

The International Law Gaze: *Marshall Islands v. United Kingdom*

Dr. Alberto Alvarez-Jimenez, University of Waikato, on a Recent Nuclear Weapons Fiasco by the International Court of Justice

The International Court of Justice recently bowed to nuclear weapons States and disappointed the rest of the international community. Forty-two years after the Court's astonishing decision in declaring the dispute on nuclear tests between New Zealand and France terminated (*Nuclear Test Case (New Zealand v. France)*, [1974] I.C.J. Rep. 458, at [54]), a new chapter on the reluctance of the Court to deal with nuclear weapons took place in its judgment of 5 October 2016 on Preliminary Objections in *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*. There, the Court declared that it lacked jurisdiction, since there was no dispute between the parties. (*Marshall Islands v UK*, at [59]).

The judgment was a debacle on many accounts. First, it virtually ignored the extraordinary and multigenerational suffering of the Marshall Islands and its people. Their massive ordeal was worth just four lines in the decision. Second, the judgment totally failed to give proper weight to the true dimension of the case: the preservation of humankind. The so-called "Historical Background" in the judgment extended to merely two-and-a-half pages. Third, the Court decided to remain in the sidelines in terms of nuclear disarmament. It left untouched the increasing risk of the use of nuclear weapons and, therefore, utterly failed to discharge its obligations under the UN Charter.

"[I]t is as though the Court has written the Foreword in a book on its irrelevance ..." says of the judgment Judge Patrick Robinson in his dissenting opinion. (Dissenting Opinion of Judge Robinson, at [70]).

The decision concerns New Zealand, a member of the New Agenda Coalition along with Brazil, Ireland, Mexico, South Africa, and Egypt. The Coalition has made a similar claim to the Marshall Islands in multilateral forums. (Dissenting Opinion of Judge Crawford, at [30]). It is worth noting that, after the judgment, the UN General Assembly adopted a resolution in which it decided "to

convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.” (General Assembly, Seventy-first session. First Committee. 14 October 2016. A/C.1/71/L.41). The UK voted against the resolution. (<http://www.independent.co.uk/news/un-nuclear-weapon-ban-united-nations-negotiations-2017-general-assembly-a7393501.html>).

The Case

In its Application before the Court, the Marshall Islands claimed that the United Kingdom was in violation of its obligations under the Non-Proliferation Treaty and under customary international law “by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects ...” (*Marshall Islands v UK*, at [11]) and “by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future ...” (*Marshall Islands v UK*, at [11]). The Marshall Islands requested that the Court order the UK “to take all steps necessary to comply with its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law ... including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament ...” (*Marshall Islands v UK*, at [12]). The said Article provides the following: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The UK raised several preliminary objections. The most important in the case was that there was no dispute between the parties at the time of the filing of the Application on the UK’s alleged failure to pursue negotiations. (*Marshall Islands v UK*, at [23]). The Court upheld the objection to jurisdiction by the narrowest margin: by eight votes to eight; the President of the Court suppressed the equality of votes, as permitted in Article 55.2 of the Statute of the Court, by casting his vote in support of the objection. (*Marshall Islands v UK*, at [59.1]). It was the first time in its history, that the Court rejected an application on the grounds that there was no dispute between the parties. The Marshall Islands started similar proceedings against India and Pakistan on the same grounds. Both States raised similar objections, and the Court responded in identical terms. (*Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, at [22]-[56]; and *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, at [22]-[56]).

The Existence of the Dispute: The Marshall Islands' Application

Before starting, it is important to recall that the existence of a dispute is a necessary requirement of the Court's jurisdiction, since Article 38.1 of the Statute of the Court provides that the Court's function "is to decide in accordance with international law such disputes as are submitted to it."

Thus, to comply with this requirement, the Marshall Islands claimed that the existence of its dispute was rooted in the following facts. First, there was the statement made on 26 September 2013 by its Minister for Foreign Affairs at the High-Level Meeting of the General Assembly on Nuclear Disarmament, urging "all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament." (*Marshall Islands v UK*, at [28]). The second statement was made on 13 February 2014 at the Second Conference on the Humanitarian Impact of Nuclear Weapons in Mexico. There, the Marshall Islands expressed 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 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." (*Marshall Islands v UK*, at [28]).

In support for its objection to jurisdiction based on the lack of a dispute, the UK stated that the first statement made by the Marshall Islands did not mention the UK and that the UK did not attend the Conference where the second statement took place. Further, the UK argued that never did the Marshall Islands attempt to bring the second statement to its attention. (*Marshall Islands v UK*, at [28]).

The Marshall Islands also invoked other reasons to support the existence of the dispute: (i) the filing of the application of the Court, (ii) the positions of the parties during the Court's proceedings constituting evidence of the existence of the dispute, (iii) the UK's conduct before and after the application was filed, (iv) the UK's voting record on nuclear disarmament in international fora. (*Marshall Islands v UK*, at [46]).

The Decision in *Marshall Islands v UK*

The Court began its judgment by recalling that the Marshall Islands had been the place of nuclear testing in the past (*Marshall Islands v UK*, at [16]); that the very first United Nations' General Assembly resolution, unanimously adopted on January 24 1946, had established a Commission to deal with "the problems raised by the discovery of atomic energy"; and that, since the 1954 resolution 808 (IX) A, the General Assembly had called on many occasions for a convention on nuclear disarmament. (*Marshall Islands v UK*, at [15]).

The Court went on with the NPT treaty negotiated in the 1960s between nuclear weapons States and non-nuclear weapons States, to which both the Marshall Islands and the UK were party. (*Marshall Islands v UK*, at [18]). It reaffirmed what it had said twenty years before in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, that by virtue of Article VI, "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects ..." (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion. I.C.J Reports 1996 (I), p. 267, para. 105 (2)F). (*Marshall Islands v UK*, at [20]).

The Court's Findings on the Concept of "Dispute"

The Court commenced its analysis by recalling its definition of dispute: "The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations." (*Marshall Islands v UK*, at [37]). The Court then moved on to show how the existence of a dispute would be evaluated. For instance, a formal diplomatic protest was not a necessary condition (*Marshall Islands v UK*, at [38]); statements or documents exchanged between the parties, depending on the authors, content, and addressees could be taken into account (*Marshall Islands v UK*, at [39]); and the existence of the dispute could also be deduced from the parties' conduct: "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." (*Marshall Islands v UK*, at [40]). The Court then made a key determination for the fate of the case: given the text of Article 38.1 of its Statute, the critical date regarding the existence of the dispute was the date on which the application was submitted to the Court. (*Marshall Islands v UK*, at [42]). Subsequent conduct and statements might be relevant to confirm the existence of the controversy, or its disappearance, but not for the purpose of demonstrating its existence at the time of the critical date. (*Marshall Islands v UK*, at [43]).

The Court revealed the “technical” policy reason behind its choice of the critical date: “If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct.” (*Marshall Islands v UK*, at [43]).

The Court’s Decision on the Existence of a Dispute

Then, the Court applied this framework of analysis to the facts of the dispute. First, the Court noted that, despite several bilateral meetings before the application, the Marshall Islands had not raised with the UK the issue of its compliance with the NPT treaty. (*Marshall Islands v UK*, at [47]). After highlighting this fact, the Court proceeded to assess whether or not there was a dispute at the time of the filing of the application.

The Court began by assessing the Marshall Islands’ statement at the High-Level Meeting of the UN General Assembly. The Court found the pronouncement hortatory. It “cannot be understood as an allegation that the United Kingdom (or any other nuclear power) was in breach of any of its legal obligations.” (*Marshall Islands v UK*, at [49]). Examining the Marshall Islands’ statement at the conference in Nayarit, Mexico, the Court stated that, on one hand, the UK had not attended the event, and on the other, the subject of the conference was not negotiations aimed at nuclear disarmament but the broader issue of the humanitarian consequences of nuclear weapons. (*Marshall Islands v UK*, at [50]). The statement, held the Court, was general and, given its context, “did not call for a specific reaction by the United Kingdom.” (*Marshall Islands v UK*, at [50]).

The Court then assessed the Marshall Islands’ argument that “nothing excludes the possibility of conceiving the seisin of the Court as an appropriate ... mode by which the injured State ‘notifies its claim’ to the State whose international responsibility is invoked ...” (*Marshall Islands v UK*, at [53]). The Marshall Islands also drew to the attention of the Court the UK’s statements made during the proceedings to show the existence of the dispute. The Court responded that, although in general, “statements made or claims advanced in or even subsequently to the Application may be relevant for various purposes — notably in clarifying the scope of the dispute submitted — they cannot create a dispute *de novo*, one that does not already exist.” (*Marshall Islands v UK*, at [54]).

On the voting record in multilateral fora, the Marshall Islands referred to the General Assembly resolution 68/32 (2013), entitled “Follow-up to the 2013 High-level Meeting of the General Assembly on Nuclear Disarmament.” The resolution requested compliance with the international obligations on nuclear disarmament. The Marshall Islands voted in favour and the UK against. (*Marshall Islands v UK*, at [55]). The Court held that these resolutions deal with different propositions and that “a State’s vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.” (*Marshall Islands v UK*, at [56]).

On these bases, the Court concluded that there was no evidence that the UK “was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligation.” (*Marshall Islands v UK*, at [57]). There was, then, no dispute between the two States, and the Court concluded that, for this reason, it lacked jurisdiction. (*Marshall Islands v UK*, at [59]).

These were the arguments invoked by the Court to refuse to deal with the gravest problem of humankind at that time. The proper context of the case was minimized, and to the lay reader the decision appears to be based on a technical issue that can be easily corrected. It was not technical, to be sure, and the dissenting judges showed this.

The Real Dimensions of the Case and the Dissenting Opinions in *Marshall Islands v UK*

If the majority refused to engage with the complex and real dimensions of the case in a telling proof that the decision was mainly based on the politics of nuclear weapons than on the Court’s Statute and the UN Charter, members of the minority did engage with these dimensions.

The Marshall Islands: A Victim of Nuclear Test

The direct and catastrophic experience of the Marshall Islands with nuclear tests deserved more than merely a few words in the judgment, recalling what the narrator in Gabriel Garcia Marquez’s novel *Love in the Times of Cholera* said: “The other’s pain is always light.”

Judge Cançado Trindade did address this suffering to, at least, make it visible. In the case against India, the Marshall Islands expressed, according to this judge, that it “has a unique and devastating history with nuclear weapons. While it was designated as a Trust Territory by the United Nations, no fewer than 67 atomic and thermonuclear weapons were deliberately exploded as ‘tests’ in the Marshall Islands, by the United States ... Several islands were vaporized and other are estimated to remain uninhabitable for thousands of years. Many, many Marshallese died, suffered birth defects never before seen and battled cancer resulting from the contamination. ... One ‘test’ in particular, called the ‘Bravo’ test [in March 1954], was one thousand times stronger than the bomb dropped on Hiroshima and Nagasaki.” (Dissenting Opinion of Judge Cançado Trindade, at [176]). This experience was the basis of the case before the Court and should have played a role in its interpretation of the concept of “existence of a dispute.” It is beyond logic that this experience was not fully taken into account.

The Relevant Stakes Regarding the NPT

Judge Robinson showed the importance of the Marshall Islands’ claims not only for itself but for the entire community of non-nuclear weapons States. He illustrated well the true substance of the controversy around compliance with the NPT. “[T]he subject-matter of the dispute reflects the bargain at the heart of the NPT, the package deal: the *quid* is that non-nuclear States will not acquire nuclear weapons; the *quo* is that nuclear-weapons States may keep their nuclear weapons but must negotiate in good faith for nuclear disarmament.” (Dissenting Opinion of Judge Robinson, at [56]).

Judge Ad Hoc Bedjaoui, a former member, for 20 years, of the Court, added another dimension to the stakes at hand by highlighting an inescapable dimension of the NPT. The treaty should have been temporary, said Judge Bedjaoui, because it was contrary to the fundamental principle of the equal sovereignty of States by creating among them States endowed with nuclear weapons and others, also sovereign, that had given up acquiring them. The former keep intact their inherent right of self-defense, while the latter renounced their right to a significant extent. In his view, non-nuclear weapons States had an alienated sovereignty that would be freed when nuclear disarmament was attained. This abnormal situation was not conceived to last perpetually. (Opinion Dissidente de M. le Juge Ad Hoc Bedjaoui, at [61], [62], and [65]).

Judge Cançado Trindade added another layer of analysis by highlighting that that the United Nations General Assembly (GA) had “emphasized that [Nuclear Weapons States] bear a special

responsibility for fulfilling the goal of achieving nuclear disarmament, and in particular those nuclear weapons States that are parties to international agreements in which they have declared their intention to achieve the cessation of nuclear arms race.” (Dissenting Opinion of Judge Cançado Trindade, at [36]).

In addition to the bargain and character of the NPT, its provisions are even more important than at the time it had entered into force. As Judge Cançado Trindade emphasized, the 1995 NPT Review Conference observed that the number of nuclear weapons in existence then were already greater than that that had existed when the said treaty entered into force in 1970. No less worrisome is the fact highlighted by the 2005 Review Conference, and noted by Judge Cançado Trindade, that nuclear weapons States are establishing new strategic doctrines that lower the threshold for the use of these weapons. (Dissenting Opinion of Judge Cançado Trindade, at [233]-[235]). If such use were carried out, concluded the First Conference on the Humanitarian Impact of Nuclear Weapons in 2013, it is improbable that any State or international organization or body, such as the International Committee of the Red Cross or UN relief agencies, could deal with the direct and immediate humanitarian collapse and emergency. (Dissenting Opinion of Judge Cançado Trindade, at [265]). The Third Conference on the Humanitarian Impact of Nuclear Weapons in 2014 acknowledged that, in the same judge’s words, “the scope, scale, and interrelationship of the humanitarian consequences caused by nuclear weapons detonation are catastrophic, and more complex than commonly understood; these consequences can be large scale and potentially irreversible.” (Dissenting Opinion of Judge Cançado Trindade, at [280]). In his communication to the Third Conference, the UN Secretary General expressed that “the more we understand about humanitarian impacts, the more clear that we must pursue disarmament as an urgent imperative.” (as quoted in Dissenting Opinion of Judge Cançado Trindade, at [279]).

Last but not least, Judge Cançado Trindade recalled that the 2014 Conference on the Humanitarian Impact of Nuclear Weapons had concluded that the weapons could be detonated not only deliberately, but also by accident or miscalculation. (Dissenting Opinion of Judge Cançado Trindade, at [272]).

Obligation to Negotiate to Achieve Nuclear Disarmament as a Rule of Customary International Law

Judge Cançado Trindade emphasized the customary international law dimension of the dispute based on the UN General Assembly’s (GA) and Security Council’s resolutions related to nuclear

disarmament. He showed well the important role that the GA has played in this matter. First, and during the period 1972–1981, the GA repeatedly condemned all nuclear tests. Subsequently, during the years between 1982–1992, the GA in 11 resolutions called upon nuclear weapons States to implement a freeze on nuclear weapons. From 1989 on, the GA was more specific. The freeze should include a comprehensive test ban, cessation of the production of nuclear weapons, a ban on their future deployment, and a cessation of the production of fissionable material for the manufacture of such weapons. (Dissenting Opinion of Judge Cançado Trindade, at [38]-[40]).

In addition, during the period 1982–2015, and in 34 resolutions, the GA stated in their preamble that it was “convinced that nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security.” (Dissenting Opinion of Judge Cançado Trindade, at [36]). In these resolutions, even more importantly, the GA has reaffirmed that “the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity ...” (Dissenting Opinion of Judge Cançado Trindade, at [47]). The expansion continued, and from 1996 to 2016, after the Court’s advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the GA kept recalling “the solemn obligation of States Parties, undertaken under Article VI of the [TNP], particularly to pursue obligations in good faith on effective measures relating to the cessation of the nuclear race at an early date and to nuclear disarmament.” (Dissenting Opinion of Judge Cançado Trindade, at [53]).

From 2013 on, the GA’s call to pursue negotiations in good faith was addressed to all States, not only to those States party to the NPT. Judge Cançado Trindade then concluded that the GA resolutions together point “towards a customary law obligation to negotiate and achieve nuclear disarmament.” (Dissenting Opinion of Judge Cançado Trindade, at [56]).

The Security Council, illustrated Judge Cançado Trindade, has also adopted decisions on the topic. The President of the Council, on behalf of its members on January 31 1992, called upon all UN members to comply with their obligations related to arms control and disarmament and to prevent the proliferation of weapons of mass destruction—nuclear, biological, and chemical. In three subsequent resolutions, 1540 (2004), 1810 (2008), and 1887 (2009), the Council stated that the proliferation of such weapons was a threat to international peace and security and that all States had to prevent such proliferation. (Dissenting Opinion of Judge Cançado Trindade, at [58]-[59]). In Resolution 1887 (2009), the Council called upon States party to the NPT to “comply fully with all their obligations, and in particular ‘pursuant to Article VI of the Treaty, to undertake to

pursue negotiations ... on effective measures relating to nuclear arms reduction and disarmament’.” (para. 5. As quoted in Dissenting Opinion of Judge Cançado Trindade, at [62]).

Both the GA and Security Council resolutions, concluded the judge, “provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT.” (Dissenting Opinion of Judge Cançado Trindade, at [63]).

All these foregoing dimensions were referred to by the parties. (Dissenting Opinion of Judge Cançado Trindade, at [295]). They were part of the Court’s deliberation, which makes the judgment not minimalistic—this is an understatement—but a monumental disregard by the Court of the imperative context of the case: nothing less than the existence of humankind.

The Dissenting Judges’ Response to the Majority’s Notion of Dispute

Several judges called the introduction of the requirement of awareness an unnecessary element. Judge Robinson stated that the requirement of awareness “plunges [the Court] into the murky legal world of the state of mind of a State.” (Dissenting Opinion of Judge Robinson, at [24]). He also suggested of awareness, and its expression, the following: “The 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.” (Dissenting Opinion of Judge Robinson, at [51]).

Some of the dissenting judges criticized the formalism of the majority’s view and recalled that flexibility in the assessment of the existence of a dispute had been the guiding criterion of the case law of the Court for decades. Evidence of this flexibility abounded in the past; for example, the assessment was objective, and the existence of the dispute could be inferred from a failure of the respondent State to respond to a claim in circumstances in which a response was expected. [Dissenting Opinion of Vice-President Yusuf, at [27], [31]]. Judge Robinson held a similar view: “The opposition of the positions may be evidenced by a course of conduct and evidence of the Parties’ attitudes ...” (Dissenting Opinion of Judge Robinson, at [40])

The dissenting opinions also questioned limiting the existence of the dispute to events prior to the application to the Court. Vice-President Yusuf held that a full-fledged dispute was not a pre-

condition. He argued that a dispute could be taking shape at the time of the application and could “clearly manifest itself during the proceedings before the Court.” (Dissenting Opinion of Vice-President Yusuf, at [34]). (See also Dissenting Opinion of Judge Crawford, at [25]).

Judge Cançado Trindade added that “there is no requirement under general international law that the contending parties must first ‘exhaust’ diplomatic negotiations before lodging a case with ... the Court.” (Dissenting Opinion of Judge Cançado Trindade, at [14]).

The dissenting judges also questioned the application of the majority’s position to the facts. In connection to the statement made by the Marshall Islands at the Second Conference on the Humanitarian Impact of Nuclear Weapons, Judge Robinson stated that “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.” (Dissenting Opinion of Judge Robinson, at [60], See also Dissenting Opinion of Judge Cançado Trindade, at [18]). Judge Robinson also deemed immaterial the absence of the UK at this conference: “In today’s world statements of this nature are rapidly reported and made widely available in various media. ... 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.” (Dissenting Opinion of Judge Robinson, at [62]). Moreover, as Judge Sebutine showed, the absence was immaterial in another key way: the UK deliberately decided not to attend this conference. The UK stated that it was making this decision “because of concerns that ‘some efforts under the humanitarian consequences initiative appear increasingly aimed at pursuing a Nuclear Weapons Convention prohibiting nuclear weapons outright’” (as quoted in Separate Opinion of Judge Sebutine, at [27]).

Regarding voting records at multilateral fora, Vice-President Yusuf shared, in principle, the difficulties raised by the majority. However, such difficulties did not exist in his view in the case in question and the votes should have evidentiary value, “where there is a consistent patten of voting against a series of resolutions which call for the same type of action, in this case the immediate commencing of negotiations and conclusion of a general convention on nuclear disarmament ...” [Dissenting Opinion of Vice-President Yusuf, at [52]].

Judge Ad Hoc Bedjaoui recalled that the proceedings dealt with a non-nuclear State against a nuclear State in order to end the nuclear risk constituted a clear expression of a major dispute whose existence should be declared by the Court immediately. (Opinion Dissidente de M. le Juge Ad Hoc Bedjaoui, at [60]).

Judge Owada, who sided with the majority, recognized that, *at the time of the judgment*, there was already a dispute between the Marshall Islands and the United Kingdom and that a second application would then be possible. (Separate Opinion of Judge Owada, at [21]). To judge Yusuf, this argument undermined judicial economy. (Dissenting Opinion of Vice-President Yusuf, at [24]). Judge Robinson agreed and quoted a passage from the Court's judgment in *Croatia v Serbia*: "It is not in the interest 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." (*Serbia v Croatia*, at [85], as quoted in Dissenting Opinion of Judge Robinson, at [55]).

But the major risk for the credibility of the Court and for the sense of justice for the Marshall Islands of counting on this possibility of fresh proceedings as a potential justification for the strict approach adopted by the majority was acutely identified by Judge Ad Hoc Bedjaoui. It could have been possible that, as a result of the judgment, the United Kingdom had either withdrawn its acceptance of the jurisdiction of the Court or modified the extent of its acceptance of the jurisdiction to exclude the subject-matter of the dispute with the Marshall Islands. If this had taken place, the Marshall Islands would have faced an impossible obstacle in seising the Court again. (Opinion Dissidente de M. le Juge Ad Hoc Bedjaoui, at [72]). Thus, Judge Owada's suggestion that there was a mere technical issue that could be corrected at any time is untenable.

The Role of the Court in the Settlement of International Disputes Related to Nuclear Weapons

Some of the dissenting members of the Court recalled to the majority the role that the Court had in the preservation of international peace and security, much more in a case involving compliance with the obligation to pursue negotiations aimed at nuclear disarmament. Judge Robinson pointed out that "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." (Dissenting Opinion of Judge Robinson, at [18]). Judge Sebutine joined this view by expressing that "the International Court of Justice, as the principal judicial organ of the United Nations 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 and through the exercise of its advisory role in accordance with the Charter and the Statute of the Court. Today there is no greater threat to international peace and security, or indeed to humanity, than the threat or prospect of a nuclear war.” (Separate Opinion of Judge Sebutine, at [3]). In the same direction, Judge Ad Hoc Bedjaoui added that, after Hiroshima, fear had become essential to the human being. It was a significant responsibility and also an immense honor for the Court to be able to contribute with all the weight of its experience and wisdom to the conjuring of the danger of a war, a war which would be nothing but the collapse of mankind. (Opinion Dissidente de M. le Juge Ad Hoc Bedjaoui, at [74]).

Finally, Judge Sebutine made the connection between the case and the Court’s role explicit by pointing out that “given the importance of the subject-matter of nuclear disarmament to the international community at large, I believe that this is not the case that should have been easily dismissed on a formalistic ... finding that no dispute exists between the contending parties.” (Separate Opinion of Judge Sebutine, at [18]).

The Court itself, said Judge Ad Hoc Bedjaoui, had lost with its decision. It abandoned the international community and put at risk its own reputation. (Opinion Dissidente de M. le Juge Ad Hoc Bedjaoui, at [85]).

Conclusion

The present author entirely agrees with the dissenters. “Sometimes silence is ... dangerous,” says a character in Margaret Atwood’s *The Handmaid’s Tale*. These words well fit the judgment in *Marshall Islands v UK*. It is also a most dangerous silence for the future of humanity.

The Court’s approach leaves the *status quo* untouched, which is the scenario that nuclear weapons States prefer to see. Non-nuclear weapons States are carrying their end of the bargain in the NPT; nuclear weapons States are not. But in addition, a pronouncement of the Court on the topic would have shaped the legal and political discussion in any future negotiations. The Court does not see itself playing such a role, despite the clear mandate in the UN Charter.

A good cartoonist summarizing the judgment in an image would draw, on one side, the nuclear weapons States laughing in joy and raising their hands with the Court in the middle—the shadow of death in the background symbolizing nuclear weapons—and on the other, the international community on the floor dismayed, trying to hold onto a shredded UN Charter.