later — in order to qualify the situation more precisely. In the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, when considering certain conditions posed for the admissibility of the Application, in that instance the one relating to the holding of negotiations, it decided that:

> "[t]he critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344). It may however be necessary,

> in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period." (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66.)

35. Thus, without changing or dismissing the concept of the critical date, the Court sensibly showed itself to be open to examining subsequent situations or events, particularly in order to "confirm" the existence of the dispute on the date proceedings were instituted (paragraph 43 of the present Judgment). This can only be applauded. Yet, after recalling its traditional jurisprudence, the Court states that:

> "neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings" *(ibid.)*.

36. Over and above this reversal on what are flimsy grounds, the Court's practical approach in relation to the critical date seems risky to me: as indicated above, it has refused, without convincing explanation, to take account of the evidence which arose after the date on which the proceedings were instituted and which attested to the existence of a dispute. In so doing, it establishes as an absolute dogma a solution that runs counter to its traditional approach, which was characterized by great flexibility, as reflected in its statement that the dispute must only "in principle" exist on the date that proceedings are instituted.

* * *

V. Procedural Defects

37. Today's decision by the Court that it does not have jurisdiction on the grounds of the supposed absence of a dispute between the Parties is, in my view, all the more unwarranted in that it moves away from the Court's traditional legal philosophy in the area described below. Indeed, in its aim of serving the international community and fostering peace between nations, the Court has always taken care to avoid becoming focused on procedural defects which appear to it to be reparable. In so doing, it has shown understanding, allowing for a touch of flexibility in order to deliver justice that is more accessible, more open and more present. It has always rejected the simplistic and unhelpful solution of sending the parties away, leaving to them the task, and the trouble, of repairing the formal defects which have been identified and then returning to the Court, if they are still in a position to do so.

38. This traditionally liberal jurisprudence dates back many years; it was formed in the days of the Permanent Court of International Justice. In the *Mavrommatis Palestine Concessions* case, in which the Applicant filed its Application several months before the Treaty of Lausanne granting it access to the Permanent Court entered into force, the Court observed the following:

> "it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even . . . if the application were premature . . . this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

39. The Permanent Court adhered to this logical and reasonable jurisprudence the following year, clearly and concisely stating that it "cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

40. The present Court has been wise enough not to depart from this liberal jurisprudence by becoming attached to simple procedural defects (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28). In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it showed how absurd it would be to require the Applicant to return to the Court after duly rectifying a procedural flaw: "[i]t would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty [of Friendship, Commerce and Navigation of 1956], which it would be fully entitled to do" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83). It also referred to the jurisprudence of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, which I have just cited.

41. The Court would stand by this perfectly consistent jurisprudence on a further occasion, subsequently reiterating that it "could not set aside its jurisdiction . . . inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 26).

42. Similarly, in the *Croatia* v. *Serbia* case, although Serbia did not become a party to the Statute of the Court until several months after the initiation of proceedings against it by Croatia, the Court did not penalize the premature character of the Application. It indicated that the deficiency on this occasion related to the Respondent's standing to participate in proceedings before the Court, that is to say to a "fundamental question". Nevertheless, even in this instance, the Court refused to see its jurisdiction compromised by a reparable procedural defect (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85). The Court was right to recall that:

> "like its predecessor, [it] has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction" (*ibid.*, p. 438, para. 81).

43. In the *Croatia* v. *Serbia* case, there is no doubt in my mind that the Court made the correct decision by freeing itself from any excessive formalism and pragmatically pursuing the goal of the sound administration of justice:

> "[w]hat matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Ibid.*, p. 441, para. 85.)

44. Thus, whether it is the applicant or the respondent, whether it is a case of proceedings being instituted prematurely or of accessing the Court too early, the Court has consistently and legitimately taken care to avoid allowing its jurisdiction to lie fallow because of a wisp of straw or a tuft of wild grass, so easily removed at any stage. As a result, it has created sound jurisprudence which has stood the test of time and demonstrated its flawless consistency over a period of almost 90 years. In addition, the decisions in question relate to particularly fundamental issues, concerning either the jurisdiction of the Court itself, or the access to the Court of one of the two parties. It is this jurisprudence that the 2011 Judgment started to destroy, with the deathblow being delivered by the *Belgium* v. *Senegal* case.

45. In the present proceedings, the Court has once again dispensed with its traditional jurisprudence, despite the latter's wisdom. The statements made by the Marshall Islands in 2013 and 2014 were addressed to the entire world and in circumstances which make me question, on the

one hand, the Court's analysis, which finds that neither statement mentions breaches by the United Kingdom of its obligations under the NPT or customary law and, on the other, the good faith of a Respondent which claims to be unaware of those statements.

46. While the Marshall Islands' statement of 26 September 2013 may seem quite general, that of 13 February 2014 in my view crystallized the dispute and constituted a complaint by the Marshall Islands against the conduct of the United Kingdom, which, although not mentioned by name, is undoubtedly one of the nations at which the statement is aimed, since, like those nations, it possesses nuclear weapons. As regards the "very general content" and "context" to which the Court refers in order to demonstrate that the 13 February 2014 statement is insufficient, I can only wonder about the validity of these vaguely defined criteria which will have unforeseeable consequences for the future. I am all the more inclined to take account of those statements, or at least of the second, since the Court has often been careful not to impose excessively narrow criteria in its jurisprudence for determining the existence of a dispute. Indeed, I believe the Court would have been better advised to avoid such formalism.

47. The United Kingdom did indeed note that it was not represented at Nayarit, Mexico, when the Marshall Islands made its statement of 13 February 2014. But I find it very hard to believe that a nuclear weapon State of international standing and importance, such as the United Kingdom, could know nothing whatsoever about a debate on nuclear weapons at an international conference, wherever in the world it might have been held. Moreover, while the United Kingdom did not have a representative at Nayarit, Mexico, it made a point of duly participating in the following conference, in Vienna, Austria — it would be surprising if it had attended the latter conference without going to the trouble of finding out what was said in the debates at the previous one.

48. I lament the fact that the majority of the Court considered those statements insufficient to crystallize the existence of a legal dispute. All the Marshall Islands needs to do tomorrow is to send a simple Note Verbale to the Respondent with a few lines expressing its opposition to the latter's nuclear policy, in order to be able to resubmit the then formalized dispute to the Court. The question even arises as to whether, in view of the statements made before the Court, it would be necessary to transmit such a Note Verbale. It was neither coherent nor judicious for the Court to focus on easily reparable procedural defects, when it has long dealt with these with a welcome degree of flexibility. It is sinking, together with the international community, into an abyss of unwelcome and artificial rigidity.

49. In this case, which the Court is so prematurely and regrettably bringing to an end today, what critical obstacle could have prevented it from bearing with the belated nature of the Respondent's opposition, since the Marshall Islands could always resubmit its Application to the Court?

* * *

VI. Proof by Inference. Proof by the Interpretation of Silence

50. Contrary to the approach followed in this case, the Court has on other occasions demonstrated flexibility and common sense, turning a respondent's *silence* or *failure to respond* to good account and even proceeding by *simple deduction*, in order to conclude that a dispute exists. That puts the Court's methods of analysis and formalism at opposite ends of the spectrum, as is clearly confirmed by certain aspects of its traditional jurisprudence.

51. For instance, in its 1988 Advisory Opinion on the *Applicability of the Obligation to Arbitrate*, the Court interpreted the failure to respond of one party to a treaty as a rejection of another party's complaint, and thus as an opposition of views and proof of the dispute's existence:

> "where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty" (*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 28, para. 38).

52. In its pursuit of common sense, the Court has gone a step further, by not excluding the use of deduction from its methods of analysis: "[i]n the determination of the existence of a dispute . . . the position or the attitude of a party can be established by inference" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

53. The Court appeared to take the same line in the *Georgia* v. *Russian Federation* case, when it declared that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). But that was doubtless just a dream . . .

54. And in its present Judgment, the Court sweeps aside its traditional jurisprudence regarding the interpretation of a respondent's silence in the face of a claim made by the applicant in an international arena, taking the view that the 13 February 2014 statement, in which the Marshall Islands accused States possessing nuclear weapons of breaching their international obligations, "[g]iven its very general content and the context in which it was made, . . . did not call for a specific reaction by the United Kingdom". And thus, "[a]ccordingly, no opposition

of views can be inferred from the absence of any such reaction" (Judgment, para. 50).

It seems to me that the Court has ventured to substitute itself for the United Kingdom, in order to justify the latter's silence in its place and, moreover, with reasons that no one can be certain were shared by that State. The Court thus seems to have had the privilege of uncovering the United Kingdom's secret motivations and does not hesitate to offer them up, with great authority, to the reader.

* * *

VII. Proof Provided by the Exchanges before the Court

55. As indicated above, the Court has made little effort in the present case to take full account of the circumstances following the filing of the Marshall Islands' Application. And yet, it was perfectly acceptable to rely on evidence arising subsequently, since the date of the evidence should in no way be confused with the date of the event to be proved. The Court seems to me to be perfectly entitled to take those later circumstances into account, circumstances which may shed light on the existence of the dispute at the time the Application was filed. It had the freedom to do so in this case, since the existence of a dispute was clearly apparent in the respective positions expressed by the Parties before the Court in the course of the proceedings. How can one conclude that a dispute does not exist, when one Party is complaining before the Court that the other has long been in breach of its international obligations, and the other Party denies that its conduct constitutes a violation of those obligations? I remain of the opinion that, in this case, the Parties' exchanges during the proceedings confirm the existence of the dispute on the date those proceedings were instituted. The exchanges that took place before the Court did not create the dispute anew. They merely *"confirmed"* its prior existence.

56. The Court has taken account of parties' exchanges during the proceedings in a number of cases, giving probative value to the statements made before it and deducing from those statements that a dispute exists (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 18-19, para. 25; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 316-317, para. 93; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29). While, as the Court strives to demonstrate, the circumstances of these cases are clearly different to those of the present case, this should not raise questions about the relevance of that jurisprudence: it illustrates the openness that the Court has shown on numerous occasions in order better to determine the parties' positions.

57. I see no compelling reason for the Court's refusal to take account of the Parties' opposing views, which it witnessed for itself. Is this not a regrettable way of departing from its own jurisprudence for no apparent reason?

58. Let us pause to consider the public delivery of the present decision. Is it not clear for all to see that, on the date when the Court is ruling on its jurisdiction, the dispute has taken on a more definite shape since the start of the proceedings? Has the Marshall Islands ceased to assert that the United Kingdom has breached and continues to be in breach of its obligation to negotiate with a view to nuclear disarmament? Has the United Kingdom grown weary of contending that it has taken and is taking steps to comply with that obligation?

* * *

VIII. *Sui Generis* Nature of any Nuclear Dispute

59. The Court has fittingly opened its decision with a beautifully simple presentation of the general historical background to the international community's efforts to bring about nuclear disarmament. It is just such a context which in itself foreshadows and signals the potential existence of a dispute. Indeed, the dispute submitted by the Marshall Islands, which aims at nothing short of protecting the human race from permanent annihilation by a terrifying weapon of mass destruction, should in itself have sounded an alarm for the Court. The Court has declared that a twofold obligation exists to negotiate and to achieve nuclear disarmament. It did so 20 years ago, on the basis of a treaty which had itself declared the same thing 30 years before. For 20 long years, it heard no more of that appeal. And then, one day, a non-nuclear State wishes to find out from another State, one that possesses nuclear weapons, why this already considerable delay appears to be continuing for even longer.

60. *This particular type of highly specific disagreement between a non-nuclear State and a nuclear State regarding the abolition of nuclear weapons is, in and of itself, the expression of a major dispute whose existence should* ipso facto *have been obvious to the Court.* Because what is the Marshall Islands seeking? That the international community and the Court itself should know why a decision enshrined 50 years ago in a treaty and confirmed 20 years ago by an opinion of the Court has yet to be performed. It is seeking an end to Article VI, an end to the NPT, through an end to nuclear weapons. Because, although the Non-Proliferation Treaty was extended in 1995 for an indefinite period of time, this was done in order to avoid having to extend it at regular intervals. The Non-Proliferation Treaty was not designed to stand the test of time.

61. The obligation contained in the NPT to negotiate and achieve nuclear disarmament was not intended to be a continuing one. Yet almost a half century has passed since it was established. The 1968 Non-Proliferation Treaty was designed to be *purely temporary* and intended to cease to exist as soon as possible. It had to be temporary, since it clashes head-on with the sacrosanct principle of the sovereign equality of States by creating among them some that possess nuclear weapons and others, which are nonetheless equally sovereign, that had forever to forgo possessing such weapons in their turn.

62. However, what is more, this Treaty is unequal, paradoxically, with the explicit *consent* of the non-nuclear-weapon States which constitute the vast majority of the international community and which, by this Treaty, give up a significant portion of their inherent right of self-defence, whilst the nuclear States retain theirs in its entirety. The NPT thus creates a major imbalance between States, which absolutely had to be limited in time.

63. Another feature of this *unequal* Treaty is that it would become *unlawful* if it were to extend indefinitely in time. It has a temporary role of achieving nuclear disarmament, before ceasing to exist forever. This was, and still is, understood by one and all. The aim of the Treaty is to lead to nuclear disarmament, a necessary condition for a return to the sacrosanct equality of States.

64. That is clearly the purpose and ultimate goal of the NPT, and should never be lost sight of. It means quite simply that as long as nuclear disarmament is not achieved, the Treaty will perpetuate an abnormal situation, infringing on the cardinal principle of equality between States. It just as simply means that the non-nuclear-weapon States have made a sacrifice and paid a high price for the achievement of the ultimate goal of nuclear disarmament, namely by renouncing their sovereignty. It is therefore clear that Article VI, placed back in the context of the Treaty, cannot signify a definitive loss of sovereignty as a result of never-ending negotiations on disarmament. In short, the perpetual extension of the NPT would be contrary both to its mission and to international law.

65. It is thus apparent that a reading of Article VI that focuses solely on a process of negotiation, without any reasonable prospect of achieving the desired outcome of disarmament, would deprive the whole Treaty of its true meaning and would forever prevent a return to the equality of States. That equality was sacrificed, or, to be more precise, its exercise suspended, solely to achieve nuclear disarmament. The non-nuclear States have been deprived of their sovereignty and it will only be restored to them on the day nuclear disarmament is achieved. This abnormal situation is not meant to be permanent. In freeing man from fear, nuclear disarmament will also free international law from its cage. The nuclear States have no right to continue this confinement. They have a peremptory obligation to *"conclude"* negotiations on nuclear disarmament.

66. It is true that Article VI does not set a deadline. But the very nature of negotiations on disarmament is so complex that it was out of the question to expect the authors of the Treaty to advance a definite date for their completion. This does not mean, however, that Article VI allows for negotiations that are open-ended with no guarantee of an outcome. Although the States parties decided, at the Fifth Review Conference in 1995, to extend the NPT indefinitely, it was above all to avoid taking the same decision again at each stage, since they know full well that the goal of nuclear disarmament will take a long time to achieve. They clearly never envisaged extending it endlessly, but over a finite, though as yet unknown, period of time. That it remained undefined is due to the very nature of disarmament.

67. Lastly, since the NPT is built on an obvious inequality between two groups of States, an inequality that is offset by an obligation to negotiate disarmament, is it really unreasonable to think that the nuclear States, by not bringing negotiations to a conclusion, are in breach of their obligations towards all the non-nuclear-weapon States and should therefore expect to find their international responsibility engaged? Is it unreasonable to infer the existence, before the Court, of a *"built-in"* dispute?

* * *

IX. An Objection not of an Exclusively Preliminary Character?

68. Furthermore, I would recall that the United Kingdom is the only one of the three respondent States to have seised the Court of *"preliminary objections"* within the meaning of Article 79 of its Rules. I am not unmindful of the opportunity that paragraph 9 of that provision might possibly have afforded the Court in these proceedings. Besides upholding or rejecting the preliminary objection, it may declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.

69. In a case as complex and important as this one between the Marshall Islands and the United Kingdom, I could perhaps have accepted a decision which reflected the Court's — after all highly legitimate — concern to avoid ruling prematurely on jurisdiction and admissibility. A basic and somewhat understandable desire for caution might well lead the Court to find, at this stage of the proceedings, that it is unable to reach a definitive conclusion regarding the existence of a dispute between the Marshall Islands and the United Kingdom. The Court might very well still require further clarification from the Parties. And knowing that, at this stage, it could not evaluate their conduct without addressing the merits, the Court might logically decide to wait for the merits stage before determining its position. In other words, the Court might have been more prudent to find that the question of the existence of a dispute was not of

an exclusively preliminary character. It failed to contemplate that, which is unfortunate.

* * *

X. The Train of Undesirable Consequences of This Decision

70. Has anyone foreseen the whole train of undesirable consequences that may well be unleashed by this decision of the Court? Has anyone considered that, before we see the day when the Applicant returns to the Court with an application which it has made fully compliant, the Respondent could completely escape the Court's jurisdiction? The Respondent, a sovereign State, is of course able to withdraw its optional recognition of the Court's jurisdiction, in accordance with the terms of its declaration, such a withdrawal being without effect on any pending proceedings to which that declaration applies. However, the new situation created today may encourage certain influential circles to ask it to renounce its declaration, or to amend it with an appropriate reservation, in order to prevent the Applicant's successful return to the Court. There is thus no point in allowing the applicant State the possibility of submitting an amended application if, in the meantime, the respondent State has withdrawn or modified its optional clause declaration so as to put itself beyond the reach of any claim of that applicant State.

71. Scholars have generally pointed to the very relative success of the optional clause accepting compulsory jurisdiction in the move towards a compulsory form of international justice. It is by means of that clause that the Marshall Islands has tried to seek from the United Kingdom an account of its actions in support of nuclear disarmament. But after this decision of the Court and with the ever-present risk of encountering a new impediment to jurisdiction as a result of the withdrawal or amendment of the optional clause, the Court should probably resign itself to seeing the United Kingdom's conduct in respect of nuclear disarmament escape for good any future scrutiny by the Court.

72. Nor is the applicant State spared from the damage caused by the Court's decision. It would indeed be rather futile to assure the Marshall Islands that it would be sufficient for it to address a few lines to the United Kingdom in a Note Verbale, and to improve the presentation of its Application a little by correcting some minor procedural flaws, in order to be able to return to the Court in a more commodious position. I think the Members of our Court are by far the best placed to know what international proceedings cost in terms of intellectual effort, financial outlay, loss of precious time, and moral and political energy. It has certainly cost the Marshall Islands a great deal in every respect, having come from the other side of the world to the Court, and it would certainly cost it a great deal more to approach this international Bench again, which is so distant both geographically and in legal terms. Was there some significant reason to subject the Marshall Islands, already ill-served by providence as

regards development and tragically invaded by man through radioactive contamination, to such an ungenerous fate? And if the Marshall Islands were to return to the Court, how could it be sure that it would not be confronted with an insurmountable obstacle in the shape of the United Kingdom's having withdrawn or modified in the meantime its optional declaration recognizing the compulsory jurisdiction of the Court?

* * *

73. And how does this decision of the Court serve the third losing party today, the international community? The world has been waiting for almost half a century — or more precisely, since 5 March 1970, the date the NPT came into force — for the announcement of the official opening of a universal conference tasked with negotiating the elimination of nuclear weapons! The Application filed by the Republic of the Marshall Islands reminds us all of this dangerous state of affairs, which leaves the way open for the nuclear arms race and postpones indefinitely the advent of a world free of nuclear weapons.

74. The three cases on which the Court has just ruled concern an issue of capital importance for the international community: nuclear disarmament. Since one sad morning in August 1945, nuclear weapons, an insane means of mass destruction, have left the entire human race living under a death sentence. For 70 years they have been part of *the human condition*. They enter into all calculations, all designs, all scenarios of international life. Since Hiroshima, fear has become man's first nature. It is therefore an overwhelming responsibility, as well as a great honour, for the Court to lend the international community the full weight of its experience and wisdom in order to help it avert the threat of war, war being nothing more or less than the failure of man and his intelligence. The international community is ready to believe, as Koskenniemi tells it, that *"the destiny of international law is to restore hope to mankind"*. It therefore somehow expects the Court to cure it of fear and to spare it from nuclear disaster.

75. That international community, which thus no doubt places too great a burden of responsibility on the Court, is likely to be heading for disappointment today. The decisions handed down by the Court today in these three cases reveal to international public opinion a world that is regrettably inconsistent, not only in terms of procedural jurisprudence, but also in respect of its substantive jurisprudence. What message is the Court leaving the international community when it decides, on what are exceedingly flimsy bases, moreover, to decline to exercise its jurisdiction in cases concerning the most crucial issues of nuclear disarmament, involving the very survival of the whole human race?

76. Today, looking at the Court's three negative decisions, all that the international community will take away is this new reality into which it has suddenly been plunged and in which, above all, *it will discern the enormity of the challenge presented by nuclear disarmament and how meagre and derisory are the arguments of the Court*.

77. It is a frustrating message that the Court is therefore leaving to an international community which is bound to remember that, 20 years ago, this very same Court, in contrast, gave it hope by sternly imposing the obligation on all States to banish nuclear weapons from the face of the earth.

78. At a time when the United Nations, in its resolution of 17 November 1989, had proclaimed the last ten years of the century, 1990-2000, as the "Decade of International Law", the Court, in its Advisory Opinion of 8 July 1996, made a valiant effort to show very clearly what the international community had to do as a matter of urgency to address the pitiful inadequacy of that international law in the face of the deadly threat of nuclear weapons. Showing a keen sense of its responsibilities, and with great honesty and simplicity, the Court laid bare the inability of contemporary international law to deal with these diabolical weapons. On this basis, the United Nations General Assembly, to which the Court's decision was primarily addressed, has since been able to call on all States, year after year, finally to enter into negotiations leading to nuclear disarmament.

79. And then all of a sudden, today, 20 years later, *because of a judicial decision that is particularly niggardly, pettily technical and largely impenetrable for the public at large*, the international community will wonder if 8 July 1996 was not just a misleading dream, as borne out by today's vacuous and abortive decision. And to deepen our despond still further, we shall have not just one negative decision — there will be three of them. They will thus repeat each other in order to hammer home the nightmare to an international community which remains captive to a deadly weapon that may well annihilate it one day.

80. What is more, these three decisions of the Court could not come at a worse time, with the five-yearly NPT review conferences failing to move forward, as was the case last year, in 2015, when the conference ended without any result. At a time when the United Nations is making an increasing number of urgent calls for the prohibition and elimination of nuclear weapons, at a time when the Organization is stressing the ethical imperatives for a world free of nuclear weapons, the international community will find it hard to "handle" the three judicial decisions handed down today.

* * *

81. The fourth losing party could be the Court itself.

82. I agreed to come one last time to serve this Court, which has given me so much during the 20 years of my life that I have devoted to it. I

hope now that I may be allowed the liberty, for a brief moment, to shrug off the robes of the professional lawyer that I have worn my whole life, in order to pay a final tribute to this venerable institution. A few days after the delivery of the Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, on 23 July at the Hague Academy of International Law, I declared my pride at belonging to this Court, which had set its seal on a judicial settlement that had long been marginalized by States; which had been able to take action to help maintain international peace; which had been capable of listening to the great anxieties which prey on the conscience of humankind, and of secularizing international justice. Following the 1996 Advisory Opinion, the approving gaze that civil society turned on the Court was eloquent proof that it was to enter the twenty-first century successfully. That pride remains, but it is also mixed with apprehension about the future.

83. The Court's recent tendency towards formalism, examples of which we have here, with regrettable consequences, obliges me to express my fears for this institution, whose mission is so essential; the Court risks being *"the fourth losing party"*, because by dismissing the Marshall Islands on the basis of a reparable procedural defect, it is undermining the sound administration of justice, on which its functioning depends.

84. If the Marshall Islands were to institute fresh proceedings against the United Kingdom, despite the cost and energy that would be required, the Court would be obliged to re-examine the numerous preliminary objections which would certainly be raised again by the Respondent. That kind of repetition would be contrary to the sound administration of justice, and that is one of the reasons why procedural defects which can be corrected have generally, at least until now, been tolerated by the Court. Would it also be appropriate to question the minimalism of the present Judgment, in which only the first objection is examined, even though it seems to be reparable? If the Marshall Islands returns before the Court, might it be dismissed once again, on another basis that could also perhaps be remedied?

85. Furthermore, by being unduly formalistic, the Court is letting down and disappointing the international community, and is likely to damage its reputation.

86. For the legal scholar, it is a truism to say that formalism plays a protective role when it comes to legitimate situations and interests, but that it can also be used as a weapon to destroy progress. In these three cases, the Court has overused this mode of reasoning to justify its positions. Its current practice of resorting to such an approach to international law is further compounded by the variable but unexplained manner in which it applies it. In these three cases, the Court seems to have been unable to break away from a formalism which is as unexpected as it is disheartening, which sacrifices the merits to procedure, content to form, and the case to its subject-matter. Such formalism can only be, and be

seen as, regressive. And all the more clearly so in this instance, since it is being applied to the most crucial issue in the world: nuclear disarmament.

* * *

87. Perhaps I might better explain my discomfort on examining today's Judgments by observing that, all in all, the Court seems to me to have made little attempt to avoid being subjective in its assessment of the evidence put forward by the Applicant. This feeling of unease has stayed with me throughout my re-readings of the three Judgments. It is particularly frustrating, since the Court has always declared that its aim is to give a fundamentally "objective" assessment of the evidence.

The Court initially began by shielding the Respondent, placing it in an impregnable fortress. It would of course be inappropriate for me to criticize the Court for considering, from the outset, that the Respondent was innocent of any breach of its obligations regarding nuclear disarmament. Indeed, in such cases, the burden of proof is naturally borne by the Applicant. However, it seems to me that the Court went beyond that, *itself organizing the Respondent's defence.* It examines all of the Applicant's arguments with what appears to be a negative prejudice.

It is in that spirit that it considers each of the four pillars making up the Marshall Islands' argument. The non-relevance of the Nayarit statement is so central to the rest of the Court's reasoning that one might hope to see this first point decided on less flimsy grounds. Likewise, the majority considers irrelevant the conduct and statements subsequent to the institution of proceedings, thus demonstrating that it has decided in advance of this stage of its reasoning that a dispute does not exist. When the Court then turns to the question of the Respondent's voting record on resolutions before international political organs, the reader's faith is restored and he or she fully agrees when the Court sounds a very wise note of caution in this regard. The spell is soon broken, however, because it would be in vain to search for the same advice being applied to explain the votes cast by the Applicant. And in order to conclude its reasoning without examining the Respondent's conduct, the Court quite simply declares that the United Kingdom's lack of awareness of the complaints renders such an examination completely unnecessary.

* * *

88. Last year I went to Hiroshima, at the invitation of the major Japanese daily newspaper *Asahi Shimbun* and the local authorities. There I saw humankind in contemplation. Before the pointless decree of death. In the essential quest for life. It was a poignant sojourn that left a permanent lump in the throat. I spoke at length before a huge crowd which, deeply troubled by such savagery committed by man, sought in vain an improbable refuge in prayer and meditation.

89. In the course of that unforgettable visit, I met the Mayor of Hiroshima, Mr. Takashi Hiraoka, the same person who, 20 years previously, had come to see us in The Hague to give a moving testimony before the Court. After the written phase of the proceedings on the *Legality of the Threat or Use of Nuclear Weapons*, the Court opened an oral phase in November 1995, during which it heard the views of some 25 States, as well as statements by the Mayor of Hiroshima, Mr. Takashi Hiraoka, and the Mayor of Nagasaki, Mr. Iccho Itoh. When I saw Mr. Hiraoka again last year, the final words of his address in 1995 before the Court came back to me. I remember that at the end of his tragic account, he looked at each judge on the Bench for a few moments before uttering his final words, which were: *"The fate of the human race is in your hands!"*

90. I cannot wipe from my mind the striking contrast between, on the one hand, the three decisions handed down by the Court today, according to which there is no dispute between the applicant State and the respondent States in the crucial sphere of nuclear disarmament, and, on the other, the highly symbolic significance of the first visit to Hiroshima by a President of the United States, on Friday 27 May 2016, the place where, on 6 August 1945, *"the world was forever changed"*. I cannot wipe from my mind the striking contrast between, on the one hand, today's three judicial decisions, so cruelly captive to a narrow legal formalism, and, on the other, that Head of State's urgent call for a *"moral revolution"* to rid our world once and for all of nuclear weapons. And lastly, I cannot wipe from my mind the striking contrast between, on the one hand, these three decisions of the Court, and, on the other, the preparations that are probably now under way for a visit to Pearl Harbour, before the end of this year, by the Japanese Prime Minister, so that humankind can seal its reconciliation with itself.

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91. I would like to conclude my statement by referring to a text by Montesquieu, one of the great French thinkers and men of letters of the first half of the eighteenth century. In his most popular work, the *Lettres persanes* ("Persian Letters"), two people are involved in an exchange of correspondence. The first of them makes the following observation:

> "I am always afraid lest it may ultimately prove possible to discover some secret making it relatively quick and easy to kill individuals and destroy whole peoples and nations."

To which the second retorts:

> "You say that you are afraid lest there be invented some means of destruction more cruel than the one now in use. No. If a fatal invention were to be discovered, it would soon be prohibited by the Law

of Nations, and buried with the unanimous consent of those nations." (Montesquieu, *Lettres persanes* [1721], Letters CV and CVI.)

I must say that the fears of the first correspondent have, tragically, been realized and have been on our conscience for more than 70 years. It only remains for us to hope, for the survival of humankind, that the certainties of the second correspondent will coincide with the facts of tomorrow.

(Signed) Mohammed BEDJAOUI.