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.

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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.

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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.)

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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.)

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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).

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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.

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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.

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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).

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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.

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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.