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.