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.

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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 dis-

pute 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" (para. 38).

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:

> "[t]he 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 respondent'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, 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 allega-

tions, 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". 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" (*I.C.J. Reports 2005*, p. 19, para. 25).

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.