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Summary
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Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)

Summary of the Judgment of 5 October 2016

Procedural background (paras. 1-14)

The Court recalls that, on 24 April 2014, the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed an Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland (hereinafter the "United Kingdom" or the "Respondent"), in which it claimed that the United Kingdom breached treaty and customary international law obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament. The Marshall Islands seeks to found the Court's jurisdiction on the declarations made by the Parties pursuant to Article 36, paragraph 2, of its Statute.

The Court further recalls that, after the Marshall Islands filed its Memorial in the case, the United Kingdom raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 19 June 2015, the President of the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 15 October 2015 as the time-limit for the presentation by the Marshall Islands of a written statement of its observations and submissions on the preliminary objections raised by the United Kingdom. The Marshall Islands filed such a statement within the time-limit so prescribed. Public hearings on the preliminary objections raised by the United Kingdom were held from Wednesday 9 to Wednesday 16 March 2016.

I. INTRODUCTION (PARAS. 15-25)

A. Historical Background (paras. 15-21)

The Court provides a brief historical background to the case, in particular in relation to the nuclear disarmament activities of the United Nations.

B. Proceedings brought before the Court (paras. 22-25)

The Court notes the other proceedings brought by the Marshall Islands at the same time as the present case. It then outlines the United Kingdom's preliminary objections to jurisdiction and

admissibility. It announces that it will first consider the preliminary objection that the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a legal dispute between the Parties.

II. THE OBJECTION BASED ON THE ABSENCE OF A DISPUTE (PARAS. 26-58)

After outlining the Parties' arguments, the Court recalls the applicable law on this question. It explains that the existence of a dispute between the Parties is a condition of its jurisdiction. In order for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other; the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure. Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides. Moreover, although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition for the existence of a dispute. Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court.

The Court continues by underlining that whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts. For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges. In particular, the Court has previously held that the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. 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.

The Court further explains that, in principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute, to clarify its subject-matter or to determine whether the dispute has disappeared as of the time when the Court makes its decision. However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings. If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

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The Court then turns to the case at hand, noting at the outset that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament. But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met.

While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists.

The Court observes that the United Kingdom relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. The United Kingdom lays particular emphasis on Article 43 of the International Law Commission's ("ILC") Articles on State Responsibility, which requires an injured State to "give notice of its claim" to the allegedly responsible State. Article 48, paragraph 3, applies that requirement mutatis mutandis to a State other than an injured State which invokes responsibility. However, the Court notes that the ILC's commentary specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals". Moreover, the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified.

The Court next examines the Marshall Islands' arguments in support of its contention that it had a dispute with the United Kingdom.

First, the Court notes that the Marshall Islands refers to a number of statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. The Marshall Islands relies on the statement made at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, the Court considers that this statement is formulated in hortatory terms and cannot be understood as an allegation that the United Kingdom (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. The Court adds that a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which that claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. The 2013 statement relied upon by the Marshall Islands does not meet these requirements. The Court observes that the statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. However, the United Kingdom was not present at the Nayarit conference. Further, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons, and while this statement contains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of the United Kingdom that gave rise to the alleged breach. For the Court, such a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was made, that statement did not call for a specific reaction by the United Kingdom. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and the United Kingdom, a specific dispute as to the scope of Article VI of the NPT and the asserted corresponding customary international law obligation, or as to the United Kingdom's compliance with such obligations. In the Court's view, none of the other more general statements relied on by the Marshall Islands in

this case supports the existence of a dispute, since none articulates an alleged breach by the United Kingdom of the obligation enshrined in Article VI of the NPT or the corresponding customary international law obligation invoked by the Marshall Islands. The Court concludes that, in all the circumstances, on the basis of those statements — whether taken individually or together — it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations.

Secondly, the Court considers the Marshall Islands' argument that the very filing of the Application and statements made in the course of the proceedings by both Parties suffice to establish the existence of a dispute. The Court deems that the case law invoked by the Marshall Islands does not support this contention. In the case concerning Certain Property, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application (Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 19, para. 25). The reference to subsequent materials in the Cameroon v. Nigeria case related to the scope of the dispute, not to its existence (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 614, paras. 27-29). Instead, the issues the Court focused on in that case were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. The Court reiterates that, although statements made or claims advanced in or even subsequently to the Application may be relevant for various purposes — notably in clarifying the scope of the dispute submitted — they cannot create a dispute de novo, one that does not already exist.

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

Fourthly, the Court assesses the Marshall Islands argument that the conduct of the United Kingdom in declining to co-operate with certain diplomatic initiatives, in failing to initiate any disarmament negotiations, and in replacing and modernizing its nuclear weapons, together with statements that its conduct is consistent with its treaty obligations, shows the existence of a dispute between the Parties. The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views. In this regard, conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition. However, as the Court has previously concluded, in the present case none of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding the United Kingdom's conduct. On the basis of such statements, it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an

allegation that the United Kingdom was in breach of its obligations. In this context, the conduct of the United Kingdom does not provide a basis for finding a dispute between the two States before the Court.

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

OPERATIVE PART (PARA. 59)

THE COURT,

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

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

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

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

(2) By nine votes to seven,

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

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

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

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

Declaration of President Abraham

In his declaration, President Abraham explains that he voted in favour of the Judgment because he considers the Court's decision to be fully consistent with its recent jurisprudence relating to the requirement for a "dispute" to exist between the parties, as established by a series of Judgments handed down over the past five years, in particular the Judgment of 1 April 2011 in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), the Judgment of 20 July 2012 in the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) and the Judgment of 17 March 2016 in the case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia). It is apparent from these Judgments, he explains, that, in order to determine whether the condition relating to the existence of a dispute has been met, the date to be referred to is the date of the institution of the proceedings, and that the Court can only find that it has jurisdiction to entertain a case where each party was — or must have been — aware on that date that the views of the other party were opposed to its own.

President Abraham explains that, even though he expressed reservations at the time the Court established this jurisprudence, he nevertheless considers himself to be bound by such jurisprudence and therefore voted in conformity with it.

Dissenting opinion of Vice-President Yusuf

I. Introduction

1. In his dissenting opinion, Vice-President Yusuf sets forth the reasons why he cannot subscribe to the decision of the Court. These reasons are fourfold: first, the Judgment fails to distinguish the objections raised by the United Kingdom from those in the two other cases of the Marshall Islands v. India and Marshall Islands v. Pakistan; secondly, he disagrees with the introduction by the majority of the subjective criterion of "awareness" in the determination of the existence of a dispute; thirdly, in the view of the Vice-President it is difficult to determine the existence of a dispute without specifying its subject-matter; finally, he is of the view that an incipient dispute existed between the Republic of the Marshall Islands and the United Kingdom (UK) prior to the submission of the Application by the former, and that this dispute further crystallized during the proceedings before the Court.

II. The distinctive features of the Marshall Islands v. United Kingdom case with regard to the existence of a dispute

2. The Vice-President highlights the features that distinguish the present case from the two cases submitted by the Republic of the Marshall Islands against India and Pakistan respectively. The first is that the both the Republic of the Marshall Islands and the United Kingdom are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and hence the current proceedings are concerned with the interpretation and application of this Treaty, and in particular Article VI thereof.

3. The second distinguishing feature is the arguments put forward by the United Kingdom regarding the inexistence of a dispute. In particular, it argues that there was "no justiciable dispute between the UK and Marshall Islands in relation to the UK's obligations, whether arising under the NPT or under customary international law, to pursue negotiations in good faith on effective measures of nuclear disarmament". Furthermore, it emphasizes that "no legal dispute can be said to exist where the State submitting the dispute has given no notice thereof to the other State".

4. The Court does not address the former argument nor does the United Kingdom explain what it means by "justiciable" dispute. In relation to the latter, the Court correctly notes that it "has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides" (paragraph 45). Having rejected the requirement of notice for the existence of a dispute, the Judgment unfortunately raises "awareness" to a precondition for the existence of a dispute.

III. The concept of a dispute and the new "awareness" test

5. As the Judgment recognizes, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 11). It is for the Court to determine the existence of a dispute objectively (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p. 74), which is a matter "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, I.C.J. Reports 2011 (I), para. 30).

6. In the present Judgment, the Court states that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (paragraph 41). The two Judgments that it invokes as authority for this statement — namely the Judgments on preliminary objections in the cases of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), and the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) — do not provide support for the "awareness" criterion expounded by the Court. In both those cases, the Court simply noted that as a matter of fact the respondent State was aware of the position of the applicant; it did not identify "awareness" as a requirement for the existence of a dispute at any point nor was this implicit in the Court's reasoning.

7. The introduction of the "awareness" criterion conflicts with the Court's established jurisprudence that the existence of a dispute is for objective determination. Moreover, such an approach also undermines judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute.

8. The existence of a dispute has to stand objectively by itself. What matters is that there is a positive opposition of juridical viewpoints, a disagreement on a point of law or fact. The positively opposed legal viewpoints may consist of a claim by one party, which is contested or rejected by the other, or by a course of conduct of one party which is met by the protest or resistance of another party. In the latter case, the dispute may be considered to be only at an incipient stage until such time as the State whose conduct is protested is afforded an opportunity either to reject the protest or

to accede to the protesting States' demands and consequently change its conduct. The institution of proceedings before the Court may, however, result in the subsequent crystallization of the nascent dispute if the juridical viewpoints of the parties in relation to the subject-matter of the dispute continue to be positively opposed.

IV. The existence of a dispute prior to the filing of an application

9. One of the important arguments put forward by the United Kingdom in support of its preliminary objections to jurisdiction and admissibility was that the dispute must have existed on the date of the filing of the Application by the Republic of the Marshall Islands.

10. The Court has recently stated in some of its Judgments that a dispute must "in principle" exist at the time of the application (see, for example, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, para. 52). The use of the term "in principle" suggests that it is not an absolute precondition for the Court's jurisdiction that a full-fledged dispute exist at the date of the application. Such a dispute may be in the process of taking shape or at an incipient stage at the time the application is submitted, but may clearly manifest itself during the proceedings before the Court.

11. This flexible approach regarding the date for the determination of the existence of a dispute is borne out by the case law of the Court, in which it has occasionally founded the existence of a dispute on opposing statements of parties made during written and oral pleadings.

V. The subject-matter of the dispute

12. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties. In doing so, the Court examines the positions of both parties, while giving particular attention to the manner in which the subject-matter of the dispute is framed by the applicant State (Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 448, para. 30).

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

14. Moreover, the Republic of the Marshall Islands relies on its statement at the Nayarit conference, as evidence of the existence of a dispute with the United Kingdom, in which it declared that the immediate commencement and conclusion of negotiations on nuclear disarmament is "required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law".

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

VI. The opposing viewpoints of the Parties on the interpretation and application of Article VI of the Non-Proliferation Treaty

16. The Republic of the Marshall Islands primarily relies on its statement made at the Nayarit conference as evidence of its position prior to the submission of its Application, which it claims is positively opposed by the conduct of the United Kingdom.

17. In particular, it refers to the opposition of the United Kingdom to all the attempts made in the context of resolutions adopted by the United Nations General Assembly to call for the immediate commencement of negotiations with a view to the conclusion of a convention on nuclear disarmament, to convene a working group to prepare the ground for such a convention, or to ensure concrete follow-up to the Advisory Opinion of the Court which underscored the existence of an obligation to pursue negotiations on nuclear disarmament.

18. The United Kingdom does not deny this consistent pattern of conduct vis-à-vis the fulfilment of the obligation underlined in the Advisory Opinion and the United Nations General Assembly's attempts to implement it, but it claims that various political and legal factors account for its position on these resolutions (see Reply of the United Kingdom to the questions by Judge Cançado Trindade, MIUK 2016/13, para. 2).

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

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

Separate opinion of Judge Owada

Judge Owada recognizes that the history of the Marshall Islands (hereinafter the "RMI") has created reasons for special concern about nuclear disarmament, and particularly the obligation of the nuclear-weapon States under Article VI of the NPT. Yet the evidence must demonstrate the existence of a concrete legal dispute in order for this Court to have jurisdiction. For this reason, Judge Owada concurs with the reasoning of the Court, but has appended a separate opinion to clarify the reasoning of the Court with respect to three issues in this legal, though politically charged, context.

The first point relates to the legal standard applied by the Court in determining whether or not a dispute existed at the time of the filing of the Application by the RMI. Judge Owada recalls that, for the purpose of establishing the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other. It is important to recognize that this requirement is not a mere formality, but a matter of cardinal significance as an indispensable precondition for the seisin of the Court by the Applicant. For this reason, the absence of an alleged dispute at the time of the filing of an application is not a procedural technicality that can be cured by a subsequent act, as was the case in the Mavrommatis Palestine Concessions case. In this context, a legal dispute must be distinguished from a mere divergence of positions. The jurisprudence of the Court reflects this principle, though it has examined this issue in diverse factual and legal circumstances and in doing so has assessed a variety of different factors. It might be tempting to conclude that the Court's reliance on such factors evidences a certain threshold for establishing the existence of a dispute, but in Judge Owada's view the jurisprudence of the Court is not quite so linear. These Judgments instead represent case-specific instances in which the evidence was adjudged to be sufficient or insufficient. This point must be borne in mind when appreciating the true meaning of the respondent's awareness, as introduced by the present Judgment. Although the Judgment might appear to introduce this element of "awareness" out of the blue, the reality is that the element of awareness is the common denominator running through the case law. The awareness of the respondent demonstrates the transformation of a mere disagreement into a true legal dispute and is thus an essential minimum common to all cases.

The second point relates to the time at which a dispute must be shown to exist. The RMI argued that the Judgments of the Court in several previous cases support its contention that statements made during the proceedings may serve as evidence of the existence of a dispute. The Court correctly explained the meaning of these precedents in the Judgment, but Judge Owada wished to provide a more detailed explanation of the correct interpretation of the case concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). The unique circumstances and mixed questions of law and fact tied to the merits of that case made the question to be decided by the Court very different from the question at issue in the present proceedings and, as such, the Court's reliance on statements made during the proceedings in that case should not be taken as signalling a departure from the Court's consistent jurisprudence on the subject.

Finally, Judge Owada wishes to elaborate upon the treatment of the evidence by the Court in the present Judgment. Some may feel that the Court adopted a piecemeal approach by rejecting each category of evidence individually, whereas the RMI argued that the evidence must be taken as a whole. It is Judge Owada's view that the Court examined all of the evidence and correctly determined that this evidence — even when taken as a whole — was not sufficient to demonstrate the existence of a dispute.

Having stated this, Judge Owada adds that a new legal situation might have emerged as a result of the present proceedings before the Court. To the extent that the present Judgment reflects the position of the Court with respect to the legal situation that existed at the time of the filing of the present Application, a new application might not be subject to the same preliminary objection to jurisdiction. The viability of such a new application would remain an open question and its fate would depend upon the Court's examination of all of the objections to jurisdiction and admissibility.

Separate opinion of Judge Tomka

Judge Tomka is not convinced by the approach taken by the Court in relation to the existence of a dispute in this case, and does not consider that it is warranted by the Court's previous jurisprudence. He is therefore regrettably unable to support the Court's conclusions in this regard.

Judge Tomka begins by outlining the claims made by the Marshall Islands in this case, relating to the United Kingdom's alleged breach of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"). He observes that the United Kingdom has clearly denied those claims.

He recalls that the Marshall Islands has invoked the Article 36 (2) declarations of the Parties as the basis for jurisdiction in this case. Judge Tomka observes that, when analysing issues of jurisdiction, caution should be taken in relying on different pronouncements of the Court which may have been made in the context of particular Article 36 (2) declarations or compromissory clauses which set preconditions for the seising of the Court. He notes that the Court in this Judgment reiterates its previous view that there is no requirement that a State negotiate before seising the Court or give notice of its claim before instituting proceedings, unless there is such a condition in the relevant basis of jurisdiction.

Judge Tomka observes that, although the Court has often stated that the existence of a dispute is a condition for its jurisdiction, it is, in his view, more properly characterized as a condition for the exercise of the Court's jurisdiction. He observes in this respect that, in relation to States which have made declarations under Article 36 (2) of the Statute, the Court's jurisdiction is established from the moment the declaration is deposited with the Secretary-General of the United Nations. Thus, in Judge Tomka's view, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. Rather, the emergence of a dispute is a necessary condition for the Court to exercise its jurisdiction. The disappearance of the dispute during the proceedings does not deprive the Court of its jurisdiction, but the Court in such situation will not give any judgment on the merits, as there is nothing upon which to decide.

Judge Tomka notes the function of the Court, as the principal judicial organ of the United Nations, "is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute). He observes that, in order to discharge that function, the dispute must still exist when the Court decides on its merits. However, even though the formulation of Article 38, paragraph 1, implies that the dispute will already exist when proceedings before the Court are instituted, the phrase about the Court's function was not intended to constitute a condition for the Court's jurisdiction and should not be determinative in respect thereof.

Judge Tomka highlights that the Court's jurisprudence requires that a dispute exist in principle at the time of the application. He considers that, even though the Court repeats this general rule in this Judgment, it has here adopted rather a very strict requirement that the dispute must have existed prior to the filing of the Marshall Islands' Application.

He outlines that in some cases, circumstances will dictate that the dispute must indeed exist as at the date of the application. This may be because of the subsequent expiry of the acceptance of the Court's jurisdiction by one of the States, as in the recent case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016. It may also be because, as in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 70, the compromissory clause at issue requires prior negotiations before the filing of the Application, from which it logically follows that a dispute relating to the subject-matter of the relevant Convention should have arisen prior to instituting the proceedings. Judge Tomka cannot agree with those who consider that the Georgia v. Russia case indicates the beginning of a more formalistic approach to the existence of a dispute in the Court's jurisprudence.

Judge Tomka observes that where there are no circumstances requiring that the dispute exist by a particular date, the Court has been flexible in not limiting itself only to the period prior to the filing of the Application in order to ascertain whether a dispute existed between the parties before it. He highlights in this respect the case concerning the Application of the Convention on the

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 595.

Moreover, Judge Tomka observes that the Court, and its predecessor, have always shown a reasonable amount of flexibility, not being overly formalistic, when it comes to the timing at which jurisdictional requirements are to be met. He discusses, inter alia, Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J. Series A, No. 6, Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, 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. 595, and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412. The Court observed, in the latter case, inter alia, that

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

Judge Tomka considers that there is no compelling reason why this principle cannot be applied to the existence of a dispute. He cannot agree with the view that the Judgment in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, represents a departure in the Court's jurisprudence in this regard.

While Judge Tomka accepts that the Marshall Islands had, for some time, not taken a particularly active position on nuclear disarmament in multilateral fora, he observes that it has, since at least 2013, voiced its dissatisfaction about the compliance, or rather lack thereof, with obligations under Article VI of the NPT by nuclear powers, among them the United Kingdom. He does not consider that a State is required, under international law, to give notice to another State of its intention to institute proceedings before the Court, but takes the view that a State can formulate its claim in the application seising the Court. He observes that to require a State to give prior notice may entail, in the present optional clause system of the Court's compulsory jurisdiction, a risk that the Court will be deprived of its jurisdiction prior to receiving an Application.

Judge Tomka concludes on this point that the proceedings before the Court in this case have clarified that there is a dispute between the Marshall Islands and the United Kingdom about the latter's performance of its obligations under Article VI of the NPT. In his view, the conclusion that the Court has no jurisdiction in the absence of a dispute is not justified in the case at hand.

Nonetheless, Judge Tomka takes the view that the nature of the obligations in the field of nuclear disarmament, including of the obligations under Article VI of the NPT, renders the Marshall Islands' Application inadmissible. He discusses Article VI of the NPT and the way the obligation thereunder was characterized by the Court in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 226. He observes, with reference to the literature on this point, that disarmament requires co-operation and performance by all States. He outlines that disarmament can realistically be achieved only through balancing the security interests of the States concerned, in particular all nuclear powers and other countries with significant military capabilities. Judge Tomka considers that enquiry into the compliance by one nuclear power with its obligations relating to nuclear disarmament, including any obligation to negotiate in good faith, invites consideration of the position taken by all other nuclear powers in relation to the same obligations which are or may be binding on them. He observes that it is only with an understanding of the positions taken by other States that the Court can stand on safe ground in

considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that one State alone is open to achieving the goal set down in Article VI of the NPT through bona fide negotiations. He emphasizes that this is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the Monetary Gold principle would apply. It is, in his view, rather a question of whether it is possible for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

Judge Tomka concludes that the issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and the United Kingdom. He is convinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States are not present before the Court to explain their positions and actions. This case illustrates, in his view, the limits of the Court's function, focused as it is on bilateral disputes. Had the Court been endowed with universal compulsory jurisdiction, all Members of the United Nations would have been subject to its jurisdiction. There would not have then existed obstacles to the Court's exercising its jurisdiction fully and thus contributing to the achievement of the purposes and goals of that Organization.

To his sincere and profound regret, Judge Tomka concludes that the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context. Therefore, he considers that the Application is inadmissible and that the Court cannot proceed to the merits of the case.

Dissenting opinion of Judge Bennouna

In the three cases brought by the Marshall Islands concerning the obligation to negotiate pursuant to Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law, the Court has declared that it lacks jurisdiction on the grounds of the non-existence of a dispute between the Parties. In doing so, the Court has preferred an exercise in pure formalism to the realism and flexibility expressed in its previous and consistent jurisprudence. Hence, whereas the existence of a dispute had until now been determined objectively, the Court has introduced a new subjective element in its three Judgments. By stopping the time of law and analysis at the date of submission of the Marshall Islands' Application and requiring that the Respondent must have been aware or could not have been "unaware that its views were 'positively opposed' by the applicant", the Court has shown excessive formalism at the expense of a flexible approach that favours the sound administration of justice.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 21 parts, in the present case of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands versus United Kingdom), Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision, encompassing the approach pursued, the whole reasoning as well as the resolutory points. In doing so, Judge Cançado Trindade distances himself as much as he can from the position of the Court's majority.

2. In analysing, first of all, the issue of the existence of a dispute before the Hague Court, Judge Cançado Trindade examines in detail the jurisprudence constante of the Hague Court (PCIJ

and ICJ), whereby a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (not necessarily stated expressis verbis). Whether there exists a dispute is a matter for "objective determination" by the Court, and the mere denial of the existence of a dispute does not prove its non-existence.

3. Such has been the position of the Hague Court — both the PCIJ, as from the case of Mavrommatis Palestine Concessions (Judgment of 30.08.1924), and the ICJ, as from the Advisory Opinion (of 30.03.1950) on the Interpretation of Peace Treaties. Even along the last decade — he recalls — the Hague Court has deemed it fit to insist on its own faculty to proceed to the "objective determination" of the dispute, consistent with its jurisprudence constante, examined in detail in Judge Cançado Trindade's Dissenting Opinion (part II).

4. It was only very recently, in a passage of its Judgment on Preliminary Objections (of 01.04.2011) in the case of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination - CERD, that the ICJ at a certain moment has decided to apply to the facts of the case a higher threshold for the determination of the existence of a dispute, by proceeding to ascertain whether the applicant State had given the respondent State prior notice of its claim and whether the respondent State had opposed it. Judge Cançado Trindade warns that such new requirement "is not consistent with the PCIJ's and the ICJ's jurisprudence constante on the determination of the existence of a dispute" (para. 9).

5. Now, in the present cases of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, the three respondent States (United Kingdom, India and Pakistan), seek to rely on a requirement of prior notification of the claim, or the test of prior awareness of the applicant State's claim, for a dispute to exist under the ICJ's Statute or general international law. Yet — Judge Cançado Trindade further warns —

> "nowhere can such a requirement be found in the Court's jurisprudence constante as to the existence of a dispute: quite on the contrary, the ICJ has made clear that the position or the attitude of a party can be established by inference [case of Land and Maritime Boundary between Cameroon and Nigeria, Judgment on Preliminary Objections, of 11.06.1998]. Pursuant to the Court's approach, it is not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute" (para. 10).

6. Judge Cançado Trindade next recalls that, in his earlier Dissenting Opinion (para. 161) in the Court's 2011 Judgment in the case of the Application of the CERD Convention, he criticized the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that went beyond the jurisprudence constante of the PCIJ and the ICJ itself (paras. 11-12). There is no general requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ. He adds that "the purpose of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function" (para. 13).

7. Likewise, there is no such requirement of prior "exhaustion" of diplomatic negotiations (para. 14) before lodging a case with, and instituting proceedings before, the Court (case of Land and Maritime Boundary between Cameroon and Nigeria, Judgment on Preliminary Objections of 11.06.1998). In the present case opposing the Marshall Islands to United Kingdom, there were two sustained and distinct courses of conduct of the two contending parties, evidencing their

distinct legal positions, which suffice for the determination of the existence of a dispute. The subject-matter of the dispute between the parties is whether United Kingdom has breached its obligation under customary international law to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under effective international control (para. 16).

8. In the present cases of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands versus United Kingdom/India/Pakistan), the Court's majority has unduly heightened the threshold for establishing the existence of a dispute; it has laid down the "awareness" requirement, seemingly "undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the contending parties" (para. 20).

9. In Judge Cançado Trindade's understanding, the view taken by the Court's majority in the present case "contradicts the Hague Court's (PCIJ and ICJ) own earlier case-law", in which it has taken a much less formalistic approach to the establishment of the existence of a dispute" (as to the PCIJ, cf., inter alia, case of Mavrommatis Palestine Concessions, Judgment of 30.08.1924; case of Certain German Interests in Polish Upper Silesia, Judgment (Jurisdiction) of 25.08.1925; case of Interpretation of Judgments ns. 7 and 8 - Chorzów Factory, Judgment of 16.12.1927; and, as to the ICJ, cf., inter alia, case of East Timor, Judgment of 30.06.1995; case of the Application of the Convention against Genocide, Preliminary Objections, Judgment of 11.07.1996; case of Certain Property, Preliminary Objections, Judgment of 10.02.2005) (para. 22).

10. In the cases of East Timor (1995) of the Application of the Convention against Genocide (1996) and of Certain Property (2005), the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case-law, it is clear that a dispute exists in the cas d'espèce (paras. 24-25).

11. Moreover, the Court's majority makes tabula rasa of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application (case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Preliminary Objections, Judgment of 17.03.2016; as already seen, in its case-law the ICJ has taken into account conduct post-dating that critical date (para. 27).

12. In the present case — Judge Cançado Trindade proceeds — the Court's majority borrows the obiter dicta it made in the case of the Application of the CERD Convention (2011) — "unduly elevating the threshold for the determination of the existence of a dispute — in respect of a compromissory clause under that Convention (wrongly interpreted anyway, making abstraction of the object and purpose of the CERD Convention). In the present case, opposing the Marshall Islands to United Kingdom, worse still, the Court's majority takes that higher standard out of context, and applies it herein, in a case lodged with the Court on the basis of an optional clause declaration" (para. 28).

13. This higher threshold is, "besides formalistic, artificial", and it does not follow from the definition of a dispute in the Court's jurisprudence constante (para. 29). In applying the criterion of "awareness", the Court's majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State, "even in a situation where, as in the cas d'espèce, there are two consistent and distinct courses of conduct on the part of the contending parties"

(para. 29). Judge Cançado Trindade concludes, on this particular issue, that the formalistic raising, by the Court's majority, of the higher threshold for the determination of the existence of a dispute,

> "unduly creates a difficulty for the very access to justice (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable" (para. 30).

14. In sequence, he then turns attention to the distinct series of U.N. General Assembly resolutions on nuclear weapons and opinio juris (part III), namely: a) U.N. General Assembly resolutions on Nuclear Weapons (1961-1981); b) UN General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992); c) U.N. General Assembly Resolutions Condemning Nuclear Weapons (1982-2015); d) U.N. General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015). He recalls, that, first, in the course of the proceedings in the present case of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, the contending parties addressed U.N. General Assembly resolutions on the matter of nuclear disarmament (para. 31).

15. As to the first series of U.N. General Assembly Resolutions on Nuclear Weapons (1961-1981), the ground-breaking General Assembly resolution 1653 (XVI), of 24.11.1961, advanced its célèbre "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons". There followed three Disarmament Decades (para. 32). In this first period under review (1961-1981), the U.N. General Assembly continuously paid special attention to disarmament issues and to nuclear disarmament in particular (para. 33). In 1978 and 1982, the U.N. General Assembly held two Special Sessions on Nuclear Disarmament (respectively, the 10th and 12th sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed; it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war (para. 34).

16. Judge Cançado Trindade recalls that the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its condemnation of all nuclear weapon tests, in whatever environment they may be conducted, and it urged NWS to suspend nuclear weapon tests in all environments (para. 35).

17. He further recalls that, in that period, the General Assembly also emphasized that NWS bear a special responsibility for fulfilling the goal of achieving nuclear disarmament (para. 36). At the 84th plenary meeting — he adds — following the 10th Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a "violation of the Charter of the United Nations" and "a crime against humanity", and that the use of nuclear weapons should be prohibited, pending nuclear disarmament (para. 37).

18. As to the second series of U.N. General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992), every year in that period of 1982-1992 (following up on the 10th and 12th Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions calling for a nuclear-weapons freeze. Such resolutions on freeze of nuclear weapons note that existing arsenals of nuclear weapons are more than sufficient to destroy all life on earth. They express the conviction that lasting world peace can be based only upon the achievement of general and complete disarmament, under effective international control. In this connection, the aforementioned General Assembly resolutions note that the highest priority

objectives in the field of disarmament have to be nuclear disarmament and the elimination of all weapons of mass destruction (para. 39).

19. They at last call upon NWS to agree to reach "a freeze on nuclear weapons", which would, inter alia, provide for "a simultaneous total stoppage of any further production of fissionable material for weapons purposes". Such nuclear-weapons freeze was not seen as an end in itself but as the most effective first step towards the reduction of nuclear arsenals, a comprehensive test ban, the cessation of the manufacture and deployment of nuclear weapons, and the cessation of the production of fissionable material for weapons purposes (para. 40).

20. After recalling the acknowledgment of the authority and legal value of General Assembly resolutions made in the course of the pleadings of late 1995 in the advisory proceedings before the ICJ (paras. 41-43), Judge Cançado Trindade points out that those resolutions continue to grow in number ever since and until today, "clearly forming", in his perception, "an opinio juris communis as to nuclear disarmament" (para. 44).

21. He then turns to the longstanding series of General Assembly resolutions condemning nuclear weapons (1982-2015), wherein the General Assembly moved on straightforwardly to the condemnation of nuclear weapons warning against their threat to the survival of humankind (para. 46). Those General Assembly resolutions next significantly reaffirm, in their preambular paragraphs, year after year, that "the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity" (para. 47).

22. Last but not least, Judge Cançado Trindade surveys the series of U.N. General Assembly resolutions following up the ICJ's 1996 Advisory Opinion (1996-2015), which begin by expressing the General Assembly's belief that "the continuing existence of nuclear weapons poses a threat to humanity" and that "their use would have catastrophic consequences for all life on earth", and, further, that "the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again" (2nd preambular paragraph). The General Assembly resolutions reiteratedly reaffirm "the commitment of the international community to the realization of the goal of a nuclear-weapon-free world through the total elimination of nuclear weapons" (para. 52).

23. Those General Assembly significantly call upon all States to fulfil promptly the obligation leading to an early conclusion of a Convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination (para. 53). The aforementioned series of General Assembly resolutions further recognize, in recent years, "with satisfaction", in a preambular paragraph, that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia's nuclear-weapon-free status, are "gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons" (para. 54).

24. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. In their operative part, they underline the ICJ's unanimous conclusion, in its 1996 Advisory Opinion on the Threat or Use of Nuclear Weapons, that "there exists an obligation to pursue in good faith and bring to a

conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (para. 55).

25. Those of General Assembly follow-up resolutions contain paragraphs referring to the obligation to pursue and conclude, in good faith, negotiations leading to nuclear disarmament, without any reference to the NPT or to States Parties to it; they rather refer to that obligation as a general one, not grounded on any treaty provision. All States, and not only States Parties to the NPT, are called upon to fulfil promptly that obligation, incumbent upon all States, to report (to the Secretary-General) on their compliance with the resolutions at issue. In sum, "references to all States are deliberate, and in the absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament" (para. 56).

26. Like the U.N. General Assembly, the U.N. Security Council has also often dwelt upon the matter at issue (part IV). For example, in two of its resolutions (984/1995, of 11.04.1995; and 1887/2009 of 24.09.2009), the U.N. Security Council refers, in particular, to the obligation to pursue negotiations in good faith in relation to nuclear disarmament (para. 61). The Security Council also makes a general call, upon all U.N. member States, whether or not Parties to the NPT (para. 62). In Judge Cançado Trindade's perception,

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

27. The surveyed U.N. resolutions (of the General Assembly and the Security Council) — he adds — portray the United Nations' longstanding saga in the condemnation of nuclear weapons (part V), going back to its birth and earlier years (paras. 64-65). In 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking and historical resolution 1653 (XVI), of 24.11.1961, titled "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons", which "remains contemporary today, and, 55 years later, continues to require close attention" (para. 66).

28. Over half a century later, that lucid and poignant declaration appears endowed with permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general Convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted on 24.09.1996, has not yet entered into force, although 164 States have ratified it to date (para. 67). Since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in the face of the invocation of divergent "security interests" (para. 73).

29. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of mass destruction — as illustrated by the adoption of the Convention

on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (on 10.04.1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (on 13.01.1993); distinctly from the CTBT, these two Conventions have already entered into force (on 26.03.1975, and on 29.04.1997, respectively). Judge Cançado Trindade concludes, in this respect, that

> "If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the universality of contemporary international law — as envisaged by its 'founding fathers', already in the XVIth-XVIIth centuries — with its underlying fundamental principles (…).
>
> The truth is that, in our times, the obligation of nuclear disarmament has emerged and crystallized, in both conventional and customary international law, and the United Nations has been giving a most valuable contribution to this along the decades" (paras. 75-76).

30. In their arguments before the Court in the present case, the contending parties have presented their distinct arguments on the issue of U.N. resolutions on nuclear disarmament and the emergence of opinio juris (part VI). Judge Cançado Trindade is of the view that, despite their distinct patterns of voting, the U.N. General Assembly resolutions reviewed in the present Dissenting Opinion, taken altogether,

> "are not at all deprived of their contribution to the conformation of opinio juris as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the U.N. General Assembly itself (and not only of the large majority of U.N. member States which voted in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole" (para. 83).

31. The contending parties had the opportunity to explain further their respective positions in the cas d'espèce, in their written responses to the questions put to them by Judge Cançado Trindade, in the public sitting of the Court of 16.03.2016 on whether the aforementioned U.N. General Assembly resolutions are constitutive of an expression of opinio juris, and, if so, what is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament, and what is their incidence upon the question of the existence of a dispute between the parties (paras. 84-88).

32. The presence of evil has marked human existence along the centuries (part VIII). Ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future (paras. 89-97), and have been drawing attention to the imperative of respect for life and the relevance of humanist values (paras. 98-110). Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism (paras. 111-114).

33. This is the position upheld also by Judge Cançado Trindade, to whom

> "it is the universal juridical conscience that is the ultimate material source of international law. (…) one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of recta ratio and not a derivative of the 'will' of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole" (para. 115).

34. Within the ICJ, Judge Cançado Trindade has made this point also in his Dissenting Opinion (paras. 488-489) in the case concerning the Application of the Convention against Genocide (Croatia versus Serbia, Judgment of 03.02.2015). He further ponders that "[t]he presence of evil has accompanied and marked human existence along the centuries", with the "increasing disregard for human life"; the "tragic message of the Book of Genesis", in his perception, "seems perennial, as contemporary as ever, in the current nuclear age" (paras. 117-118).

35. His next line of considerations pertain to the attention of the U.N. Charter to peoples, as shown in several of its provisions, and in its attention also to the safeguarding of values common to humankind, and to the respect for life and human dignity (part IX). The new vision advanced by the U.N. Charter, and espoused by the Law of the United Nations — he proceeds — has, in his perception,

> "an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension. Such reasoning beyond the inter-State dimension is faithful to the U.N. Charter, the ICJ being 'the principal judicial organ of the United Nations'" (para. 121).

36. Likewise, the cycle of World Conferences of the United Nations along the nineties, in a commendable endeavour of the United Nations to go beyond and transcend the purely inter-State dimension, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind. The common denominator in those U.N. World Conferences — Judge Cançado Trindade adds — can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (paras. 125-127).

37. In sum, the nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

38. Contrary to the reasoning of the Court's majority, the so-called Monetary Gold "principle" has no place in a case like the present one, and it "does not belong to the realm of the

prima principia, being nothing more than a concession to State consent, within an outdated State voluntarist framework". The present case, in the perception of Judge Cançado Trindade, shows

> "the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the principle of humanity" (paras. 130-131).

39. The present case of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament stresses the utmost importance of general principles of international law, such as the principle of the juridical equality of States (part XI). General principles of law (prima principia) rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of jus necessarium over jus voluntarium (cf. infra).

40. Factual inequalities and the strategy of "deterrence" cannot be made to prevail over the juridical equality of States; "deterrence" cannot keep on overlooking the distinct series of U.N. General Assembly resolutions, expressing an opinio juris communis in condemnation of nuclear weapons (part XII). As also sustained by general principles of international law and international legal doctrine — Judge Cançado Trindade adds — nuclear weapons are in breach of international law, of IHL and the ILHR, of the U.N. Charter, and of jus cogens, for the devastating effects and sufferings they can inflict upon humankind as a whole (paras. 138-139).

41. In his understanding, the ICJ should give "far greater weight to the raison d'humanité", rather than to the raison d'État nourishing "deterrence"; it should "keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the raison d'État". The raison d'humanité, in his understanding, "prevails surely over considerations of Realpolitik" (para. 139). He adds that, in its 1996 Advisory Opinion, the ICJ rightly acknowledged the importance of complete nuclear disarmament (asserted in the series of General Assembly resolutions) as an obligation of result, and not of mere conduct (para. 99), but

> "did not extract the consequences of that. Had it done so, it would have reached the conclusion that nuclear disarmament cannot be hampered by the conduct of a few States — the NWS — which maintain and modernize their own arsenals of nuclear weapons, pursuant to their strategy of 'deterrence'.
>
> The strategy of 'deterrence' has a suicidal component. Nowadays, in 2016, twenty years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an opinio juris communis as to the illegality of nuclear weapons, and as to the well-established obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such opinio juris cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that opinio juris discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of 'deterrence'" (paras. 140-141).

42. Judge Cançado Trindade concludes on this point that there is here, in effect, clearly formed, an opinio juris communis as to the illegality and prohibition of nuclear weapons, and the survival of humankind cannot be made to depend on the "will" and the insistence on "national security interests" of a handful of privileged States; the "universal juridical conscience stands well above the 'will' of individual States" (para. 146).

43. His next line of considerations pertains to the illegality of nuclear weapons and the obligation of nuclear disarmament (part XIII), encompassing: a) the condemnation of all weapons of mass destruction; b) the prohibition of nuclear weapons (the need of a people-centred approach, and the fundamental right to life); c) the absolute prohibitions of jus cogens and the humanization of international law; d) pitfalls of legal positivism. Judge Cançado Trindade stresses the need of a people-centred approach in this domain, keeping in mind the fundamental right to life (paras. 172-185). Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons.

44. He warns that, in the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of jus cogens, which have an incidence on ILHR, IHL, ILR and ICL, fostering the current historical process of humanization of international law (paras. 186-189).

45. He further warns that the positivist outlook unduly overlooks the opinio juris communis as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law (paras. 190-196). Conventional and customary international law go together — he adds — in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons (paras. 197-205).

46. To Judge Cançado Trindade, the existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking (part XV). He ponders that

> "In the domain of nuclear disarmament, we are faced today, within the conceptual universe of international law, with unexplainable insufficiencies, or anomalies, if not absurdities. For example, there are fortunately in our times Conventions prohibiting biological and chemical weapons (of 1972 and 1993), but there is to date no such comprehensive conventional prohibition of nuclear weapons, which are far more destructive. There is no such prohibition despite the fact that they are in clear breach of international law, of IHL and the ILHR, as well as of the Law of the United Nations.
>
> Does this make any sense? Can international law prescind from ethics? In my understanding, not at all. Just as law and ethics go together (in the line of jusnaturalist thinking), scientific knowledge itself cannot be dissociated from ethics. The production of nuclear weapons is an illustration of the divorce between ethical considerations and scientific and technological progress. Otherwise, weapons which can destroy millions of innocent civilians, and the whole of humankind, would not have been conceived.

> The principles of recta ratio, orienting the lex praeceptiva, emanate from human conscience, affirming the ineluctable relationship between law and ethics. Ethical considerations are to guide the debates on nuclear disarmament. Nuclear weapons, capable of destroying humankind as a whole, carry evil in themselves. They ignore civilian populations, they make abstraction of the principles of necessity, of distinction and of proportionality. They overlook the principle of humanity. They have no respect for the fundamental right to life. They are wholly illegal and illegitimate, rejected by the recta ratio, which endowed jus gentium, in its historical evolution, with ethical foundations, and its character of universality" (paras. 207-209).

47. In Judge Cançado Trindade's understanding, humankind is subject of rights (as propounded by the "founding fathers" of international law); in the realm of the humanized new jus gentium; as a subject of rights, humankind has been a potential victim of nuclear weapons already for a long time. This humanist vision is centred on peoples, keeping in mind the humane ends of States.

48. In his view, the contemporary tragedy of nuclear weapons cannot be addressed from "the myopic outlook of positive law alone"; nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations (le droit des gens). They are in flagrant breach of its fundamental principles, and those of IHL, the ILHR, as well as the Law of the United Nations; they are a contemporary "manifestation of evil, in its perennial trajectory going back to the Book of Genesis". Jusnaturalist thinking, "always open to ethical considerations", identifies and discards the disrupting effects of the strategy of "deterrence" of fear creation and infliction; "humankind is victimized by this" (para. 213).

49. The next line of considerations of Judge Cançado Trindade concerns the principle of humanity (para. 221) and the universalist approach, with the jus necessarium transcending the limitations of jus voluntarium (part XVI). He recalls that, on several occasions, in his Individual Opinions both in the ICJ and, earlier on, in another international jurisdiction (the IACtHR), he underlined that

> "the law of nations (droit des gens), since its historical origins in the XVIth century, was seen as comprising not only States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole. The strictly inter-State outlook was devised much later on, as from the Vattelian reductionism of the mid-XVIIIth century, which became en vogue by the end of the XIXth century and beginning of the XXth century, with the well-known disastrous consequences — the successive atrocities victimizing human beings and peoples in distinct regions of world, — along the whole XXth century. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened" (para. 219).

50. The conventional and customary obligation of nuclear disarmament — he proceeds — brings to the fore another aspect:

> "the issue of the validity of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is necessary — such as a world free of nuclear weapons — in order to secure the survival of humankind. This idée du droit precedes positive international law, and is in line with jusnaturalist thinking. (…)

It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of jus cogens" (paras. 227-229).

51. Judge Cançado Trindade then addresses other aspects of the matter at issue, mentioned by the contending parties in the present case of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament. He points out that opinio juris communis necessitatis, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression, first, in the NPT Review Conferences, from 1975 to 2015 (part XVII).

52. Secondly, the same has happened in the relevant establishment of nuclear-weapon-free zones (part XVIII), to the ultimate benefit of humankind as a whole (para. 253). Basic considerations of humanity have surely been taken into account for the establishment of those zones, by the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Tlatelolco), followed by four others of the kind, in distinct regions of the world, namely the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the 1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty, as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty (and their respective Protocols).

53. The establishment of those nuclear-weapon-free zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole (para. 246). To the establishment of aforementioned five nuclear-weapon-free zones other initiatives against nuclear weapons are to be added — Judge Cançado Trindade proceeds — such as the prohibitions of placement of nuclear weapons, and other kinds of weapons of mass destruction, in outer space, on the seabed, on the ocean floor and in the subsoil beyond the outer limit of the territorial seabed zone — "denuclearized" by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon (para. 257).

54. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, "reveals an undeniable advance of right reason, of the recta ratio in the foundations of contemporary international law". Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground: in recent years, proposals are being examined for the setting up of new denuclearized zones of the kind, as well as of the so-called single-State zone (e.g., Mongolia). All this "further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely destructive capability, constitute an affront to right reason (recta ratio)" (para. 258).

55. And thirdly, the same has happened in respect of the recent Conferences of the Humanitarian Impact of Nuclear Weapons (part XIX — held, respectively, in Oslo in March 2013, in Nayarit in February 2014, and in Vienna in December 2014) — in their common cause of achieving and maintaining a nuclear-weapon-free world. This recent series of Conferences — examined by Judge Cançado Trindade — has drawn attention to the humanitarian effects of nuclear weapons, "restoring the central position of the concern for human beings and peoples"; it has thus "stressed the importance of the human dimension of the whole matter, and has endeavoured to awaken the conscience of the whole international community as well as to enhance the needed humanitarian coordination in the present domain" (para. 261).

56. Given their devastating effects, nuclear weapons should never have been conceived and produced. The Nayarit and Vienna Conferences participants heard the poignant testimonies of some Hibakusha — survivors of the atomic bombings of Hiroshima and Nagasaki — who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, such as the birth of "monster-like babies", the continuous suffering from "thyroid cancer, liver cancer and all types of radiogenic cancerous illnesses", extending over the years, and killing survivors along seven decades) (paras. 269 and 277).

57. This series of recent Conferences on the Humanitarian Impact of Nuclear Weapons have contributed to a deeper understanding of the consequences and risks of a nuclear detonation, and have demonstrated their devastating immediate, mid- and long-term effects of the use and testing of nuclear weapons; they have focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons (paras. 280-281 and 283-287). In the struggle against nuclear weapons, a "Humanitarian Pledge" has ensued from the Vienna Conference, which, by April 2016, has been formally endorsed by 127 States (paras. 288-290).

58. Judge Cançado Trindade concludes on this point that all these recent initiatives (supra) have been

> "rightly drawing attention to the grave humanitarian consequences of nuclear weapons detonations. The reframing of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of 'deterrence' and the catastrophic consequences of the use of nuclear weapons. (…)
>
> The obligation of nuclear disarmament being one of result, the 'step-by-step' approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The 'step-by-step' approach has produced no significantly concrete results to date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. supra). After all, the absolute prohibition of nuclear weapons — which is multifaceted, is one of jus cogens (cf. supra). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of 'deterrence' unfounded and unsustainable" (paras. 291-292).

59. Moreover, those initiatives, reviewed in the present Dissenting Opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on the Humanitarian Impact of Nuclear Weapons) — referred to by the contending parties in the course of the proceedings before the ICJ in the present case of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament — "have gone beyond the inter-State outlook". In Judge Cançado Trindade's perception, "there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times" (para. 295).

60. After recalling that nuclear weapons, "as from their conception, have been associated with overwhelming destruction" (para. 296), Judge Cançado Trindade proceeds to his final considerations (part XX). In his own understanding, opinio juris communis — to which U.N. General Assembly resolutions have contributed — has a much broader dimension than the

subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons.

61. U.N. (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for all U.N. member States. Of the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable along the years. The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

62. Opinio juris has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Already in the XIXth century, the so-called "historical school" of legal thinking and jurisprudence, "in reaction to the voluntarist conception, gradually discarded the "will" of the States by shifting attention to opinio juris, requiring practice to be an authentic expression of the "juridical conscience" of nations and peoples". With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as "a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community" (para. 299). Judge Cançado Trindade adds that

> "opinio juris became a key element in the formation itself of international law, a law of conscience. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.
>
> The foundations of the international legal order came to be reckoned as independent from, and transcending, the 'will' of individual States; opinio juris communis came to give expression to the 'juridical conscience', no longer only of nations and peoples — sustained in the past by the 'historical school' — but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind" (paras. 300-301).

63. Judge Cançado Trindade further recalls that, along the years, he has consistently repudiated "voluntarist positivism", as he does now in the present Dissenting Opinion, in respect of "the customary and conventional international obligation to put an end to nuclear weapons", so as "to rid the world of their inhuman threat" (paras. 303-305). He then ponders that U.N. General Assembly or Security Council resolutions on the present matter, surveyed herein,

> "are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs), being thus valid for all U.N. member States. (…) [T]he U.N. is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker States, such as the NNWS; in doing so, it aims — by multilateralism — at the common good, at the realization of common goals of the international community as a whole, such as nuclear disarmament.
>
> A small group of States — such as the NWS — cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them,

> or abstained. Once adopted, they are valid for all U.N. member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of U.N. member States which voted in favour of them. U.N. General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one" (paras. 306-307).

64. Those resolutions — he proceeds — "find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of all humankind". The values which find expression in those prima principia "inspire every legal order and, ultimately, lie in the foundations of this latter" (para. 308). The general principles of law (prima principia), in his perception,

> "confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political 'realism', in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous" (para. 309).

65. They have been contributing, in the last decades, to a vast corpus juris on matters of concern to the international community as a whole, overcoming the traditional inter-State paradigm of the international legal order. And this can no longer be overlooked in our days: the inter-State mechanism of the contentieux before the ICJ "cannot be invoked in justification for an inter-State reasoning". As "the principal judicial organ" of the United Nations,

> "the ICJ has to bear in mind not only States, but also 'we, the peoples', on whose behalf the U.N. Charter was adopted. In its international adjudication of contentious cases, like the present one of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law" (para. 310).

66. Last but not least, in his epilogue (part XXI), Judge Cançado Trindade expresses the feeling of being in peace with his own conscience, in laying the foundations of his own personal position in the cas d'espèce, which "stands in clear and entire opposition to the view espoused by the Court's majority". In his understanding,

> "there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case" (para. 311).

67. His dissenting position "is grounded not only on the assessment of the arguments produced before the Court by the contending parties, but above all on issues of principle and on fundamental values, to which I attach even greater importance" (para. 316). In conclusion — he adds — "[a] world with arsenals of nuclear weapons, like ours, is bound to destroy its past,

dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness" (para. 331). In his understanding,

> "the International Court of Justice, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole" (para. 327).

Declaration of Judge Xue

Judge Xue votes in favour of the Judgment because she agrees with the decision of the Court to dismiss the case for lack of jurisdiction. Notwithstanding her vote, she wishes to make two points on the Judgment.

Her first point relates to the approach taken by the Court with regard to the existence of a dispute. 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.

Judge Xue notes that the Court does not deal with the other objections raised by the Respondent, but dismissed the case by solely relying on the finding that there did not exist a dispute between the Parties at the time of the filing of the Application. Therefore, it is not unpredicted that questions arise as to the propriety of this formal and restrictive approach. Given the Court's past practice of judicial flexibility in handling procedural defects, 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.

The reason for Judge Xue to support the Court's decision is threefold. First of all, in her 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. 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 her opinion, it would undermine the confidence of States in accepting the compulsory jurisdiction of the Court.

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 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.

Thirdly, the Court's jurisdiction is built on mutuality and reciprocity. The present case is different in character from the previous cases where the Court took a flexible approach in dealing with some procedural defects. Judge Xue observes that 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 (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.

As to her second point, Judge Xue regrets very much that the Court does not proceed further to deal with some other objections raised by the Respondent. The United Kingdom argues, inter alia, that on the basis of the Monetary Gold rule, the alleged dispute cannot be decided by the Court in the absence of the other nuclear-weapon States. Moreover, it maintains that the alleged obligation to negotiate requires the participation of all nuclear-weapon States — and others. A decision binding the Marshall Islands and the United Kingdom therefore could not have the desired effect.

In her opinion, these objections 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.

She recalls the Court's Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons case, in which the Court stated that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" (Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 264, para. 100; emphasis added) and that the obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is not a mere obligation of conduct, but an obligation to achieve a precise result.

Judge Xue observes that it has been twenty years since this Advisory Opinion was delivered. She notes that 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. She wonders whether such disagreement, as may exist between some nuclear-weapon States, on the one hand, and non-nuclear-weapon States, on the other, on the cessation of nuclear arms race and the negotiation process on nuclear disarmament, can be characterized as a dispute that falls within the meaning of Articles 36 and 38 of the Statute. She questions whether a dispute as such, assuming existent at the time of the filing of the application or crystallized subsequently, is justiciable for the Court to settle through contentious proceedings. In her view, 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.

Declaration of Judge Donoghue

Judge Donoghue notes that the criteria pursuant to which the Court decides on the existence of a dispute are not found in the Statute of the Court, but are instead contained in the reasoning of the Court's judgments. This calls for clarity in those criteria and for their consistent application. Judge Donoghue considers that the Court's inquiry into the existence of a dispute in today's Judgment follows the reasoning contained in the recent jurisprudence of the Court.

As to the Marshall Islands' proposition that opposing statements made by the parties during the proceedings before the Court can suffice to establish the existence of a dispute, Judge Donoghue considers that in its recent judgments the Court has not found the existence of a dispute based solely on the parties' statements in Court, but instead has adhered to the principle that the evidence must show that a dispute existed as of the date of an application, as it does today.

Concerning the Marshall Islands' contention that the Court should infer the existence of a dispute from the juxtaposition of the Marshall Islands' statements with the Respondent's conduct, Judge Donoghue observes that the objective standard applied today to scrutinize the evidence is consistent with the recent case law of the Court. The essential question is whether the Applicant's statements referred to the subject-matter of its claim against the Respondent — i.e., "the issue brought before the Court" in the Application — with sufficient clarity that the Respondent "was aware, or could not have been unaware," of the Applicant's claim against it. As this was not the case, there was no reason to expect a response from the Respondent nor for the Court to infer opposition from the alleged unaltered course of conduct of the Respondent. Accordingly, there was no opposition of views, and no dispute, as of the date of the Application.

Declaration of Judge Gaja

Having reached the conclusion that there was no dispute between the Parties on the date when the Application was filed, the Court decides not to examine the other objections raised by the respondent States. Given that disputes have clearly arisen since that date, it would have been preferable for the Court to examine also other objections made by the respondent States which are likely to be litigated again should the Marshall Islands file new applications.

Separate opinion of Judge Sebutinde

The object and purpose of the United Nations Charter is the maintenance of international peace and security. It is in light of that object and purpose that the International Court of Justice (ICJ), as the principal judicial organ of the United Nations, discharges its mandate to decide inter-State disputes on the basis of international law. The object and purpose of the United Nations becomes apparent in view of the threat to international peace and security posed by nuclear weapons.

The subject-matter of the dispute between the Parties is the alleged breach by the United Kingdom (UK), of an international obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and 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. Both the Republic of the Marshall Islands (RMI) and the UK filed optional clause declarations under Article 36, paragraph 2, of the Statute of the ICJ, in 2013 and 2004 respectively, accepting the compulsory jurisdiction of the Court. However, the existence of a dispute is a precondition for the exercise of that jurisdiction.

It is the role of the Court (and not the Parties) to objectively determine whether or not at the time the Application was filed, there was "a disagreement on a point of law or fact, or a conflict of legal views or interests" between the Parties, regarding the above-mentioned subject-matter. The Court's jurisprudence demonstrates that the Court has in the discharge of this function adopted a flexible approach attaching more importance to the substance of the evidence, including the conduct of the parties, rather than to matters of form or procedure. The approach and reasoning adopted by the majority in arriving at the conclusion that there is no dispute between the Parties in the present case, is not only both formalistic and procedural but is also inflexible in as far as it does not take due account of the conduct of the Parties. A more flexible, substantive approach

examining the conduct of the Parties as relevant evidence, would have shown that the RMI and the UK clearly held opposing views regarding the subject-matter of the present dispute.

Lastly, by insisting that, in order for a dispute to exist, an applicant must prove that the respondent State "was aware or could not have been unaware that its views were positively opposed by the applicant", the majority has introduced a new legal test that is alien to the Court's established jurisprudence and that unduly raises the evidential threshold. Apart from unduly emphasizing form over substance, this new legal criterion of "awareness" introduces a degree of subjectivity into an equation that ought to remain objective, since it requires both an applicant and the Court to delve into the mind of a respondent State. The jurisprudence relied upon by the majority in adopting this new criterion is distinguishable and inapplicable to the present case.

Separate opinion of Judge Bhandari

In his separate opinion, Judge Bhandari recalls that he has concurred with the conclusions of the majority Judgment. However, he wishes to expand the basis of the reasoning of the Judgment, and proposes to deal with another aspect of the case, namely that, in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by the United Kingdom because the issues raised in the case affect not only the Parties, but also the entire humanity.

Judge Bhandari stated that, according to the Statute of the Court and its jurisprudence, this Court can only exercise its jurisdiction in case of a dispute between the parties. Hence, the question to be decided is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of the filing of the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence. He then refers to the relevant statutory provisions (Articles 36, paragraph 2, and 38, paragraph 1, of the Statute of the Court) and to the definition of "dispute". Thereafter, he recalls that, in determining the existence of a dispute, the Court has reviewed in detail the Parties' diplomatic exchanges, documents and statements (Georgia v. Russia and Belgium v. Senegal) in order to establish whether there is "a disagreement on a point of law or fact, a conflict of legal views or of interests" (Mavrommatis Palestine Concessions). Further to the holding in the South West Africa cases, the criterion for the existence of a dispute is that the claim of one party be positively opposed by the other.

In his separate opinion, Judge Bhandari concludes that, on application of the Court's Statute and its jurisprudence, as well as the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, this Court lacks jurisdiction to deal with this case. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute.

The Court has the freedom to choose any preliminary objection when examining its own jurisdiction and, in doing so, it usually chooses the most "direct and conclusive" (Norwegian Loans). In the instant case, by choosing the lack of awareness on the part of the Respondent as the main ground for the dismissal of the claim, the Court has not chosen the most "direct and conclusive" ground for dismissal, as the lack of awareness on the part of the Respondent can easily be cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the Applicant could simply bring the case again before the Court. This would be an undesirable result and should be discouraged. The Parties have already submitted documents, pleadings and submissions in extenso. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in the treatment of this matter.

Consequently, Judge Bhandari considers in his separate opinion that, in the facts of this case, the Court should have examined the other preliminary objections taken by the Respondent, namely, lack of jurisdiction due to the absence of essential parties not party to the instant proceedings (Monetary Gold principle), that the Marshall Islands' claim is excluded in consequence of the Optional Clause Declarations of the Parties, and that the Marshall Islands' claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the claim. In relation to the Monetary Gold principle in particular, it is recalled that in its 1996 Advisory Opinion on nuclear weapons the Court considered that any realistic search for general and complete disarmament would require the co-operation of all States. These preliminary objections are substantial in character and ought to have been adjudicated by the Court.

Dissenting opinion of Judge Robinson

Judge Robinson disagrees with the majority's conclusion that there is no dispute in this case.

The United Nations Charter has assigned the Court a special role, giving it a particular relevance in the maintenance of international peace and security through the exercise of its judicial functions. The Majority's decision today fails to demonstrate sensitivity to this role.

The Court's case law has been consistent in the approach to be adopted in determining the existence of a dispute; an approach that is not reflected in today's Judgment. The jurisprudence of the Court calls for an objective, flexible and pragmatic approach in determining the existence of a dispute. It is firmly established in the Court's jurisprudence that a dispute arises where, examined objectively, there are "clearly opposite views concerning the question of the performance or non-performance" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74) of a State's obligations. There is not a single case in the Court's case law that authorizes the majority's proposition that the determination of the existence of a dispute requires a finding of the respondent's awareness of the applicant's positive opposition to its views. While awareness may act as evidence that confirms the existence of a dispute, framing awareness as a prerequisite for a dispute is a departure from the empirical and pragmatic enquiry that the Court must undertake: an enquiry focused simply on whether or not the evidence reveals clearly opposite views.

The majority also misconstrues the plain meaning of its dicta and its own case law in concluding that post-Application evidence may act simply to confirm the existence of a dispute. The Court's approach to this question has been less definitive and uncompromising than the Majority would like to suggest. The Court has given itself room to afford significant weight to statements made during the proceedings, particularly the denial of allegations by the respondent, not just to confirm but to establish a dispute. This is entirely consistent with the flexible, pragmatic approach that is the hallmark of the Court's jurisprudence on this question. A respondent's opportunity to react is more properly addressed as a question of procedural due process rather than as an element of the dispute criterion.

Another reason for rejecting the majority decision is that it militates against the sound administration of justice, a principle that the Court has emphasized on more than one occasion. The Court spoke against an approach that would lead to, what it termed, the "needless proliferation of proceedings" (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. 443, para. 89). An odd result of the majority Judgment is that, given the basis on which the claim has been dismissed, the Applicant could, in theory, file another Application against the Respondent.

The facts of this case show that there was a dispute between the Applicant and the Respondent. Even though Judge Robinson disagrees with the majority's position that awareness is not a prerequisite for a finding that a dispute exists, it is hard to conclude that the Respondent "could not have been unaware" of the opposite views of the Parties.

The majority's holding today has placed an additional and unwarranted hurdle in the way of claims that may proceed to be examined on the merits. In so doing, it has detracted from the potential of the Court to play the role envisaged for it as a standing body for the peaceful settlement of the disputes and through this function, as an important contributor to the maintenance of international peace and security. This conclusion is rendered even more telling by the subject-matter of the dispute before the Court today.

Dissenting opinion of Judge Crawford

Judge Crawford disagreed with the "objective awareness" test for the existence of a dispute adopted by the majority. No such legal requirement was to be found in the Court's jurisprudence. An objective awareness test was difficult to distinguish from a formal notice requirement, which the Court had rejected. Moreover, the Court had traditionally exercised flexibility in determining the existence of a dispute. While Judge Crawford agreed that in principle the dispute should exist at the time the application was filed, a finding of a dispute could be based, inter alia, on post-application conduct or evidence, including the statements of the parties in the proceedings.

As well as disagreeing with the Court's statement of the law, Judge Crawford disagreed with its application to the facts. In particular, the dispute in question should have been characterized as a multilateral dispute, relying on South West Africa (Preliminary Objections) as authority for the proposition that such a dispute may crystallize in multilateral fora involving a plurality of States. In his view there was, at the least, an incipient dispute between the Applicant and the Respondent as at the date of the Application, given that the Marshall Islands had associated itself with one side of a multilateral disagreement with the nuclear-weapon States.

Since there was, at the date of the Application, a dispute between the Marshall Islands and the Respondent as to the latter's compliance with Article VI of the NPT or its customary international law equivalent, it was unnecessary to consider whether any deficiency could and should be remedied in the exercise of the Mavrommatis discretion, as recently articulated in Croatia v. Serbia.

Judge Crawford also referred to one of the other objections to jurisdiction and admissibility raised by the Respondent, the Monetary Gold objection. In his view this was a question for the merits stage. Whether it was necessary as a precondition for resolving the dispute for the Court to rule on the rights and obligations of third parties to the dispute would depend, inter alia, on the scope and application of Article VI of the NPT, or any parallel customary international law obligation.

Dissenting opinion of Judge ad hoc Bedjaoui

I. Introduction

Judge ad hoc Bedjaoui voted against the operative clause adopted by the Court in the case between the Marshall Islands and the United Kingdom. He believes that a dispute does exist between the Marshall Islands and the Respondent.

He notes that 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 it has itself

identified for determining the existence of that dispute. The most significant break from its jurisprudence can be seen in the Judgment of 1 April 2011 in the Georgia v. Russian Federation case, and this was continued in the case concerning Questions relating to the Obligation to Prosecute or Extradite.

II. A traditionally less formalistic jurisprudence

Judge ad hoc Bedjaoui argues that 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.

He refers to the Court's clarity and resourcefulness in the exercise of both its advisory and contentious functions. The Court has successfully avoided falling prisoner to the letter of the Charter and the lacunae of international law. Judge ad hoc Bedjaoui gives a quick and simplified overview of the Court's jurisprudence, leaving him saddened at the impression that might be left by today's decision in the present case.

In his 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. It is 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. Failing to do so creates 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.

Besides this first duty of consistency, Judge ad hoc Bedjaoui believes that 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; it is by no means a case of the Court accepting every new idea, but of 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.

To his mind, the greatest danger for the moment remains excessive formalism, especially when, as is the case here, it combines with a jurisprudence which is entirely unclear for the future. That evidently increases the risk of the arbitrary.

III. Notification/"awareness"?

Judge ad hoc Bedjaoui is of the opinion that while the Court has traditionally been reticent to make notification of the dispute by the applicant to the respondent a precondition for the institution of proceedings, since the 2011 decision there has been uncertainty obscuring the general view.

He laments the fact that the Court seems to establish a direct and — it would appear — automatic correlation between awareness of an opposition of views and the existence of a dispute. He also points out that, in the Court's reasoning, what is essential is the fact that the respondent should "be aware". Judge ad hoc Bedjaoui wonders if we are not thus witnessing the resurrection by degrees of the "notification" concept.

However, if we accept the existence of this additional precondition, then why not apply it correctly? Judge ad hoc Bedjaoui maintains that the United Kingdom had to be "aware" of the Marshall Islands' anti-nuclear views in opposition to its own nuclear conduct, given, among other things, the history of the Marshall Islands and its 2013 and 2014 statements made at international

events which were open to all. These statements were aimed at all States possessing nuclear weapons, without distinction, as everyone knows, and they did not exclude the United Kingdom.

Finally, Judge ad hoc Bedjaoui asks: how can the Respondent's level of "awareness" be assessed? And how could this unusual excursion into subjectivity be reconciled with the stated "objective" search for the existence of a dispute?

IV. Date of the existence of a dispute

Judge ad hoc Bedjaoui is pleased that, 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".

However, in practice, the Court has refused, without convincing explanation, to take account of the evidence which arose after the date on which the proceedings were instituted and which attested to the existence of a dispute. In so doing, it establishes as an absolute dogma a solution that runs counter to its traditional approach, which was characterized by great flexibility, as reflected in its statement that the dispute must only "in principle" exist on the date that proceedings are instituted.

V. Procedural defects

As regards reparable procedural defects, 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, Judge ad hoc Bedjaoui notes that the Court has created sound jurisprudence which has stood the test of time and demonstrated its flawless consistency over a period of almost 90 years. It is this jurisprudence that the 2011 Judgment started to destroy, with the deathblow being delivered by the Belgium v. Senegal case.

In the present proceedings, the Court has once again dispensed with its traditional jurisprudence, despite the latter's wisdom. Judge ad hoc Bedjaoui laments the fact that the majority of the Court considered the Marshall Islands' 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. 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.

VI. Proof by inference; proof by the interpretation of silence

Judge ad hoc Bedjaoui recalls that, 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.

In its present Judgment, the Court sweeps aside its traditional jurisprudence and takes 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". The Court seems to have 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.

VII. Proof provided by the exchanges before the Court

Judge ad hoc Bedjaoui is of the opinion that 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, once again moving away from its traditional jurisprudence.

He wonders how one can 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. The exchanges that took place before the Court did not create the dispute anew. They merely "confirmed" its prior existence.

VIII. Sui generis nature of any nuclear dispute

Judge ad hoc Bedjaoui notes that the general historical background to the international community's efforts to bring about nuclear disarmament 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 declared 20 years ago that a twofold obligation exists to negotiate and to achieve nuclear disarmament. For 20 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.

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. The Marshall Islands is seeking an end to Article VI, an end to the NPT, through an end to nuclear weapons.

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. 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. And while it is true that Article VI does not set a deadline, this does not mean, however, that it allows for negotiations that are open-ended with no guarantee of an outcome.

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?

Judge ad hoc Bedjaoui could perhaps have accepted, in a case as complex and important as this one between the Marshall Islands and the United Kingdom, a decision which reflected the

Court's — after all highly legitimate — concern to avoid ruling prematurely on jurisdiction and admissibility. 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.

X. The train of undesirable consequences of this decision

Finally, Judge ad hoc Bedjaoui notes that the present decision has the unfortunate potential to unleash whole train of undesirable consequences, not only for the Respondent, which could find itself encouraged to withdraw its optional recognition of the Court's jurisdiction, but also for the Applicant, which has shouldered the cost of coming to the Court, as well as for the international community and the Court itself.

As regards the international community, the decisions handed down by the Court today 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?

As for the Court itself, it 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. In these three cases, the Court seems to have been unable to break away from a formalism which sacrifices the merits to procedure, content to form, and the case to its subject-matter. Moreover, even though the Court has always declared that its aim is to give a fundamentally "objective" assessment of the evidence, it seems here to have made little attempt to avoid being subjective in its assessment of the evidence put forward by the Applicant, itself organizing the Respondent's defence and examining all of the Applicant's arguments with what appears to be a negative prejudice.

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