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 India, 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 hitherto consistently 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 on 5 March 1970.

including the Republic of the Marshall Islands (RMI)[9]. India has neither signed nor ratified the NPT (Judgment, para. 17). 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[10]. 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"[11]. 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[12];

— there is no comprehensive and universal prohibition of the threat or use of nuclear weapons as such, in either customary or conventional international law[13];
— 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 principles and rules of international humanitarian law applicable in armed conflict or that is incompatible with treaties specifically dealing with nuclear weapons, is illegal[14].

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[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] 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.

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 238, para. 20.

[12] *Ibid.*, p. 266, para. 105 (2) A.

[13] *Ibid.*, para. 105 (2) B.

[14] *Ibid.*, para. 105 (2) C and D.

6. However, the Court did make one exception to its findings (albeit in an evenly divided manner[15]) 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"[16].

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.
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> 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.
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> 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, 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.)

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[15] By seven to seven votes with the President having to use his casting vote.

[16] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 266, para. 105 (2) E.

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."[17] 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[18].

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 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 previously filed declarations pursuant to Article 36, paragraph 2, of the Statute of the Court recognizing the compulsory jurisdiction of the Court (Judgment, para. 21).

[17] *I.C.J. Reports 1996 (I)*, p. 267, para. 105 (2) F.

[18] 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.

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; and that of India dated 15 September 1974 and deposited on 18 September 1974, which declarations the Marshall Islands claims are "without pertinent reservation"[19]. India, which is not party to the NPT (Judgment, para. 17), raised a number of preliminary objections against the Court's jurisdiction, including the absence of a legal dispute between the Applicant and Respondent as at 24 April 2014, the date of filing of the Application. The Marshall Islands disagrees and maintains that a dispute did exist at the time it filed its Application, the subject-matter of which is "India's compliance or non-compliance with its obligation under customary international law to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament"[20]. In its Judgment, the Court agrees with India in this regard and upholds its objection to jurisdiction (*ibid.*, para. 56). I respectfully disagree with the majority 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 between the Parties before the filing of the Application. 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. 38-49).

11. India contends that the Court lacks jurisdiction to entertain the claim of Marshall Islands on the grounds that:

(a) prior to or at the time the Marshall Islands filed its Application on 24 April 2014, there was no legal dispute in existence between the Parties that could trigger the Court's jurisdiction under its Statute[21];

(b) that the Marshall Islands had never brought its claim to the attention of India, nor attempted to hold diplomatic negotiations with India before filing the case with the Court. Consequently, there could be no conflict of legal positions between the two Parties, and as such no legal dispute between them[22];

[19] Application of the Marshall Islands (AMI), p. 38, para. 65.
[20] Memorial of the Marshall Islands (MMI), p. 8, para. 13.
[21] Counter-Memorial of India (CMI), p. 2, para. 3.
[22] CMI, p. 10, para. 16 and CR 2016/8, p. 31, paras. 13-14 (Pellet).

(c) that the claim of the Marshall Islands is artificial[23] in as far as the Applicant cites an "undefined and unstated principle" of customary international law[24]; and

(d) that the claim of the Marshall Islands constitutes an abuse of process in as far as the Marshall Islands is attempting to impose upon India the obligations established in the NPT, a treaty that it has systematically rejected[25].

12. For its part, the Marshall Islands maintains that a dispute did exist between the Parties at the time the Application was filed[26], the subject-matter of which is "India's non-compliance with its obligation under customary international law 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"[27]. It argues further that it has repeatedly called upon nuclear-weapon States, including India, to comply with their international obligations and to negotiate nuclear disarmament[28]. In particular the Marshall Islands refers to two of its statements made publicly in the presence of India before the Application was filed. First, on 26 September 2013, at the UN High-Level Meeting on Nuclear Disarmament, 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 disarmament"*[29]. Secondly, on 13 February 2014, during the Second Conference on the Humanitarian Impact of Nuclear Weapons at Nayarit, Mexico, the RMI representative made similar remarks[30].

13. The Marshall Islands submits that these and other public statements "illustrate with perfect clarity the content of the claim . . ."[31] and that these statements were "unequivocally directed against *all States possessing nuclear arsenals*, including India" (emphasis added)[32]. The fact that India participated in those conferences was, according to the

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[23] CMI, p. 13, para. 20.

[24] *Ibid.*, p. 16, para. 25.

[25] CR 2016/4, p. 21, para. 9 (Salve).

[26] MMI, p. 8, para. 14, citing: *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *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.

[27] MMI, p. 9, para. 15.

[28] *Ibid.*, para. 16.

[29] *Ibid.*, citing statement by Honourable Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013 (emphasis added).

[30] *Ibid.*, p. 10, citing 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).

[31] MMI, p. 9, para. 17.

[32] *Ibid.*, pp. 9-10, paras. 17-18.

Marshall Islands, sufficient to consider it notified of the claim of the Marshall Islands, in particular, because the RMI statements were very clear on the subject-matter of the dispute, namely, the failure of nuclear-weapon States to seriously engage in multilateral negotiation leading to nuclear disarmament arising under the NPT and/or customary international law. The legal basis of the claim was also clearly identified[33]. Finally, the Marshall Islands considers that its claims have been positively opposed by India in that the latter, while rhetorically claiming to be committed to achieving a nuclear-free world, has continued to "engage in a course of conduct consisting of the quantitative build-up and qualitative improvement of its nuclear arsenal, which is contrary to the objective of nuclear disarmament"[34]. Furthermore, the Marshall Islands submits that India positively opposed the Applicant's claims in its Letter of 6 June 2014 and in its Counter-Memorial, where it explicitly disputed the validity of those claims[35], considering that such denial constitutes a legal dispute in itself[36]. On the issue of negotiations, the Marshall Islands submits that it was under no obligation to pursue diplomatic negotiations with India prior to submitting the dispute before the Court[37]. Finally, the Marshall Islands addresses the applicability of the ILC Articles on State Responsibility to the present dispute and points out that, according to the ILC commentary, the said Articles do not concern the jurisdiction of international courts[38]. In its Judgment, the Court upholds India's preliminary objection to jurisdiction on the ground that there was no dispute between the Parties prior to the filing of the RMI Application. 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.

14. First, the Judgment rightly points out the Court's function under

[33] MMI, p. 9, para. 17.
[34] *Ibid.*, p. 10, para. 19; CR 2016/1, p. 19, para. 16 (deBrum).
[35] MMI, p. 12, para. 22.
[36] *Ibid.*, citing *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25 and CR 2016/1, p. 34, para. 13 (Condorelli). The Marshall Islands further contends that the qualitative build-up of the nuclear capabilities of India is illustrated by its test, during the hearings, of intermediate range, submarine-launched ballistic missiles capable of deploying nuclear warheads. CR 2016/6, p. 8, paras. 1-2 (van den Biesen).

[37] CR 2016/6, pp. 15-16, paras. 8-9 (Condorelli).
[38] *Ibid.*, p. 18, para. 14 (Condorelli).

Article 38 of its Statute, which is to decide such inter-State disputes as are referred to it (Judgment, para. 33). 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 the Statute, the jurisdiction of the Court emanates from those very declarations rather than from the existence of a dispute as such. It is more accurate to say that the existence of a dispute between the contending States is merely a pre-condition *for the exercise of that jurisdiction*.

15. 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" (Judgment, para. 34). 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. 36) and that such determination is a matter of substance and not procedure or form (*ibid.*, para. 35). 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)*.

16. 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 to be not only 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 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 and beyond if necessary, should have been undertaken in determining whether the Parties had "clearly opposite views"[39]. 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[40], and until more recently in *Croatia* v. *Serbia*[41].

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[39] *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.

[40] *Op. cit., 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.

[41] *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. 438-441, paras. 80-85; *op. cit.*, *I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

17. An applicant is required under Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court to indicate the "subject of the dispute" in the Application and to specifying therein the "precise nature of the claim"[42]. The Marshall Islands did specify its claim or subject-matter of the dispute in its Application and Memorial as

> "the failure of India 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"[43].

Furthermore, the Marshall Islands claim is clearly legal in nature in as far as it concerns the alleged non-performance by India of an obligation under customary international law. Of course the existence and nature of the purported obligation, as well as the acts constituting the alleged breach thereof, are matters to be examined at the merits phase of the case.

18. 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 India 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[44] and that this was the case at the time the Application was filed.

19. As stated in the Court's jurisprudence, it is for the Court to determine on an objective basis, whether or not an international dispute exists between the Parties by "isolat[ing] the real issue in the case and identify[ing] the object of the claim"[45]. The Court must carry out a substantial exami-

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[42] *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.

[43] MMI, p. 8, para. 13; see also AMI, p. 6, para. 2.

[44] *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, Judgment, 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.

[45] *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, I.C.J. Reports 2015 (II)*, p. 602, para. 26.

nation or inquiry of the facts or evidence[46]. Although the dispute must, in principle, exist at the time the Application is submitted to the Court[47], there have been cases in which the Court has adopted a more flexible 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."[48]

20. 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[49], 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. 34-37), 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

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[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)*, pp. 84-85, para. 30.

[47] *Ibid.*; *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.

[48] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 95, para. 66.

[49] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa) Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

may indeed be theoretical, is not sufficient for a dispute to be regarded as existing.

. . . . . .

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 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."[50]

21. 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. First, the conduct of India that the Marshall Islands has raised issue within its Application and Memorial is "India's continuing breach of its obligations under customary international law to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament"[51]. Furthermore, the Marshall Islands has in its Application cited India's nuclear weapons program which India is reportedly expanding[52]. The Marshall Islands refers to this program as "a quantitative build-up and qualitative improvement"[53] of India's nuclear arsenal and submits that it is inconsistent with India's *erga omnes* obligations under customary international law to pursue negotiations towards nuclear disarmament. On its part, India refers to its right to maintain a nuclear arsenal for reasons of national security and points to its assurances that it would never use its arsenal for aggression or "first-use" towards any State. It also points to the fact that it has always voted in favour of United Nations resolutions in favour of international negotiations towards nuclear disarmament. It also cites a number of statements by its high-ranking officials in both domestic and international fora reiterating

[50] *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.

[51] MMI, p. 8, para. 13; AMI, pp. 9-10, para. 6.

[52] AMI, pp. 16-24, paras. 23-34.

[53] *Ibid.*, p. 38, section "Remedies", para. *(a)*.

India's commitment to meaningful negotiations towards nuclear disarmament. The Marshall Islands maintains that notwithstanding its voting patterns, India's course of conduct consisting, on the one hand, of 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 customary international law. Without prejudging the issue of whether or not India's conduct referred to above actually constitutes a breach of an obligation under customary international law, (an issue clearly for the merits) the question for determination is whether, before filing its Application against India on 24 April 2014, the Parties held clearly opposite views concerning India's performance or non-performance of certain international obligations.

22. 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[54], and those made during the 2010 NPT Review Conference, the 2013 United Nations High-Level Meeting on Nuclear Disarmament[55], and the 2014 Conference on the Humanitarian Impact of Nuclear Weapons[56]. The Marshall Islands argues that those statements were sufficient to make all nuclear-weapon States, including India, aware of the Marshall Islands position on the matter[57].

23. First, 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 disarmament"[58].

24. Secondly, on 13 February 2014, at the Second Conference on the Humanitarian Impact of Nuclear Weapons at Nayarit, Mexico, the Marshall Islands reiterated its position on the failure of nuclear-weapon States to pursue negotiations towards nuclear disarmament when it issued a Declaration stating that:

> "the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long

[54] CR 2016/1, p. 16, para. 5 (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.

[55] MMI, p. 9, para. 16.

[56] *Ibid.*

[57] *Ibid.*, p. 10, para. 18.

[58] *Ibid.*, p. 9, para. 16, citing statement by Hon. Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013 (emphasis added).

> 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."[59] (Emphasis added.)

25. In my view, those statements also represent the RMI's claim that nuclear-weapon States, including India, are obliged under the NPT and/or customary international law, to pursue negotiations leading to nuclear disarmament. India, known to be one of nine States that possess nuclear weapons[60], was represented at that meeting. At the meeting of 26 September 2013, India was represented by Mr. Salman Khurshid, External Affairs Minister of India; while at the meeting of 13 February 2014 it was represented by Mr. Ashutosh Agrawal, Deputy Head of the Indian Embassy in Mexico. Thus, although the statements were generally addressed to "all nuclear weapon States" and India was not singled out for mention by the RMI, it was implicitly included in the category of nuclear-weapon States that were "failing to fulfil their international obligations to carry out multilateral negotiations on achieving sustainable nuclear disarmament".

26. In my view, the "Nayarit Declaration" quoted above did mention with sufficient clarity both the obligation on nuclear-weapon States to negotiate nuclear disarmament as well as the legal basis upon which the Marshall Islands based that obligation, namely, "Article VI of the Non-Proliferation Treaty and customary international law". In this regard, I disagree with the findings of the majority in paragraphs 45-48 of the Judgment. 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 them. A distinction ought to be drawn between a purely bilateral setting where the applicant must single out the respondent, 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

[59] MMI, p. 9, para. 16; CR 2016/2, pp. 32-33, para. 19 (Condorelli), citing Marshall Islands statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014.

[60] Since the NPT entered into force in 1970, India, Pakistan and North Korea have all conducted nuclear tests, although they are not party to the NPT. North Korea withdrew from the NPT in 2003. Israel is also widely presumed to have nuclear weapons although it maintains a policy of deliberate ambiguity in this regard. NPT States that possess nuclear weapons include the permanent five on the United Nations Security Council, namely China, France, Russia, United Kingdom and the United States. (Belgium, Germany, Italy, the Netherlands and Turkey are NATO nuclear-weapon sharing States.)

nine possess nuclear weapons. To insist that the Marshall Islands should in its statements 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. Similarly, the fact that the Nayarit Declaration was made at a conference the subject of which was the "broader question of the humanitarian impact of nuclear weapons" does not detract from the clarity of that statement nor of the Marshall Islands protestation against the conduct of the nuclear-weapon States expressed therein. That argument too is unduly formalistic.

27. Furthermore, it has been argued that India's public statements both domestically and at international fora demonstrate its commitment to negotiations towards nuclear disarmament. True as that may be, for the purposes of demonstrating the existence of opposing views, the Marshall Islands has made it clear that it has no issues with India's rhetoric in this regard. Its opposition is with regard to India's failure to pursue in good faith those obligations. Again, without prejudging the issue of whether or not India's nuclear policy is in breach of its international obligations, the above facts clearly demonstrate that there is a course of conduct by one of the Parties (India) to achieve its own interests, which the other Party (Marshall Islands) meets by protest, thus crystalizing the dispute between the Parties.

28. I have also taken into account the Parties' conduct *after* the critical date of 24 April 2014, which in my view, confirms a pre-existing dispute. In its Letter filed on 6 June 2014, India asserts that the Court lacks jurisdiction to entertain the Applicant's claims as they fall outside the scope of its optional clause declaration and are inadmissible[61]. In addition, India reiterates its own unique stand on nuclear disarmament, stating:

> "it is well-known that India is committed to the goal of a nuclear-weapon-free world through global, verifiable and non-discriminatory nuclear disarmament. India believes that this goal can be achieved through a step-by-step process underwritten by a universal commitment and an agreed global and non-discriminatory multilateral framework. It is also well-known that pending global nuclear disarmament, *India is committed for reasons of national security and self-defence to building and maintaining a credible minimum nuclear deterrent*."[62] (Emphasis added.)

[61] MMI, Ann. 3: Letter of India of 6 June 2014, paras. 4-5.
[62] *Ibid.*, para. 2.

29. Thus while both Parties are at least in nominal agreement regarding the desirability of a nuclear-free world, they have different notions regarding how and when to achieve that goal. Both Parties hold opposing views on certain key issues. First, they disagree on the existence of an obligation under customary international law to negotiate nuclear disarmament and on whether India has breached that obligation[63]. Secondly they hold opposing views regarding the legality of India's maintenance and improvement of a nuclear arsenal for "defense purposes" and whether it is necessarily incompatible with the alleged international obligation to negotiate nuclear disarmament[64]. Thirdly, the Parties disagree on the nature of the alleged obligation to disarm under international law. While the Marshall Islands considers that customary international law requires States possessing nuclear weapons to disarm, India considers that there is no such obligation under customary international law and that invoking them is only a thinly veiled attempt by the Marshall Islands to impose upon India the obligations established in the NPT, a treaty that it has systematically rejected[65]. India described the Marshall Islands' approach as "an abuse of process"[66]. Without prejudging any of the above questions (all of which are issues to be addressed at the merits stage), this divergence of opinions confirms the existence of a dispute for the purposes of determining the Court's jurisdiction.

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[63] CR 2016/1, p. 31, para. 7 (Condorelli), citing paragraphs 2, 6 and 64 of the RMI Application; CR 2016/1, pp. 31-32, para. 8, citing paragraph 2 of the Memorial of RMI.

[64] CMI, Ann. 6: Statement by Salman Khurshid, Minister of External Affairs of India, at the High-Level Meeting of the General Assembly on Nuclear Disarmament, 68th United Nations General Assembly in New York, 26 September 2013.

[65] For India's consistent refusal to sign and ratify the NPT see: CMI, p. 14, para. 22 citing *Documents on India's Nuclear Disarmament Policy*, Volume II, Eds. Gopal Singh and S. K. Sharma for statements made by India's negotiator V. C. Trivedi at the Conference of the Eighteen-Nation Committee on Disarmament of 12 August 1965, pp. 582-596; 15 February 1966, pp. 612-627; 10 May 1966, pp. 638-646; 23 May 1967, pp. 687-700; and 28 September 1967, pp. 706-718; Statement by External Affairs Minister, M. C. Chagla in Parliament on 27 March 1967, pp. 685-687; Statements by Ambassador Azim Husain in the Eighteen-Nation Committee on Disarmament on 27 February 1968, pp. 724-730 and in the Political Committee of the United Nations on 14 May 1968, pp. 741-755, (CMI, Anns. 13-20). On 5 April 1968, Prime Minister Indira Ghandi highlighted the shortcomings of the NPT and stated that "we shall be guided entirely by our self-enlightenment and the considerations of national security", statement by Prime Minister Indira Ghandi, Lok Sabha, 5 April 1968, pp. 739-741; see CMI, Ann. 21.

[66] CR 2016/4, p. 21, para. 9 (Salve).

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 were positively opposed by the applicant", before making a determination that a dispute exists (Judgment, para. 38). 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[67] (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[68]. 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 shown that the claim of one party is positively opposed by the other."[69]

Also in *Nicaragua* v. *Colombia* the Court stated 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 [for the existence of a dispute]"[70].

31. By introducing proof of "awareness" as a new legal requirement, what the majority has done is 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".

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

[68] *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.

[69] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[70] *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.

32. It is also pertinent to note that paragraph 73 of *Nicaragua* v. *Colombia* cited by the majority at paragraph 38 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[71], 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'"[72].

It is clear that the Court in that case was not prepared to turn a specific factual finding into a formalistic legal requirement of 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.

33. Similarly, *Georgia* v. *Russian Federation*[73], also cited in the Judgment at paragraph 38 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[74]. 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

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[71] 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.

[72] *Ibid.*, para. 72.

[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. 70.

[74] 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."

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 at the date on which the Application was filed, there existed a dispute between the Parties concerning the alleged violation, by India, of an obligation 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.