SEPARATE OPINION OF JUDGE SEBUTINDE

Object and purpose of the United Nations Charter — Maintenance of international peace and security — Role of the Court in the peaceful settlement of disputes — The Court's compulsory jurisdiction derives from the optional clause declarations pursuant to Article 36, paragraph 2, of the Court's Statute and not from the existence of a dispute — The existence of a dispute is merely the precondition for the exercise of that jurisdiction — Article 38 of the Statute of the Court — The objective determination of the existence of a dispute is the prerogative of the Court and is a matter of substance, not of form or procedure — Conduct of the Parties is relevant evidence — The new legal prerequisite of "awareness by the Respondent that its views were positively opposed" is formalistic and alien to the Court's jurisprudence.

Introduction

1. I have voted against the operative paragraph of the Judgment because I am unable to agree with the decision of the Court upholding the first preliminary objection of the United Kingdom, as well as the underlying reasoning. In my view, the majority of the Court has unjustifiably departed from the flexible and discretionary approach that it has consistently hitherto adopted in determining the existence of a dispute, choosing instead, to introduce a new rigorous and formalistic test of "awareness" that raises the evidentiary threshold and that is bound to present the Court with difficulties in future. Furthermore, given the importance of the subject-matter of this case not only to the Parties involved but to the international community as a whole, I find it regrettable that the Court has opted to adopt an inflexible approach that has resulted in summarily disposing of this case at this early stage. I explain my views in more detail in this separate opinion.

Responsibility for the Maintenance of International Peace and Security

2. If there is one lesson that the international community learnt from the human catastrophes that were the First and Second World Wars, it was the need for a concerted, global effort

> "[t]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth

> of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . ."[1].

3. It is also important to recollect the purpose for which the United Nations was created, namely,

> "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"[2].

Under the Charter, although the primary responsibility for the maintenance of international peace and security lies with the Security Council[3], and to a lesser extent, the General Assembly[4], the International Court of Justice, as the principal judicial organ of the United Nations[5] does contribute to the maintenance of international peace and security through its judicial settlement of such inter-State disputes as are referred to it for adjudication[6] and through the exercise of its advisory role in accordance with the Charter and the Statute of the Court[7]. Today there is no greater threat to international peace and security, or indeed to humanity, than the threat or prospect of a nuclear war.

The NPT and Nuclear Disarmament

4. It may also be useful to briefly recall the historical background to the present case. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which entered into force in 1970[8] and whose objectives are, to prevent the spread of nuclear weapons and weapons technology; to promote co-operation in the peaceful use of nuclear energy and to further the goal of achieving nuclear disarmament, currently has 191 States parties

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[1] United Nations, Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI, Preamble (hereinafter the "UN Charter").

[2] UN Charter, Art. 1.

[3] *Ibid.*, Art. 24 (1).

[4] *Ibid.*, Art. 11.

[5] *Ibid.*, Art. 92.

[6] United Nations, Statute of the International Court of Justice, 18 April 1946 (hereinafter the "Statute"), Art. 38.

[7] UN Charter, Art. 96 and Statute, Arts. 65-68.

[8] Treaty on the Non-Proliferation of Nuclear Weapons, 729 *UNTS* 161, opened for signature at London, Moscow and Washington on 1 July 1968 and entered into force 5 March 1970.

including the Marshall Islands[9] and the United Kingdom[10]. However, contrary to the NPT objectives, State practice demonstrates that for the past nearly 70 years, some States have continued to manufacture, acquire, upgrade, test and/or deploy nuclear weapons and that a threat of possible use is inherent in such deployment. Furthermore, State practice demonstrates that far from proscribing the threat or use of nuclear weapons in all circumstances, the international community has, by treaty and through the United Nations Security Council, recognized in effect that in certain circumstances the use or threat of use of nuclear weapons may even be justified.

5. In December 1994 the United Nations General Assembly sought an advisory opinion from the Court regarding the legality of the threat or use of nuclear weapons[11]. The question posed by the General Assembly was quite simply "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" In response, the Court considered that it was being asked "to determine the legality or illegality of the threat or use of nuclear weapons"[12]. After taking into account the body of international law (including Article 2, paragraph 4, and Article 51 of the United Nations Charter) as well as the views of a vast number of States that filed their written submissions before the Court, the Court opined that:

— there is no specific authorization of the threat or use of nuclear weapons in either customary or conventional international law[13];

— there is no comprehensive and universal prohibition of the threat or use of nuclear weapons as such, in either customary or conventional international law[14];
— a threat or use of nuclear weapons that was contrary to Article 2, paragraph 4, or that failed to meet all the requirements of Article 51 of the United Nations Charter; or that is incompatible with the prin-

[9] The Republic of the Marshall Islands (RMI) acceded to the NPT on 30 January 1995. See United Nations Office of Disarmament Affairs, Marshall Islands: Accession to Treaty on the Non-Proliferation of Nuclear Weapons, available at: http://disarmament.un.org/treaties/a/npt/marshallislands/acc/washington.

[10] The United Kingdom signed the NPT on 1 July 1968 in London, Moscow and Washington and it ratified it on 27 November 1968 in London and Washington and on 29 November 1968 in Moscow. See United Nations Office of Disarmament Affairs, United Kingdom of Great Britain and Northern Ireland: Ratification of the NPT, available at: http://disarmament.un.org/treaties/a/npt/unitedkingdomofgreatbritainandnorthernireland/rat/london.

[11] UN General Assembly resolution A/RES/49/75 K, 15 December 1994, Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons.

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

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

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

ciples and rules of international humanitarian law applicable in armed conflict or that is incompatible with treaties specifically dealing with nuclear weapons, is illegal[15].

6. However, the Court did make one exception to its findings (albeit in an evenly divided manner[16]) when it opined that:

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"[17].

7. Finally, although this does not appear to have been in direct answer to the question posed by the General Assembly, the Court went an extra mile in what, in my view, is the real contribution of the Court to world peace and security as far as the question of nuclear weapons is concerned. It stated in paragraphs 98 to 100 of the Advisory Opinion, as follows:

> "Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.
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> In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.
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> In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament . . . The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.
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> This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the [NPT], or, in other words, the vast majority of the international community . . . Indeed

[15] *Op. cit. supra* note 12, p. 266, para. 105 (2) C and D.

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

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

any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 263-264, paras. 98-100.)

8. The Court then unanimously opined in the operative clause that, "There exists an obligation to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[18] The Advisory Opinion of the Court, although not legally binding, was well received by the vast majority of NPT States parties, although it was less welcome by those nuclear-weapon States that were of the view that the Court had over-stepped its judicial function by rendering this opinion. In December 1996, the General Assembly passed a resolution endorsing the conclusion of the Court relating to the existence of "an obligation to pursue in good faith and to bring to a conclusion, negotiations leading to disarmament in all its aspects under strict and effective international control" and calling upon all States to immediately commence multilateral negotiations leading to a nuclear weapons convention prohibiting "the development, production, testing, deployment, stockpiling, threat or use of nuclear weapons" and providing for their elimination[19].

9. Regrettably, since the adoption of the Court's Advisory Opinion 20 years ago, the international community has made little progress towards nuclear disarmament and even the prospect of negotiations on the conclusion of a nuclear weapons convention seems illusory. It is in this context that, on 24 April 2014, the Republic of the Marshall Islands (RMI) filed an Application against each of the nine respondent States (United States, Russia, United Kingdom, France, China, India, Pakistan, Israel and North Korea) which the Applicant maintains currently possess nuclear weapons, alleging a failure by the respondent States to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. Of the nine respondent States, only Pakistan, India and the United Kingdom formally responded to the RMI Application, each of the three States having

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

[19] UN General Assembly resolution A/RES/51/45 M, 10 December 1996, Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. The General Assembly has been adopting an almost identical resolution every year, since the handing down of the *Nuclear Weapons* Advisory Opinion. See UN General Assembly resolutions 52/38 O of 9 December 1997; 53/77 W of 4 December 1998; 54/54 Q of 1 December 1999; 55/33 X of 20 November 2000; 56/24 S of 29 November 2001; 57/85 of 22 November 2002; 58/46 of 8 December 2003; 59/83 of 3 December 2004; 60/76 of 8 December 2005; 61/83 of 6 December 2006; 62/39 of 5 December 2007; 63/49 of 2 December 2008; 64/55 of 2 December 2009; 65/76 of 8 December 2010; 66/46 of 2 December 2011; 67/33 of 3 December 2012; 68/42 of 5 December 2013; 69/43 of 2 December 2014; 70/56 of 7 December 2015.

previously filed declarations pursuant to Article 36, paragraph 2, of the Statute of the Court recognizing the compulsory jurisdiction of the Court (Judgment, para. 22).

The Threshold for Determining the Existence of a Dispute and the New Criterion of "Awareness"

10. The Marshall Islands bases the jurisdiction of the Court on its optional clause declaration pursuant to Article 36, paragraph 2, of the Statute of the Court dated 15 March 2013 and deposited on 24 April 2013, recognizing the compulsory jurisdiction of the Court[20], and that of the United Kingdom made on 5 July 2004, and deposited on 5 July 2004 (Judgment, para. 1)[21], which declarations the Marshall Islands claims are "without pertinent reservations"[22]. Paragraph 23 of the Judgment outlines the five preliminary objections raised by the United Kingdom against the Marshall Islands claim. In support of its preliminary objection based on the absence of a dispute, the United Kingdom argues that *(a)* prior to filing its Application, the Marshall Islands never brought its claim to the United Kingdom's attention[23], nor attempted to hold diplomatic negotiations with the United Kingdom regarding its claims[24]; and *(b)* that claim of the Marshall Islands is artificial and political in nature.

11. The United Kingdom further points out that the RMI Memorial only made reference to two statements as proof of the existence of a dispute between the Parties, and that neither the content of these statements nor the circumstances in which they were made provide any evidence of the existence of a dispute between the Marshall Islands and the United Kingdom on the date of the filing of the Application[25]. The first statement was made in the aforementioned United Nations High-Level Meeting, and was addressed to "all nuclear weapon States"[26]. The Respondent observes this statement did not specifically mention the United Kingdom and that it could not in any way be viewed as invoking the latter's responsibility under international law for any breach of the NPT or of customary international law[27]. The Respondent further observes that the second

[20] Optional Clause Declaration of the Marshall Islands, 24 April 2013, available at: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=MH.

[21] Optional Clause Declaration of the United Kingdom, 5 July 2004, available at: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB.

[22] Application of the Marshall Islands (AMI), para. 114 and Memorial of the Marshall Islands (MMI), paras. 93-94.

[23] Preliminary Objections of the United Kingdom (POUK), p. 14, para. 29, citing Article 43 of the ILC Articles on State Responsibility.

[24] CR 2016/3, p. 19, para. 25 and CR 2016/7, p. 13, paras. 17-18.

[25] *Ibid.*, and CR 2016/3, p. 26, para. 41 (Bethlehem).

[26] POUK, p. 22, para. 47, citing MMI, p. 98, Ann. 71.

[27] *Ibid.*, and CR 2016/3, pp. 26-27, para. 42 (Bethlehem).

statement relied upon by the Marshall Islands was made at an international conference at which the United Kingdom was not present[28]. The United Kingdom argues that the Marshall Islands took no steps to bring this statement to the attention of the United Kingdom[29]. Accordingly there could be no conflict of legal positions between the two Parties, and as such no legal dispute between them[30].

12. During oral arguments the United Kingdom affirmed that it views the obligation established in Article VI of the NPT as the "cornerstone" of that treaty[31], and that as a nuclear-weapon State, it has acted unilaterally, significantly reducing not only its own stockpile of weapons but also their delivery systems[32]. The United Kingdom also cited statements made by then Prime Minister Gordon Brown, accepting the disarmament obligations established in the NPT[33], and those made by the Preparatory Committees leading to the 2015 NPT Review Conference as proof that the United Kingdom is in fact committed to fulfilling its obligations regarding nuclear disarmament[34].

13. The Marshall Islands requests the Court to overrule the United Kingdom's preliminary objections, maintaining that a dispute did exist at the time it filed its Application, the subject-matter of which is "the United Kingdom's non-compliance with its legal obligations under Article VI of the NPT and under customary international law to pursue in good faith, and bring to a conclusion, negotiations leading to the cessation of the nuclear arms race at an early date and to nuclear disarmament"[35]. The Marshall Islands further submits that prior notification to the United Kingdom of its intention to commence proceedings is not a necessary requirement. The Marshall Islands argues further that it has repeatedly called for nuclear-weapon States, including the United Kingdom, to comply with their international obligations and to negotiate nuclear disarmament[36]. In particular it refers to two of its statements made publicly in multilateral international conferences before the Application was filed. First, on 26 September 2013, at the United Nations High-Level Meeting on Nuclear Disarmament, the Minister of Foreign Affairs of the Marshall Islands called

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[28] POUK, p. 23, para. 48 and CR 2016/3, p. 27, para. 44.
[29] POUK, p. 23, para. 48.
[30] *Ibid.*, para. 52.
[31] CR 2016/7, p. 14, para. 20.
[32] *Ibid.*
[33] *Ibid.*, p. 15, paras. 21-22.
[34] *Ibid.*, para. 22, the cited statement reads:

> "our enduring commitment to the fulfilment of our obligations under Article VI of the Non-Proliferation Treaty and noted our determination to work together in pursuit of our shared goal of nuclear disarmament under Article VI, including engagement on the steps outlined in action 5 of the 2010 Review Conference action plan, as well as other efforts called for in the action plan."

[35] MMI, pp. 17-18, para. 42.
[36] *Ibid.*, p. 9, para. 16.

upon "all nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament"[37]. Secondly, on 13 February 2014, during the Second Conference on the Humanitarian Impact of Nuclear Weapons at Nayarit, Mexico, the Marshall Islands representative made similar remarks[38].

14. The Marshall Islands submits that these and other public statements illustrate "with extreme clarity the content of the claim" and that these statements were "unequivocally directed against *all States possessing nuclear arsenals*, including the United Kingdom"[39] (emphasis added). The fact that the United Kingdom participated in at least one of those conferences was, according to the Marshall Islands, sufficient to consider it notified of the claim of the Marshall Islands, in particular, because the Marshall Islands statements were very clear on the subject-matter of the dispute as well as its legal basis, namely, the failure of nuclear-weapon States to seriously engage in multilateral negotiations leading to nuclear disarmament arising under the NPT and/or customary international law.

15. In its Judgment, the Court upholds the United Kingdom's preliminary objection to jurisdiction on the ground that there was no dispute between the Parties prior to the filing of the RMI Application (Judgment, para. 59). I respectfully disagree with that decision as well as the underlying reasoning, and set out my reasons in this separate opinion. In my view, the evidence on record, when properly tested against the criteria well-established in the Court's jurisprudence, shows that a dispute did exist, albeit in a nascent form, between the Parties before the filing of the Application and that this dispute crystallized during the proceedings. I particularly disagree with the new criterion of "awareness" that the majority introduces, as well as the formalistic and inflexible approach taken in the determination of whether or not a dispute exists (*ibid.*, paras. 41-53).

16. First, as the Judgment rightly points out, the Court's function under Article 38 of its Statute, is to decide such inter-State disputes as are referred to it (Judgment, para. 36). In cases such as this one, where States have made declarations (with or without reservations) recognizing the compulsory jurisdiction of the Court under Article 36, paragraph 2, of that Statute, the jurisdiction of the Court emanates from those very declarations rather than from the existence of a dispute as such

[37] MMI, Vol. I, Ann. 4: Statement by Honourable Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013.

[38] *Ibid.*, Vol. II, Ann. 72: Marshall Islands statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014; CR 2016/1, pp. 18-19, para. 14 (deBrum), and CR 2016/1, p. 37, para. 20 (Condorelli).

[39] Written Statement of the Marshall Islands (WSMI), p. 16, para. 34.

(Judgment, para. 36). The existence of a dispute between the contending States is merely a precondition *for the exercise of that jurisdiction*.

17. Secondly, the Judgment rightly defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between parties" (*ibid.*, para. 37). The Judgment also correctly states that it is for the Court and not the Parties to determine objectively whether a dispute exists after examining the facts or evidence before it (*ibid.*, para. 39) and that such determination is a matter of substance and not procedure or form (*ibid.*, para. 38). Thirdly, it is clear from the Court's jurisprudence that neither prior notification by the applicant, of its claim to the respondent, nor a formal diplomatic protest by the applicant, are necessary prerequisites for purposes of determining the existence of a dispute *(ibid.)*. This is particularly so since the NPT, to which both the United Kingdom and Marshall Islands are party, contains no provision requiring prior notification or diplomatic negotiations.

18. While the Judgment correctly rehearses the Court's jurisprudence regarding the definition of a "dispute" and the fact that determination of the existence of a dispute is "a matter of substance, and not a question of form or procedure", I disagree with the approach and analysis that the majority has employed in arriving at the conclusion that there is no dispute between the Parties. I find that approach not only to be both formalistic and procedural, but also lacking in addressing the substantive aspects of the Applicant's claim, such as the conduct of the Respondent. Given the importance of the subject-matter of nuclear disarmament to the international community at large, I believe that this is not a case that should have been easily dismissed on a formalistic or procedural finding that no dispute exists between the contending Parties. Instead, a more substantive approach that analyses the conduct of the contesting States right up until 24 April 2014 should have been undertaken in determining whether the Parties had "clearly opposite views"[40]. The Court's jurisprudence clearly demonstrates the Court's consistent preference for a flexible approach that steers clear of formality or procedural rigour, right from the days of the Permanent Court of International Justice[41], and until more recently in *Croatia* v. *Serbia*[42].

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[40] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50.

[41] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 428-441, paras. 80-85; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

19. Under Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court, an applicant is required to indicate the "subject of the dispute" in the Application and to specify therein the "precise nature of the claim"[43]. The Marshall Islands did specify its claim or subject-matter of the dispute in its Application and Memorial as

> "the failure of the United Kingdom to honour its obligation towards the Applicant (and other States) to pursue in good faith and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control"[44].

However, it is not sufficient, for purposes of demonstrating the existence of a dispute, for the Marshall Islands to articulate its claims in its Application and Memorial. Nor is it sufficient merely for one party to assert that a dispute exists or for the other to deny that it does. It must, in this case, be demonstrated that the claims of the Marshall Islands are positively opposed by the United Kingdom or that there is *"a disagreement on a point of law or fact, a conflict of legal views or of interests"* between the two Parties[45] and that this was the case at the time the Application was filed.

20. In order for the Court to determine on an objective basis, whether or not an international dispute exists between the parties, it must examine the facts or evidence before it, "isolate[ing] the real issue in the case and identify[ing] the object of the claim"[46]. As previously emphasized, the matter is one of substance, not form[47]. Although the dispute must in principle exist at the time the Application is submitted to the Court[48], there have been cases in which the Court has adopted a more flexible

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[43] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment*, *I.C.J. Reports 2015 (II)*, p. 602, para. 25; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29.

[44] AMI, Parts III and IV and MMI, para. 2.

[45] *Mavrommatis Palestine Concessions, 1924, Judgment No. 2, P.C.I.J., Series A, No. 2*, p. 11; emphasis added. It has also been repeated by the ICJ in: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, pp. 28-30, paras. 37-44.

[46] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.

[47] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

[48] *Ibid.*; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom),*

position, considering that facts arising *after* the application has been filed may be taken into account. For example, in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case, the Court held that:

> "It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period."[49]

21. Furthermore, although the Court has stated in the *South West Africa* cases that in order for a dispute to exist, the claim of one party must be "positively opposed" by the other[50], such "positive opposition" should not be perceived as a formal or procedural disagreement on a point of law or fact only. In my view, the Court should, consistent with its jurisprudence rehearsed in the Judgment (paras. 37-40), adopt a substantive approach whereby if one State adopts *a course of conduct* to achieve its own interests, which conduct is then protested by the other, a positive opposition of views or interests is demonstrated. The perspective that takes into account the conduct of the contesting parties in determining the existence or otherwise of a dispute, and with which I agree, was aptly expressed by Judge Gaetano Morelli in his dissenting opinion in the *South West Africa* cases when he stated as follows:

> "As to a disagreement upon a point of law or fact, it is to be observed that, while such a disagreement may be present and commonly (but not necessarily) is present where there is a dispute, the two things (disagreement and dispute) are not the same. In any event it is abundantly clear that a disagreement on a point of law or fact, which may indeed be theoretical, is not sufficient for a dispute to be regarded as existing.
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> . . . . . .
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> In my opinion, a dispute consists, not of a conflict of interests as such, but rather in a contrast between the respective attitudes of the parties in relation to a certain conflict of interests. The opposing attitudes of the parties, in relation to a given conflict of interests, may respectively consist of the manifestations of the will by which each of

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Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44.

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

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

> the parties requires that its own interest be realized. It is the case of a dispute resulting, on one side, from a claim by one of the parties and, on the other side, of the contesting of that claim by the other party. But it may also be that one of the opposing attitudes of the parties consists, not of a manifestation of the will, but rather of a course of conduct by means of which the party pursuing that course directly achieves its own interest. This is the case of a claim which is followed not by the contesting of the claim but by the adoption of a course of conduct by the other party inconsistent with the claim. And this is the case too where there is in the first place a course of conduct by one of the parties to achieve its own interest, which the other party meets by a protest."[51]

22. In order to determine with certainty what the situation was at the date of filing of the RMI Application, it is necessary to examine the conduct of the Parties over the period prior to that date, and during the subsequent period. The conduct and position of each of the Parties over the years regarding the possession of nuclear weapons is not in dispute. The United Kingdom, on the one hand, maintains that as one of the nuclear-weapon States, it has significantly reduced its nuclear arsenal[52], but is entitled, in the interests of national security to maintain a minimum level of nuclear arsenal for "primarily deterrent purposes" whose use would only be contemplated in "extreme circumstances of self-defence"[53]. Further, the United Kingdom accepts that it is bound by the NPT and in particular Article VI thereof, but considers that the maintenance of nuclear arsenal for the stated purposes is not in any way incompatible with its obligations under the NPT[54]. The United Kingdom also remains committed to multilateral negotiations under the NPT towards nuclear disarmament. However, the conduct of the United Kingdom that the Marshall Islands has raised issue with, not only in its statements in the multilateral conferences but also in its Application and Memorial, is "the United Kingdom's non-compliance with its legal obligations under the NPT and customary international law to pursue in good faith, and bring

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[51] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa) Preliminary Objections, Judgment, I.C.J. Reports 1962*; dissenting opinion of Judge Morelli, pp. 566-567, Part II, paras. 1-2.

[52] MMI, Ann. 15: Security Britain in an Age of Uncertainty: The Strategic Defence and Security Review, 19 October 2010, Cm 7948, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62482/strategic-defence-security-review.pdf; AMI, pp. 14-15, para. 34.

[53] Statement by Defence Secretary of the United Kingdom, Des Browne, in the House of Commons, on 22 May 2006, available at: http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060522/text/60522w0014.htm#06052325002261.

[54] The United Kingdom's position is evident from the statements of high-ranking Government officials made both domestically and during international conferences, some of which statements have been referred to by the Parties in their pleadings.

to a conclusion, negotiations leading to nuclear disarmament"[55]. Furthermore, the Marshall Islands has also objected to the United Kingdom's qualitative and quantitative improvement of its nuclear arsenal[56].

23. The Marshall Islands maintains that the United Kingdom's course of conduct, consisting on the one hand, its participation in the nuclear arms race and, on the other hand, its failure to pursue multilateral negotiations towards nuclear disarmament, is inconsistent with its obligations under the NPT and customary international law. Without prejudging the issue of whether or not the United Kingdom's conduct referred to above actually constitutes a breach of an obligation under the NPT or customary international law (an issue clearly for the merits), the question for determination is whether, before filing its Application against the United Kingdom on 24 April 2014, the Parties held clearly opposite views concerning the United Kingdom's performance or non-performance of certain international obligations.

24. In this regard, I have taken into account relevant statements of high-ranking officials of each of the Parties. The Marshall Islands specifically mentions the statements it made when it joined the NPT[57], and those made during the 2010 NPT Review Conference; the 2013 United Nations High-Level Meeting on Nuclear Disarmament[58], and the 2014 Conference on the Humanitarian Impact of Nuclear Weapons[59]. The Marshall Islands argues that those statements were sufficient to make each and every one of the nuclear-weapon States, including the United Kingdom, aware of the Marshall Islands position on the matter[60].

25. First, on 6 May 2010 at the NPT Review Conference where the United Kingdom was well represented, the Marshall Islands representative declared: "We have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT."[61] On another occasion, the views of the Marshall Islands on nuclear disarmament were clearly communicated to all nuclear-weapon States present in New York on 26 September 2013, at the UN High-Level Meeting on Nuclear Disarmament, when the Minister of Foreign Affairs of the Marshall Islands called upon: "*all nuclear weapon States* to intensify efforts to address their responsibilities in moving towards an effective and secure

[55] MMI, pp. 17-18, para. 42.
[56] AMI, p. 39, paras. *(a)* to *(d)*.
[57] CR 2016/5, p. 9, paras. 9-11 (deBrum), citing: Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands.
[58] MMI, p. 43, para. 98 and CR 2016/9, p. 18, para. 7 (Condorelli).
[59] WSMI, p. 16, para. 34 and CR 2016/5, p. 27, para. 18 (Condorelli).
[60] WSMI, p. 16, para. 35.
[61] *Ibid.*, p. 15, para. 32.

disarmament"[62]. Again the United Kingdom was well represented at this conference. The United Kingdom was represented at that meeting by Mr. Alistair Burt, Parliamentary Under-Secretary of State of the United Kingdom and Northern Ireland, who also made a joint statement on behalf of the United Kingdom, France and the United States[63]. In that statement, Mr. Burt emphasized the need for a methodical, step-by-step approach towards the ultimate goal of nuclear disarmament, including the negotiation of a Fissile Material Cut-off Treaty and the entry into force of the Comprehensive Test Ban Treaty (an approach preferred by the three States), as opposed to initiatives such as "the humanitarian consequences campaign" (favoured by the Marshall Islands). In my view, the content of the two statements at this conference (i.e., that of the United Kingdom and that of the Marshall Islands) further demonstrate the opposing views of the Parties regarding the United Kingdom's performance or non-performance of international obligations.

26. Furthermore, the views of the Marshall Islands on nuclear disarmament were clearly communicated to all nuclear-weapon States present on 13 February 2014, at the Second Conference on the Humanitarian Impact of Nuclear Weapons, when the Marshall Islands made the so-called "Nayarit Declaration" stating that:

> "the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that *states possessing nuclear arsenals* are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non Proliferation Treaty and customary international law."[64] (Emphasis added.)

27. However, the United Kingdom made a deliberate decision not to attend this Conference. Its absence was explained as follows:

> "The United Kingdom Government outlined its general position towards the Conference in a letter to Jeremy Corbyn on 12 Febru-

[62] MMI, pp. 18-19, para. 45, citing statement by Honourable Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013; emphasis added.

[63] POUK, Ann. 9: Statement of the Parliamentary Under Secretary of State of the United Kingdom of Great Britain and Northern Ireland, Alistair Burt, on behalf of France, the United Kingdom and the United States at the UN General Assembly High-Level Meeting on Nuclear Disarmament on 26 September 2013.

[64] MMI, Vol. II, Ann. 72; Marshall Islands Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014.

> ary 2014. This was in relation to the question of United Kingdom attendance at the Conference in Mexico in February . . .
>
> In that letter, Mr. Robertson explained that the United Kingdom 'shares deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, expressed by the NPT State parties at the 2010 Review Conference'. He added, however, that after careful consideration, the Foreign and Commonwealth Office had decided against attending the Mexico conference because of concerns that 'some efforts under the humanitarian consequences initiative appear increasingly aimed at pursuing a Nuclear Weapons Convention prohibiting nuclear weapons outright'. He went on to state that 'the United Kingdom believes the NPT should remain the cornerstone of the international nuclear non-proliferation regime and the essential foundation for the pursuit of nuclear disarmament and for peaceful uses of nuclear energy'. As such the best way to achieve the goal of a world without nuclear weapons is 'through gradual disarmament negotiated using the NPT Step-by-Step process and Review cycle'."[65]

28. The United Kingdom's decision not to participate in this conference was clearly consistent with its long-standing position on multilateral negotiations towards nuclear disarmament. It is also clear that the United Kingdom was wary of what it describes as "efforts under the humanitarian consequences initiative aimed at pursuing a Nuclear Weapons Convention prohibiting nuclear weapons outright", as this is clearly not the kind of approach to nuclear disarmament the United Kingdom favours. Based on the above explanation, it cannot be said that the United Kingdom was totally oblivious of the Nayarit agenda or of the fact that non-nuclear-weapon States like the Marshall Islands would be taking a view opposed to that of the United Kingdom as far as multilateral negotiations on nuclear disarmament are concerned. Quite to the contrary, the United Kingdom anticipated the thrust of the discussions at Nayarit and decided it was not meaningful for it to attend the conference. Thus, far from proving the United Kingdom's ignorance or "unawareness" (to use the new criterion adopted by the majority) of what transpired at Nayarit, this tactical or deliberate avoidance of the Nayarit conference is further demonstration of the opposing views between the United Kingdom and the Marshall Islands. The Court should have taken into account the United Kingdom's conduct in this regard instead of taking a formalistic approach and concluding that it was "unaware" of the Marshall Islands position at Nayarit.

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[65] Conference on the Humanitarian Impact of Nuclear Weapons, House of Commons Research Note prepared by Claire Mills, 3 December 2014, p. 7.

29. In my view, those statements also represent the Marshall Islands' claim that nuclear-weapon States, including the United Kingdom, are obliged under the NPT and/or customary international law, to pursue negotiations leading to nuclear disarmament. Furthermore, I do not subscribe to the view that in the context of these multilateral conferences, it was necessary for the Marshall Islands to single out and name each of the nine nuclear States in order for it to validly express its claim against each of them (Judgment, paras. 49-50). A distinction ought to be drawn between a purely bilateral setting where the applicant must single out the respondent and articulate to that respondent the particular conduct to which the applicant is opposed, and a setting involving multilateral exchanges or processes such as the present case, where it is well known throughout the international community, that amongst the over 191 member States to the NPT, only nine possess nuclear weapons. To insist that the Marshall Islands should have identified each of these States by name and mentioned the conduct of each one that it objects to, is to apply form over substance.

The New Criterion of "Awareness" in Determining the Existence of a Dispute Is Alien to the Court's Jurisprudence

30. Hitherto, the Court has not made it a legal prerequisite for an applicant to prove that before the application was filed, the respondent State "was aware or could not have been unaware that its views are positively opposed by the applicant" State, before making a determination that a dispute exists (Judgment, para. 41). This new test is not only alien to the established jurisprudence of the Court but also directly contradicts what the Court has stated in the past and with no convincing reasons. On every occasion that the Court has had to examine the issue of whether or not a dispute exists, it has emphasized that this is a role reserved for its objective determination[66] (not that of the parties) and that that determination must involve an examination in substance and not form, of the facts or evidence before the Court[67]. For example, the Court has categorically stated in the *South West Africa* cases that:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be

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

[67] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

> shown that the claim of one party is positively opposed by the other."[68]

Also in *Nicaragua* v. *Colombia* the Court stated that, "although a formal diplomatic protest may be an important step to bring the 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]"[69].

31. By introducing proof of "awareness" as a new legal requirement, what the majority has done was to raise the evidentiary threshold that will from now on require not only an applicant, but the Court itself, to delve into the "mind" of a respondent State in order to find out about its state of awareness. In my view, this formalistic requirement is not only problematic but also directly contradicts the principle in *Nicaragua* v. *Colombia* quoted above, since the surest way of ensuring awareness is for an applicant to make some form of formal notification or diplomatic protest. The test also introduces subjectivity into an equation previously reserved "for the Court's objective determination".

32. It is also pertinent to note that paragraph 73 of *Nicaragua* v. *Colombia* cited by the majority at paragraph 41 of the Judgment as the basis for the new "awareness" test, merely sets out the factual assessment conducted by the Court to determine whether a dispute existed in that case[70], and not the legal test applicable. In paragraph 72 of *Nicaragua* v. *Colombia*, immediately preceding, the Court had just observed that,

> "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition . . . in determining whether a dispute exists or not, '[t]he matter is one of substance, not of form'"[71].

It is clear that the Court in that case was not prepared to turn a specific factual finding into a formalistic legal requirement for prior notification. In my view, it would be inappropriate to turn what was clearly a factual observation into a rigid legal test that was rejected by the Court in that case.

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

[69] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia) Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72.

[70] The exact quotation of paragraph 73 is "Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua". The applicable legal framework regarding the existence of the dispute is quoted at: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 26-27, paras. 49-52.

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

33. Similarly, *Georgia* v. *Russian Federation*[72], also cited in the Judgment at paragraph 41 in support of the majority view, is inapplicable and should be distinguished. That case involved the interpretation and application of a specific treaty (the Convention on the Elimination of All Forms of Racial Discrimination) to which both Georgia and Russia were party. Article 22 of that treaty (the compromissory clause conferring jurisdiction on the Court) has an express requirement that, prior to filing a case before the Court, the contending parties must first try to settle the dispute by negotiation or by other processes stipulated in the Convention[73]. It was imperative in that case for the Applicant to prove that prior to seising the Court, it had not only notified the Respondent of its claims but that the two had attempted negotiating a settlement. It was therefore logical that the respondent formally be made "aware" of the applicant's claim before negotiations could take place. That case is in stark contrast to the present case where no such compromissory clause exists requiring prior negotiations or formal notification or "awareness". Accordingly *Georgia* v. *Russian Federation* is, in my view, distinguishable and inapplicable as an authority for the "awareness" test.

CONCLUSION

34. Based on the evidence examined above, my view is that, as at the date on which the Application was filed, there existed a dispute between the Parties concerning the alleged violation by the United Kingdom, of an obligation under Article VI of the NPT and under customary international law to pursue in good faith and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

(Signed) Julia SEBUTINDE.

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[72] *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.

[73] Article 22 of the Convention stipulated that:

> "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."