

## DISSENTING OPINION OF JUDGE ROBINSON

*I disagree with the Majority's conclusion that there is no dispute in this case — Role of the Court as envisaged by the United Nations Charter — Linear development of the Court's case law stressing objectivity, flexibility and substance over form in the determination of dispute — The Court's enquiry is empirical and pragmatic, focused simply on whether or not the evidence reveals clearly opposite views — Court's case law does not support criterion applied by the Majority that the Respondent was aware or could not have been unaware that its views were "positively opposed" by the Applicant — Awareness may be confirmatory, but is not a prerequisite for determining the existence of a dispute — The Court has previously relied upon post-Application evidence as determinative of the existence of a dispute — Even if the test set out by the Majority is applied to the facts of the case, there is a dispute between the Parties.*

1. In this opinion, I explain why I have dissented from the Majority decision that there was no dispute between the Marshall Islands and the United Kingdom.

### I. INTRODUCTION

2. In the period of twenty months that I have served on this Court, I have been privileged to consider the interpretation and application of five treaties in cases before the Court. But I dare say that, were I to examine another fifty treaties in the rest of my term, none would be, by virtue of the existential threat to mankind posed by nuclear weapons, as critically important for the work of the Court and the interests of the international community as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) that is the subject of the *Marshall Islands v. United Kingdom* case.

3. 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. It is regrettable that the Majority did not seize the opportunity presented by this case to demonstrate the Court's sensitivity to that role. It is even more regrettable that this failure could have been avoided had the Court simply followed its own case law. 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 the Judgment.

4. 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"<sup>1</sup> 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; that is, that the absence of evidence of the respondent's awareness of the other party's opposing view is fatal to a finding that a dispute exists.

5. The requirement that there be a "dispute" is designed to ensure that what the Court is being asked to decide is susceptible to its authority and competence, or, as Judge Fitzmaurice in his separate opinion in *Northern Cameroons* said, the dispute must be "capable of engaging the

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<sup>1</sup>*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.*

judicial function of the Court”<sup>2</sup>. It is a question of the *nature* and *character*, determined objectively, of the claim presented to the Court. It is not about mandating that an applicant State jump through various hoops suggesting a formal approach before it can appear in the Great Hall of Justice.

6. The Court and its predecessor, the Permanent Court of International Justice (PCIJ), have developed a significant body of jurisprudence interpreting the requirement that the Court can only decide a “dispute” or “legal dispute”, as discussed in the next section of this opinion. However, it is important to note, that while many respondents have raised the objection that the Court does not have jurisdiction because there is no dispute, the Court has more often than not rejected this objection<sup>3</sup>. This is in keeping with a flexible approach to finding a dispute — the criteria for determining the existence of a dispute are not intended to create a high bar.

Before examining the Court’s case law, I look briefly at the Court’s role under the United Nations Charter.

## II. THE ROLE OF THE COURT AS ENVISAGED BY THE UNITED NATIONS CHARTER

7. An objective, flexible and pragmatic approach to finding a dispute is called for by the role envisaged for the Court by the United Nations Charter. As I explained in my separate opinion in the case concerning *Certain Activities in the Border Area (Costa Rica v. Nicaragua)* issued in December 2015:

“The United Nations Charter also highlights the important role the Court has in the peaceful settlement of disputes, ‘the continuance of which is likely to endanger the maintenance of international peace and security’ and thus undermine the Purposes of the United Nations Charter<sup>4</sup>. Article 92 of the United Nations Charter identifies the Court as the principal judicial organ of the United Nations and provides that its Statute — annexed to the United Nations Charter — is an integral part of the United Nations Charter. Article 36 (3) of the United Nations Charter provides that the Security Council ‘should also take into consideration that legal disputes, as a general rule, be referred by the parties to the International Court of Justice’. It is thus clear that the Court is expected, through its judicial function, to contribute to the maintenance of international peace and security. Therefore, the discharge by the Court of its judicial functions is not peripheral to, but is an integral part of the post-World War II system for the maintenance of international peace and security.”<sup>5</sup>

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<sup>2</sup>Judge Fitzmaurice, separate opinion to case concerning the *Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 98.

<sup>3</sup>See, for example, the cases cited later in this opinion. In *Alleged Violations*, the Court determined that “Nicaragua makes two distinct claims — one that Colombia has violated Nicaragua’s sovereign rights and maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force”. The Court found that there was a dispute in respect of the first claim and no dispute in respect of the second. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 17 March 2016*, paras. 67, 74, 78. See also C. Tomuschat, *Commentary to Article 36*, Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edition, 2012), p. 642, para. 9.

“[w]ith this limitation [that the applicant must advance a legal claim], the concept of jurisdiction has always been interpreted in a truly broad sense. As far as can be seen, no case has been rejected as not encapsulating a dispute.”

<sup>4</sup>Article 33 of the UN Charter.

<sup>5</sup>Judge Robinson, separate opinion in the case concerning *Certain Activities in the Border Area (Costa Rica v. Nicaragua)*, *Judgment of 16 December 2015*, para. 30.

8. The Court has a different relationship with the United Nations Charter from that between the PCIJ and the Covenant of the League of Nations. Although the latter provided for the establishment of the PCIJ, it gave that Court no pre-eminence in relation to other methods of international dispute resolution<sup>6</sup>. The United Nations Charter, on the other hand, identifies the Court as the “principal judicial organ of the United Nations”<sup>7</sup>. Each party to the United Nations Charter is *ipso facto* party to the ICJ Statute. This is logically linked to (i) Article 36 (3) — that while States may choose between a variety of dispute resolution methods, Article 36 (3) envisages that legal disputes should — as a general rule — be referred to the ICJ; and (ii) Article 1 (1), identifying the purposes of the United Nations as including “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”<sup>8</sup>. “Having recourse to the ICJ, whose function is to decide disputes in accordance with international law . . . is the most obvious way to realize that purpose.”<sup>9</sup> Therefore the Court’s exercise of its judicial functions cannot be divorced from the architecture of the system established to respond to the atrocities of World War II. The Court was intended to play a positive role in the maintenance of international peace and security. It is difficult to see how the Court can discharge its responsibility to contribute to the maintenance of international peace and security through the peaceful settlement of disputes, if it establishes additional criteria that have no basis in its case law, thus making it more difficult for parties to avail themselves of its jurisdiction.

### III. THE COURT’S JURISPRUDENCE

9. In paragraph 41 of the Judgment, the Majority states:

“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 (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections*, Judgment of

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<sup>6</sup>Article 14 of the Covenant of the League of Nations reads:

“[t]he Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.”

Article 13 states:

“Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.”

<sup>7</sup>Article 92 of the UN Charter.

<sup>8</sup>Thomas Giegerich, *Commentary to Article 36* (above fn. 3), p. 154, para. 52.

<sup>9</sup>*Ibid.* See also *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Judgment, I.C.J. Reports 1980*, p. 22, para. 40.

“It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.”

17 March 2016, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104).”

It is on the basis of this finding that the Majority upholds the Respondent’s objection that there is no dispute in this case. The burden of this opinion is that this holding is, as is shown by the analysis of the Court’s case law below, incorrect, as a matter of doctrine, of law, and of fact.

### **1. The *Mavrommatis Palestine Concessions***

10. Mavrommatis was a Greek national who owned “concessions for certain public works to be constructed in Palestine” under contracts and agreements signed with the Ottoman Empire. The Government of the Greek Republic, espousing the claim of its national, claimed that the Government of Palestine and the Government of His Britannic Majesty (Great Britain), by virtue of its power as a Mandate, failed to recognize the extent of Mavrommatis’s rights under two groups of concessions, and requested that the PCIJ order the payment of compensation as a result. The claim was brought under Article 9 of Protocol XII annexed to the Peace Treaty of Lausanne 1923, and Articles 11 and 26 of the Mandate for Palestine conferred on Britain 1922.

11. The British Government objected to the PCIJ’s jurisdiction, and the PCIJ proceeded to examine whether or not it had jurisdiction under Article 26 of the Mandate. Article 26 gave the PCIJ jurisdiction over disputes “between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate”, that could not “be settled by negotiation”. In determining that there was a dispute susceptible to its jurisdiction, the PCIJ proceeded to set out its famous *dictum* on the definition of a dispute: “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”<sup>10</sup>.

12. The PCIJ found that the dispute “certainly possess[ed] these characteristics”<sup>11</sup>. The Greek Republic was asserting that the Palestinian or British authorities had treated one of its citizens in a manner incompatible with international law obligations by which they were bound, and had requested an “indemnity” on this basis<sup>12</sup>.

13. In this case, which is very much the Alpha in the Court’s examination of the criteria for the existence of a dispute, and which is cited in the Judgment at paragraph 37, there is no reference, express or implied, to the mental state of the respondent State, as a criterion for the existence of a dispute. The focus of the case is simply on a disagreement or conflict between the Parties. Implicit in the *dictum* from *Mavrommatis* is that, in determining the existence of a dispute, the Court carries out an analysis of the facts that may show a conflict of legal views or interests; there is no suggestion that this analysis is in any way influenced by the respondent’s awareness of the applicant’s position.

14. The *Mavrommatis* definition has been frequently relied upon by the Court, as the brief survey of jurisprudence below reveals. Although the definition of a dispute has been developed and consolidated over time, these developments have, for the most part, followed a path that is in

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<sup>10</sup>*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*, p 12.

line with the position taken in *Mavrommatis*. The addition of awareness as a prerequisite for a finding of a dispute, on the other hand, is not a minor deviation, but represents a seismic change in what the Court requires before it will proceed to examine the merits of a claim<sup>13</sup>. Attempts to debunk *Mavrommatis* from its pedestal will fail. *Mavrommatis* will always retain its significance when considering what constitutes a “dispute” for the purposes of Article 36 of the Statute, not merely because it was the first case to set out a definition, but more importantly because it identifies the parameters of a dispute between States.

## 2. Interpretation of Peace Treaties

15. By means of a resolution dated 22 October 1949, the General Assembly decided to request an advisory opinion on two questions relating to the Treaties of Peace signed with Bulgaria, Hungary and Romania.

16. The first question put before the Court was whether or not diplomatic exchanges between Bulgaria, Hungary and Romania and “certain Allied and Associated Powers signatories to the Treaties of Peace” regarding the implementation of certain provisions in those treaties disclosed “disputes” subject to the dispute settlement provisions of those treaties. The diplomatic exchanges included concerns and accusations regarding the observance of human rights and fundamental freedoms by the three Governments. In order to determine this question, the Court divided the issues, and examined, first, whether or not the diplomatic exchanges disclosed any disputes per se.

17. The Court started by setting out its now oft-repeated mantra: “[w]hether there exists an international dispute is a matter for objective determination”<sup>14</sup>. In my view, this is one of the Court’s most important *dicta* in determining the criteria for a dispute. The logical result of objective determination is that: “[t]he mere denial of the existence of a dispute does not prove its non-existence”<sup>15</sup>.

18. In its application to the facts, the Court noted that the diplomatic exchanges included allegations that the Governments of Bulgaria, Romania and Hungary had violated various provisions of the Peace Treaties and requested that they take remedial measures. Bulgaria, Romania and Hungary, on the other hand, denied the charges. The exchanges thus showed that “[t]here has . . . arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations”<sup>16</sup>. On this basis, the Court concluded that international disputes had arisen<sup>17</sup>.

19. Here again, as in *Mavrommatis*, the question of the awareness of the respondent, was not a factor. The focus was not on Bulgaria, Hungary and Romania’s awareness of the dispute. The Court’s formulation, that a dispute was present where “the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations”, is a

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<sup>13</sup>See, for example, Robert Kolb’s examination of the Court’s jurisprudence up until [2009], where he notes that the *Mavrommatis* definition has been followed “in a remarkably consistent and continuous way”, although it “has now and then been subjected to subtle minor variations, and also to some rather questionable additions”. Kolb, *The International Court of Justice* (Hart, 2013), p. 302.

<sup>14</sup>*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*, pp. 74-75.

classic illustration of the application of an objective approach. It requires no more than that the Court simply look at the parties' positions, and determine whether they "have shown themselves as holding opposite views"<sup>18</sup>; in doing so there is not the slightest suggestion of the need to resort to any question of the respondent's awareness of the applicant's position.

### 3. *South West Africa* cases

20. Liberia and Ethiopia both brought cases against South Africa, which were joined by order of the Court on 20 May 1961. The applicants alleged that South Africa was acting in violation of various provisions of the Covenant of the League of Nations and the Mandate for South West Africa, including by practising apartheid in its administration of South West Africa. As a preliminary matter, the Court examined whether or not the subject-matter of the Applications filed by Liberia and Ethiopia constituted a dispute between the Applicants and South Africa. The Court repeated its definition of a dispute from the case of *Mavrommatis Palestine Concessions* (as set out above), and noted that it is not sufficient for one party to assert or deny that a dispute exists, a position consistent with the objective task that the Court has set itself:

"A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other."<sup>19</sup>

Applying this test to the facts of the case before it, the Court noted that there could "be no doubt" about the existence of a dispute between the Parties in the *South West Africa* cases. A dispute was "clearly constituted" by the opposing attitudes of the Parties to South Africa's performance of its international obligations as Mandatory<sup>20</sup>.

21. Judge Morelli, in his dissenting opinion, drew a distinction between a dispute and a disagreement; and between a dispute and a conflict of interests. He noted that the opposing attitudes of the parties may consist of a "manifestation of the will" or a "course of conduct by means of which the party pursuing that course directly achieves its own interest" which is "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."<sup>21</sup> The Judgment, at paragraphs 40 and 57, also acknowledges the evidentiary value of a party's conduct in the determination of a dispute.

22. Here, again, the Court made no explicit or implicit reference to awareness as a criterion for finding the existence of a dispute. Rather, the Court's stress was on the Parties' "opposing attitudes relating to the performance of the obligations"<sup>22</sup>. In searching for positive opposition, the Court was reaffirming the test that it had set out in *Interpretation of Peace Treaties*, that a dispute was constituted where the parties held "clearly opposite views concerning the question of the performance or non-performance" of international obligations. It was not developing a new test

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<sup>18</sup>*Interpretation of Judgments Nos. 7 and 8 (Factory of Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, pp. 10-11.

<sup>19</sup>*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

<sup>20</sup>*Ibid.*

<sup>21</sup>Dissenting opinion of Judge Morelli, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C. J. Reports 1962*, p. 567.

<sup>22</sup>*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

nor establishing any additional criteria; whether States hold “clearly opposite views” or whether “the claim of one party is positively opposed by the other” is essentially the same question, inviting the same objective determination, without recourse to any mental element, such as awareness, on the part of the respondent.

#### IV. PARAGRAPH 41 OF THE JUDGMENT

23. The manner in which the Court considers opposition of views in the current case calls for close examination. As noted above, paragraph 41 provides:

“The evidence must show that the parties ‘hold clearly opposite views’ with respect to the issue brought before the Court (see paragraph 37 above). 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 (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections*, Judgment of 17 March 2016, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104).”

24. The first point to note about this paragraph is that it plunges us, quite unnecessarily, into the murky legal world of the state of mind of a State. The emphasis placed on awareness would seem to introduce through the back door a requirement that the Court has previously rejected<sup>23</sup>, i.e., an obligation on the applicant to notify the other State of its claim.

25. It is a misinterpretation of the approach set out by the Court in its prior case law (and discussed earlier in this opinion) to state that the determination that a dispute exists requires a showing of the respondent’s awareness of the applicant’s positive opposition to its views. To establish whether the parties hold clearly opposite views, it is sufficient to examine the positions of the parties on the issue as objectively revealed by the evidence before the Court, without regard to their awareness of the other party’s position. It is, of course, perfectly possible to conduct an objective examination of a subjective factor; however, the issue in this case is whether there is any legal basis for that subjective element.

26. In paragraph 41, the Majority refers to two cases in support of its position: *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia)* (*Alleged Violations*) and *Application of the Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)* (*Application of the CERD*). In paragraph 73 of *Alleged*

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<sup>23</sup>See paragraph 38 of the Judgment. In *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections*, Judgment of 17 March 2016, para. 72, the Court stated:

“Concerning Colombia’s argument that Nicaragua did not lodge a complaint of alleged violations with Colombia through diplomatic channels until long after it filed the Application, the Court is of the view 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. As the Court held in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, in determining whether a dispute exists or not, ‘[t]he matter is one of substance, not of form’ (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30).”

*Violations*, cited by the Majority, the Court was responding to Colombia's argument that Nicaragua had not "indicate[d] . . . by any modality, that Colombia was violating . . ." <sup>24</sup> its international obligations vis-à-vis Nicaragua, and had not raised any complaints until it sent a diplomatic Note after the Application had been filed. The Court noted:

"although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged violations of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, 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. Given the public statements made by the highest representatives of the Parties, such as those referred to in paragraph 69, Colombia could not have misunderstood the position of Nicaragua over such differences."

27. The Court's statement represents the application of an objective standard, with the Court eschewing formalities as a particular bar to finding a dispute. The Court examined the evidence presented and emphasized by the Parties, including statements and conduct, to conclude that there was positive opposition. Far from establishing awareness as a criterion of the dispute, the references to awareness and understanding are factual statements made in the specific circumstances of the case in support of the Court's conclusion. There is no suggestion that these references are an expression of a legal test. While the element of awareness may sharpen the positive opposition, it is not expressed as a prerequisite for that opposition. Moreover, the Court emphasized that the finding of a dispute is a matter of substance and not of form <sup>25</sup>.

28. The Majority's reliance on *Application of the CERD* is as unsatisfactory as the use it made of *Alleged Violations*. The Court's primary purpose in carrying out an examination of the documents and exchanges presented by the applicant as evidence of a dispute was to establish whether, in light of the specific objections raised, Russia was the intended addressee of the documents, and, if so, whether the documents related to the application or interpretation of the Convention on the Elimination of all Forms of Racial Discrimination (CERD). In many instances, the Court found that the documents were not addressed to Russia and, in any event, that they did not reveal a dispute concerning the application and interpretation of the CERD, as per Article 22.

29. At the outset, it is worth noting the particular circumstances before the Court in *Application of the CERD*. The Court upheld Russia's second preliminary objection in this case because it decided that Georgia had not satisfied the negotiations and procedures expressly provided for in the CERD before a dispute could be brought under Article 22. This decision is of limited value as a precedent in the circumstances of this case.

30. In any case, the passages relied upon by the Majority, do not support its conclusion that, the Court, in *Application of the CERD*, invoked awareness as a requirement in the finding of a dispute. Given the Court's cautionary statement as to the significance of the analysis it carried out in Section II (4) of the Judgment, it is not at all clear how reliance on the finding in paragraph 61 becomes helpful to the position of the Majority. Section II (4) is devoted to documents and statements from the period before the CERD entered into force between the Parties on 2 July 1999. The Court was careful to explain in paragraph 50 that it was only carrying out an examination of

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<sup>24</sup>*Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections*, Judgment of 17 March 2016, para. 55 *et seq.*

<sup>25</sup>*Ibid.*, para. 50 and 72.

documents and statements in that period because Georgia contended that its dispute with the Russian Federation was “long-standing and legitimate and not of recent invention”. The Court then went on to say that those earlier documents “may help to put into context those documents or statements which were issued or made after the entry into force of CERD between the Parties”<sup>26</sup>. Why anyone would rely on a *dictum* from that section in relation to the question of the existence of a dispute is difficult to understand, since, for the purposes of that case, there could be no dispute which fell within the terms of CERD between the Parties at the time under examination, and the Court had explained the limited and very specific context in which it was examining documents and statements from that period.

31. Paragraph 61 relevantly reads: “There is no evidence that this Parliamentary statement, directed at ‘separatists’ and alleging violations of agreements which could not at that time have included CERD, was known to the authorities of the Russian Federation.” One of the issues before the Court was Russia’s argument that it was not a party to a dispute with Georgia; that and it was nothing more than a facilitator and that the real disputants were Abkhazia and South Ossetia<sup>27</sup>. Thus, the reference to Russia’s lack of knowledge should also be viewed in light of the fact that much of the evidence pointed to by Georgia as relevant to the question of the existence of a dispute was actually directed to other parties. The reference to Russia’s lack of knowledge was a factual statement highlighting that Russia was not the addressee of the Parliamentary statement. There is nothing, either in express or implied terms, in paragraph 61 to suggest that the Court was setting up awareness or knowledge that its views were positively opposed on the part of the respondent as a requirement for a finding of a dispute. The Court dismissed the statement on the basis that it did not have any legal significance in the determination of the dispute.

32. In paragraph 87, the Court notes that Russia was aware of a Georgian Parliamentary action relating to Russia’s peacekeeping operations. However, the Court makes this statement without seeking to develop it and with no suggestion that this was a vital element in its consideration of the question of the existence of a dispute. Indeed, the Court went on to dismiss the documents as not having any legal significance in the determination of the dispute. Again, the Court’s analysis must be viewed in light of the disagreement about the proper parties to the dispute and, more particularly, whether Georgia’s claims were made against Russia. The difficulty for the Majority in relying upon paragraph 87 in support of its position that awareness is a condition for the finding of a dispute is that the Court in the *Application of the CERD* does not state this explicitly, nor is there anything in the text that allows the reader to infer awareness as such a condition. In fact, the Court does not develop its analysis in any way beyond a factual statement of the particular circumstances surrounding the documents in question. Moreover, the Majority decision itself offers no explanation as to how paragraph 87 is an authority for the proposition that awareness is a prerequisite for the finding of the existence of a dispute.

33. The discussion in paragraph 104 of the *Application of the CERD* as to whether a press release was brought to Russia’s attention is cited by the Majority as evidence that previous decisions set down awareness as a condition of finding the existence of a dispute. The Court, in paragraph 104, does not make clear the significance to be attached to this statement. It is expressed in terms that show that it is nothing more than a simple statement of fact, which does not expressly or impliedly set out an additional limb for the legal test for the finding of a dispute. Again, the Court’s statement must be seen in the context of the particular facts of the case: whether Russia was truly a party to the dispute, or whether Georgia’s grievances lay elsewhere, and whether the

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<sup>26</sup>*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. 94, para. 50.*

<sup>27</sup>*Ibid.*, p. 87, para. 38.

dispute concerned the interpretation and application of the CERD. In any event, the Court dismissed the press release as having no legal significance in the determination of the dispute.

34. An inescapable comment on the four citations taken from *Application of the CERD and Alleged Violations* in paragraph 41 is that, surely, if the Court intended to set up awareness as a criterion for determining the existence of a dispute, it would have spent much more time examining and explaining the basis and rationale for its approach, including looking at its case law. There would have been no need for the Court to introduce an additional limb of the test in such an indirect and non-transparent manner.

35. The paragraphs relied upon by the Majority as establishing awareness as a criterion of a dispute should be contrasted with the establishment of an “awareness” or “knowledge” test in other decisions of the Court, and the care the Court takes in setting up a test of this nature. For example, in the *Bosnia Genocide* case, the Court stated:

“But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.”<sup>28</sup>

Even though the element of knowledge or awareness is necessarily a part of complicity in genocide, it is nonetheless noteworthy how assiduously and explicitly the Court approaches the construction of a test which contains the criterion of awareness.

36. Moreover, if the three passages in *Application of the CERD* were intended to set up an additional limb of the test for the existence of a dispute, it is strange that they were not cited in paragraph 73 of *Alleged Violations*. This is all the more peculiar as passages from *Application of the CERD* were cited five times in the treatment of Colombia’s Second Preliminary Objection as authority for various other propositions in relation to the finding of a dispute.

37. Significantly, in Section II (6), where the Court did find that the evidence established the existence of a dispute between Russia and Georgia, there is not a single reference to Russia’s awareness of Georgia’s opposing views. The Court was content to conclude that the exchanges showed that there was a dispute between the two countries about Russia’s performance of its obligations under CERD. In fact, the Court continued to be most concerned about the parties to the dispute and whether or not the dispute was about the interpretation and application of CERD<sup>29</sup>. It is also noteworthy that, in the many instances in which the Court discounted the documents and exchanges as having any legal value, it did so without any reliance on Russia’s lack of awareness, including in relation to the documents cited in paragraphs 61, 87 and 104<sup>30</sup>. What this shows is that the reference to awareness or knowledge in those three instances is nothing more than a mere happenstance, similar to the references to awareness and understanding in paragraph 73 of *Alleged Violations*. The irresistible conclusion in the analysis of the four cited passages is that the Majority has confused the incidental with the essential.

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<sup>28</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 218, para. 421.

<sup>29</sup>*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 120, para. 113.

<sup>30</sup>*Ibid.*, paras. 62, 89 and 104.

38. It is indeed striking that among the many cases in the Court's jurisprudence on the existence of a dispute the Majority has only been able to cite two cases in support of its position, one of which — *Application of the CERD* — is of limited value as a precedent given the peculiarities of Article 22 of the CERD, the other — *Alleged Violations* — clearly wrongly construed by the Majority, and both of which were handed down in the last six years. Implicit in these citations — from 2011 and 2016 — is an acceptance that the jurisprudence prior to April 2011 does not support the Majority's position. In reaching this conclusion, it should be recalled that the passages cited by the Majority do not contain references to prior jurisprudence because they are, themselves, no more than factual statements.

39. In *Application of the CERD*, the Court importantly confirmed that the finding of a dispute is a matter of substance and not of form (as the Judgment notes at paragraph 38). This is consistent with the pragmatic, flexible approach that has already been discussed in the context of former jurisprudence. It follows that the Court's case law has eschewed a formal approach, including suggestions that formalities are a precondition of the existence of a dispute, such as notice of the intention to file a case, formal diplomatic protest and negotiations (unless specifically required by the Optional Declaration) (see paragraph 38 of the Judgment) and any specific mental element.

40. On the basis of the examination of the jurisprudence set out above, it is clear that:

- (1) the development of the Court's case law in this area has been linear in the stress that it has placed on objectivity, flexibility and substance over form; whether or not a dispute exists is a matter for *objective determination by the Court* on the basis of the evidence before it;
- (2) the enquiry, which is empirical and pragmatic, is focused on whether or not the States concerned have shown themselves as holding opposite views, i.e., whether the evidence reveals a difference of views, regarding the performance or non-performance of an international obligation;
- (3) the positive opposition that is required by case law does not have to be manifested in a formal manner, for example, that the positions be set out in a diplomatic Note. Further, there is no need for notice and/or response. The opposition of positions may be evidenced by a course of conduct and evidence of the Parties' attitudes, and this is the enquiry that the Court must undertake. There is no particular *way* in which a claim must be made. Moreover, the case law establishes that the requirement that a dispute exist is not intended to set a high threshold for the Court's exercise of its jurisdiction, a conclusion that is entirely consistent with the role of the Court as described in Section II;
- (4) properly seen, therefore, awareness may be confirmatory of positive opposition of views, but it is not, as paragraph 41 suggests, a prerequisite for, nor decisive in determining the existence of a dispute.

## V. THE DATE AT WHICH A DISPUTE MUST EXIST

41. Another conundrum raised by the Judgment relates to the date at which the dispute must exist. Paragraph 42 reads “[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court”. Similar formulations with the words “in principle” are to be found in cases cited in the same paragraph. However, the plain meaning of the sentence beginning with “in principle” is that it admits of the possibility that the date at which the dispute is determined may be a date other than the date on which the Application was submitted to the Court, i.e., that post-Application evidence may be determinative of the existence of a dispute

rather than simply confirmatory as is stated in paragraph 42. Consequently, the entire analysis in paragraphs 42 and 43 fails to acknowledge the nuance and flexibility that is denoted by the phrase “in principle”.

42. That post-Application evidence may be determinative of the existence of a dispute is entirely consistent with the flexible, pragmatic approach that is the hallmark of the Court’s jurisprudence on this question.

43. Paragraph 42 cites two cases in support of its statement that — “[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court” — *Alleged Violations and Application of the CERD*. The relevant paragraphs of both cases cite *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*<sup>31</sup> and *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)*<sup>32</sup>. The cited paragraphs from these cases begin: “Libya furthermore dr[ew] the Court’s attention to *the principle* that ‘[t]he critical date for determining the admissibility of an application is the date on which it is filed’” (my emphasis) and reflect the Court’s conclusion that it would uphold Libya’s submission in this regard. The Court concluded that “[t]he date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application”<sup>33</sup>. It may be that the difficulty arising from the phrase “in principle” could be traced to Libya’s reference to “the principle” that the critical date was the date on which the Application was filed. The two phrases are, of course, totally different in meaning.

44. In paragraph 54, the Majority rejected the Marshall Islands’ contention that the Court had, in prior cases, relied upon statements made by the parties during proceedings as evidence of the existence of a dispute. The Majority discussed the three cases cited by the Marshall Islands in support of its contentions: *Certain Property (Lichtenstein v. Germany)*, *Preliminary Objections, Judgment, I.C.J. Reports 2005*; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *I.C.J. Reports 1998*; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *I.C.J. Reports 1996 (II)*. However, the Majority’s analysis of these three cases is too categorical and does not allow for the flexibility that the Court has given itself in this regard. These cases show that the Court has afforded significant weight to statements made during proceedings in its determination of whether or not a dispute exists, and, at times, did so, to the exclusion of other evidence.

45. In *Certain Property*, the Court’s analysis indicates that it relied primarily on the positions taken by the Parties before the Court in finding a dispute. At paragraph 54, the Majority states that in *Certain Property* “the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application”. However, Germany submitted a preliminary objection on the basis that there was no dispute between the parties. While Liechtenstein and Germany characterized the subject of the dispute differently, Germany’s

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<sup>31</sup>*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-45.

<sup>32</sup>*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.

<sup>33</sup>*Ibid.*, p. 130, paras. 42 and 43.

preferred characterization suggested that it was not a true party to the dispute and thus that there was no dispute between the parties.

46. After setting out the positions of the Parties, the Court proceeded to note:

“[t]he Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence . . . the Court concludes that ‘[b]y virtue of this denial, there is a legal dispute’ between Lichtenstein and Germany (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 100, para. 22; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Judgment, I.C.J. Reports 1996, p. 615, para. 29).”<sup>34</sup>

The Court then added that pre-Application consultations and exchanges had “evidentiary value” in support of a finding of positive opposition. The Court therefore relied on Germany’s denial during the proceedings as determinative of the existence of a dispute and merely had recourse to the pre-Application consultations and exchanges as supporting evidence.

47. In *Land and Maritime Boundary*, Nigeria’s submission was that there was no dispute as such throughout the length of the boundary and therefore Cameroon’s request to definitively settle the boundary was inadmissible (more specifically that there was no dispute, subject, within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula)<sup>35</sup>. The Court concluded that in the oral proceedings it had become clear that there was also a dispute over the boundary at the village of Tipsan<sup>36</sup>.

48. The Court noted that Nigeria had not indicated whether or not it agreed with Cameroon’s position on the course of the boundary or its legal basis. In reaching this conclusion, the Court relied particularly on Nigeria’s response to a question posed by a Member of the Court. The Court decided that, while Nigeria did not have to advance arguments pertaining to the merits, “[the Court] cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States”<sup>37</sup>. While it is true, as stated in paragraph 54, that the Court was concerned with the scope of the dispute (i.e., the extent to which the boundary was in dispute between the Parties)<sup>38</sup>, the Court did examine the submissions of the Parties and their positions before the Court in determining that Nigeria had not indicated its agreement, and thus that it could not uphold Nigeria’s objection.

49. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* is, perhaps, the strongest case in support of the position taken by the Marshall Islands because the only evidence on which the Court relied in relation to the existence of a dispute was Yugoslavia’s denial of Bosnia and Herzegovina’s allegations during the proceedings: “that, by reason of the rejection by Yugoslavia of the

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<sup>34</sup>*Certain Property (Lichtenstein v. Germany)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2005, p. 19, para. 25.

<sup>35</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1998, pp. 313-314, 316.

<sup>36</sup>*Ibid.*, p. 313, para. 85.

<sup>37</sup>*Ibid.*, p. 317, para. 93.

<sup>38</sup>The Court’s examination of materials showed that there was a dispute “at least as regards the legal bases of the boundary”. The Court was not able to determine “the exact scope of the dispute”; *Ibid.*

complaints formulated against it by Bosnia and Herzegovina, ‘there is a legal dispute’ between them (*East Timor (Portugal v. Australia)*, *I. C. J. Reports 1995*, p. 100, para. 22)<sup>39</sup>. The Majority’s attempt to distinguish this case is far from satisfactory.

50. 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.

51. I note that the Majority has advanced the view that: “[i]f 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”<sup>40</sup>. This appears to be nothing more than a reflection of the Majority’s doctrinal attachment to the awareness criterion. It is inconsistent with the case law that notification of a dispute is not required. 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. If a party is embarrassed by hearing for the first time, through the commencement of Court proceedings, a claim against it, it is surely open to the Court to address that matter by recourse to the rules of procedure.

## VI. THE PRINCIPLE OF THE SOUND ADMINISTRATION OF JUSTICE

52. 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. In *Mavrommatis*, the PCIJ held:

“Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant’s suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.”<sup>41</sup>

53. This dictum is in keeping with the rejection of formalism in determining access to international justice, as discussed throughout the opinion. It is a principle that promotes judicial economy, and thus the sound administration of justice. In *Upper Silesia*, in considering whether there was a “difference of opinion” for the purposes of Article 23 of the Geneva Convention (the 1922 Convention between Germany and Poland relating to Upper Silesia), the PCIJ held:

“Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the

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<sup>39</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29.

<sup>40</sup>Paragraph 43 of the Judgment.

<sup>41</sup>*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.

applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned.”<sup>42</sup>

54. This principle was also cited by the Court in the *Paramilitaries* case, refusing to reject Nicaragua’s claim when it could remedy a defect unilaterally (to have expressly invoked a treaty in its negotiations) and refile the case<sup>43</sup>. The Court continued as follows:

“It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, ‘the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned’ (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14*).”

55. Further, in *Croatia v. Serbia*, the Court cited the passage from *Mavrommatis* and held 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”.<sup>44</sup>

The Court spoke against an approach that would lead to, what it termed the “needless proliferation of proceedings”<sup>45</sup> or what Judge Crawford in his dissent calls a “circularity of procedure”<sup>46</sup>. An odd result of the Majority Judgment is that, given the basis on which the claim has been dismissed, the Marshall Islands could, in theory, file another Application against the United Kingdom. Any objection based on lack of awareness of “opposite views” could not be upheld. The “unmet condition” would have already been remedied. The formal approach adopted by the Majority Judgment is incongruous with previous *dicta* on this point, and militates against judicial economy and the sound administration of justice.

## VII. FACTS

56. The subject-matter of the dispute with the United Kingdom is the failure of the respondent to fulfil its conventional and customary obligations to pursue in good faith and bring to a conclusion nuclear disarmament in all its aspects under strict and effective control; the phrase “in all its aspects” includes negotiations on effective measures for the cessation of the arms race and a treaty on general and complete disarmament.

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<sup>42</sup>*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.*

<sup>43</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 427-429, paras. 81-83.*

<sup>44</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 441, para. 85.*

<sup>45</sup>*Ibid.*, p. 443, para. 89.

<sup>46</sup>See dissenting opinion of Judge Crawford in this case, paragraph 8.

The subject-matter of the dispute reflects the bargain at the heart of the NPT, the package deal: the *quid* is that non-nuclear-weapon States will not acquire nuclear weapons; the *quo* is that nuclear-weapon States may keep their nuclear weapons but must negotiate in good faith for nuclear disarmament.

57. In my view, the United Kingdom's first preliminary objection should be dismissed. This conclusion flows from application of the facts to the analysis of the law set out above. However, even when the facts are assessed against the criterion set out by the Majority, this conclusion still stands<sup>47</sup>. An objective examination of the evidence reveals a fundamental difference (or views that are positively opposed) between the Applicant and Respondent on the date of the Application in relation to the United Kingdom's performance of its obligations under Article VI of the NPT, both because of the latter's negotiating position and the action it has taken in respect of its nuclear arsenal, as evidenced by the statements of the parties and the conduct of the United Kingdom.

58. The Marshall Islands made three statements that are relevant to the consideration of the existence of a dispute with the United Kingdom. On 6 May 2010, at an NPT Review Conference, at which the United Kingdom was present, the Marshall Islands stated:

“We are alarmed that, although almost all NPT members are achieving obligations, there are a small few who appear to be determined to violate the rules which bind them, and whose actions thus far appear evasive, particularly in testing or assembling nuclear weapons. We have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT.”<sup>48</sup>

On 26 September 2013, at the High-Level Meeting of the General Assembly on Nuclear Disarmament, it “urge[d] all nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament”<sup>49</sup>. While these statements did not allege any breach by nuclear-weapon States specifically of their responsibilities, they are indicative of the general posture of the Marshall Islands on the subject of nuclear disarmament. In my view, they can certainly be seen as placing nuclear-weapon States on notice that the Marshall Islands was concerned about the discharge by those States of their responsibilities relating to disarmament. The United Kingdom's expression of regret at the High-Level Meeting of the General Assembly on Nuclear Disarmament about the “energy . . . being directed towards initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention”<sup>50</sup> may be taken as a sign of a nascent dispute between the parties about the steps to be adopted to discharge the obligations under Article VI of the NPT.

59. At the Second Conference on the Humanitarian Impact of Nuclear Weapons in Nayarit, Mexico, 13-14 February 2014, the Marshall Islands was more explicit:

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<sup>47</sup>See paragraphs 62 and 63 of the Judgment.

<sup>48</sup>Statement by H.E. Mr. Phillip H. Muller, Ambassador & Permanent Representative, Permanent Mission of the Republic of the Marshall Islands, to the United Nations at the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 6 May 2010, as referred to in the Marshall Islands' Statement of Observations on the Preliminary Objections of the United Kingdom (WSMI), para. 32.

<sup>49</sup>Memorial of the Marshall Islands (MMI), p. 43, para. 98; Ann. 71.

<sup>50</sup>Statement by Minister Alistair Burt, Parliamentary Under Secretary of State, United Kingdom of Great Britain and Northern Ireland, to the UN General Assembly on Nuclear Disarmament, 26 September 2013, as referred to in POUK, p. 43, para. 98, and Ann. 6; see also MMI, para. 90 and Ann. 69.

“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 fulfill 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.”

60. This statement alleges a breach by nuclear-weapon States of their international obligations. It is immaterial that the Marshall Islands did not cite each of the nuclear-weapon States by name, since those States are constituted by a small number of countries (nine) and the identity of those States is common knowledge. The United Kingdom explicitly recognizes itself as a nuclear-weapon State. Contrary to what is stated in paragraph 50 of the Judgment, this statement does identify the conduct that has given rise to a breach by the United Kingdom; as a failure to fulfil its obligations under Article VI of the NPT, specifically in relation to the negotiations required by that Article. The statement not only identifies the breach, but also indicates how it is to be remedied.

61. The Judgment also comments negatively, in paragraph 50, on the place and context in which the statement was made, indicating that it was at a conference not directly concerned with negotiations seeking nuclear disarmament — at the Second Conference on the Humanitarian Impact of Nuclear Weapons — as distinct from a conference on negotiating nuclear disarmament. This is a strange criticism because the questions that arise from the humanitarian impact of nuclear weapons cannot be divorced from the fulfilment of obligations under Article VI of the NPT, as is indicated clearly in the first line of the Preamble to the NPT, which notes that the States parties were mindful of “the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples”.

62. The absence of the United Kingdom from the meeting is immaterial. While awareness is not a requirement for the finding that there is a dispute, it is reasonable to assume that the United Kingdom was aware of the Marshall Islands’ statements. The United Kingdom argues that the Marshall Islands made no attempts to bring the statements to its attention. The Majority has dismissed the United Kingdom’s argument that there must be a record of bilateral exchanges. It is beyond question that modern technological developments have made communication more certain, quicker and, in many cases, instantaneous. It has done away with classic images of how statements and positions of one State may be brought to the attention of another. In today’s world, statements of this nature are rapidly reported and made widely available in various media. Given the importance that the United Kingdom has confirmed that it attaches to this question<sup>51</sup>, it is hard to believe that the Marshall Islands’ statement escaped its attention. It is safe to assume that, by the very next day at the latest, a copy of the statement would have been on the desk of an officer in the United Kingdom’s Foreign and Commonwealth Office.

63. I make it clear that the thesis advanced by this opinion is that awareness is not a prerequisite for determining the existence of a dispute, but it is certainly noteworthy that, in any case, the United Kingdom’s position would fall within the parameters of the test set out by the Majority. The latter part of the test in paragraph 41 — “could not have been unaware” — invites an objective examination based upon a standard of reasonableness. In the modern world of

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<sup>51</sup>Sir Daniel Bethlehem on behalf of the UK confirmed: “I do not tread into the merits of the case when I say that the United Kingdom has always explicitly acknowledged the imperative of Article VI of the NPT and has acted and continues to act towards the end that it mandates” (CR 2016/7 p. 9, para. 3 (Sir Daniel Bethlehem)).

communications technology, it is reasonable to conclude that the Marshall Islands' statement would not have escaped the United Kingdom's attention. Thus the United Kingdom could not have been unaware that its views and conduct here were opposed by the Marshall Islands.

64. I now turn to look at whether an objective assessment of the Parties' statements and conduct evidenced positive opposition as at the date of the Application. As noted by Judge Morelli, a course of conduct, inconsistent with the other party's position, may evidence positive opposition. Consistent with the position taken in this dissenting opinion, this assessment is made on the basis that awareness is not a requirement for finding a dispute, and that positive opposition may be deduced without reference to any mental element.

65. At the date of the Application, there was clearly a dispute about the manner in which the United Kingdom's obligation was to be discharged: whereas the Marshall Islands favoured a comprehensive multilateral approach at that time, calling for "total nuclear disarmament"<sup>52</sup>, the United Kingdom prioritized a step-by-step approach. The following evidence presented to the Court are indicia of these positions:

- (i) the public position taken by the United Kingdom on the Open-Ended Working Group (*OEWG*) when it was established by the General Assembly in December 2012, when the United Kingdom noted several concerns, including relating to working methods and budgetary impact, and that, as a result, the United Kingdom would not support "the establishment of the *OEWG* and any outcome it may produce", as well as its refusal to participate in the working group's deliberations<sup>53</sup>, which the Marshall Islands views as evidence of the United Kingdom's "systematic opposition" to the commencement of multilateral negotiations on complete nuclear disarmament<sup>54</sup>;
- (ii) the statements of the Parties on 26 September 2013, at the High-Level Meeting of the General Assembly on Nuclear Disarmament, where the Marshall Islands "urge[d] all nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament", and the United Kingdom's expression of regret about the "energy . . . being directed towards initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention";
- (iii) the statement of the Marshall Islands at Nayarit in 2014;

And the following evidence after the date of the Application confirms this position:

- (i) the United Kingdom delegation's statement on 9 December 2014 at the third International Conference on the Humanitarian Impact of Nuclear Weapons, hosted by the Austrian Foreign Ministry in Vienna:

"The UK agrees that we must also pursue the goal of a world without nuclear weapons, and we are active here too. Some have argued that the way to this goal is to ban nuclear weapons now, or to fix a timetable for their elimination. The UK considers that this approach fails to take account of, and therefore jeopardises, the stability and security which nuclear weapons can help to ensure. The UK believes that

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<sup>52</sup>MMI, p. 18, para. 25, where the Marshall Islands argues that the UK has "continuously and actively oppos[ed] efforts of a great majority of the States of the world to initiate negotiations that are to lead to total nuclear disarmament".

<sup>53</sup>Explanation of Vote, 6 November 2012, MMI, p. 38, para. 77 and Ann. 60.

<sup>54</sup>CR 2016/5, pp. 46-47, paras. 6-8 (Grief).

the step-by-step approach through the NPT is the only way to combine the imperatives of disarmament and of maintaining global stability.”

(ii) On 14 January 2015, in answer to a question in Parliament about the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Foreign and Commonwealth Office minister, Tobias Ellwood, declared: “as stated at the Conference, the UK will continue to follow the step-by-step approach to disarmament through the existing UN disarmament machinery and the Nuclear Non-Proliferation Treaty.”

(iii) The United Kingdom’s Report on the implementation plan of the 2010 NPT Review Conference, dated 22 April 2015, in which the United Kingdom stated that it:

“is committed to a world without nuclear weapons in line with our obligations under Article VI of the [NPT] and firmly believes that the best way to achieve this goal is through gradual disarmament negotiated using a step-by-step approach and within the framework of the United Nations disarmament machinery and the Treaty on the Non-Proliferation of Nuclear Weapons.

.....

We remain determined to continue to work with partners across the international community to prevent proliferation and to make progress on multilateral nuclear disarmament, to build trust and confidence between nuclear and non-nuclear weapon States, and to take tangible steps towards a safer and more stable world, in which countries with nuclear weapons feel able to relinquish them.

The United Kingdom has a strong record on nuclear disarmament. We have steadily reduced the size of our own nuclear forces by well over 50 per cent since our Cold War peak and since 1998 all of our air-delivered nuclear weapons have been withdrawn and dismantled.”<sup>55</sup>

66. The Parties also take opposite views as to whether or not the United Kingdom’s conduct in respect of its nuclear arsenal complies with the United Kingdom’s international obligations. The United Kingdom has confirmed its view that the replacement of the Trident System is in compliance with its NPT obligations, for example:

(i) David Cameron, during a Parliamentary Debate on 19 October 2010, stating the Government’s position on whether the replacement of the Trident nuclear system was to be regarded as illegal under the terms of the NPT: “[o]ur proposals are within the spirit and the letter of the non-proliferation treaty”<sup>56</sup>.

(ii) Letter from the Ministry of Defence, dated 27 September 2013: “[t]he renewal of our nuclear deterrent is fully consistent with our obligations under this treaty [i.e., the NPT]”<sup>57</sup>.

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<sup>55</sup>National report on the implementation of actions 5, 20, and 21 of the action plan of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Report submitted by the United Kingdom, 22 April 2015, pp. 1-2.

<sup>56</sup>HC Deb., 16 October 2010, cl 814, cited at WSMI, p. 17, para. 38 (<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101019/debtext/101019-0001.htm>).

<sup>57</sup>Letter sent by the Minister for State for the Armed Forces, Andrew Robathan, 27 September 2013, cited at WSMI, p. 17, para. 39 (<https://www.gov.uk/government/publications/mod-response-about-the-uks-nuclear-deterrent>).

- (iii) In a Research Paper of the House of Commons, entitled “The Trident Successor Programme: An Update”, it is stated: “Successive Governments have insisted that replacing Trident is compatible with the UK’s obligations under the NPT, arguing that the treaty contains no prohibition on updating existing weapons systems and gives no explicit timeframe for nuclear disarmament”<sup>58</sup>.

The Marshall Islands argues the contrary: that the United Kingdom’s qualitative improvement and maintenance and extension of its nuclear weapons system are in breach of Article VI. The substantiation of the Marshall Islands’ allegations, and the legality of the United Kingdom’s actions vis-à-vis Article VI of the NPT, are issues for the merits. However, the divergent positions of the Parties on this issue are sufficient to effect a dispute between the two countries. In this respect, the most important aspect of the obligation under Article VI of the NPT is that States should pursue negotiations in good faith.

67. The analysis in this opinion shows that there was a dispute between the Parties as at the date of the Application. It is clear that the Parties had different views as to the content of and the United Kingdom’s compliance with its obligations. This includes the speed and manner in which negotiations were to take place, as well as the United Kingdom’s actions in respect of its nuclear arsenal. This conclusion is confirmed by the position taken by the Parties during the proceedings. The United Kingdom, in its Preliminary Objections, noted that it “considers the allegations [of the Marshall Islands regarding the United Kingdom’s breach of Article VI of the NPT and parallel customary obligations] to be manifestly unfounded on the merits”<sup>59</sup>.

## VIII. CONCLUSION

68. The Majority decision in this case represents a conspicuous aberration and an unwelcome deviation from the Court’s long-applied position on this question. International law, like any other branch of law, is not static and some of the greatest developments in history would not have taken place but for the dynamism of law. But where current law can be applied to serve the interests of the international community as a whole, such a dramatic change is only warranted if there is a compelling consideration in favour of doing so. Indeed such an approach is confirmed by the Court’s own holding that:

“To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.”<sup>60</sup>

69. The Majority has advanced no such reasons. Its 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 us today.

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<sup>58</sup>The Trident Successor Programme: An Update, Commons Briefing papers SN06526, 10 March 2015, p. 14, cited at WSMI, p. 17, para. 39 (<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06526#fullreport>).

<sup>59</sup>POUK, p. 3, para. 5. Discussed by Marshall Islands, e.g., CR 2016/9, p. 17.

<sup>60</sup>*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. 428, para. 53.

70. Seen in the light of the considerations set out in Sections I and II of this opinion, one would be forgiven for concluding that, with this Judgment, it is as though the Court has written the Foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive issues such as nuclear disarmament.

(Signed) Patrick ROBINSON.

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