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SYMPOSIUM ON THE MARSHALL ISLANDS CASE

NUCLEAR WEAPONS AND THE COURT

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Although caution must be exercised in attributing a policy to the International Court of Justice, it is difficult not to see the *Marshall Islands* judgments as part of a longer trend of the Court using formalistic reasoning to decline cases concerning nuclear weapons.

In 1974, it decided not to exercise jurisdiction in the *Nuclear Tests* cases brought against France by Australia and New Zealand on the ground that, following France's unilateral declaration to cease atmospheric nuclear tests in the South Pacific, their claims "no longer ha[d] any object."[1] The judgments denied the applicants the declarations they had sought as to the violation of their rights,[2] but permitted them to request a re-examination of the situation "if the basis of this Judgment were to be affected."[3] However, in 1995, the Court dismissed New Zealand's request for such an examination in connection with France's proposed underground nuclear tests in the same region, on the basis that its previous judgment had concerned only atmospheric tests.[4] Here, it ignored that New Zealand's previous application had been founded on the harm caused to the South Pacific environment by nuclear testing and, at the time, atmospheric testing was the form known to be harmful and used by France in that region.[5] Science had since revealed the dangers of underground testing, but this knowledge failed to move the Court from its reading of its previous judgment. A similar failure to focus on material factors underpinned its rejection of the World Health Organization (WHO)'s request for an advisory opinion in 1996.[6] The WHO had asked the Court whether, in view of their health and environmental effects, the use of nuclear weapons in armed conflict violated states' obligations under international law.[7] The Court reasoned that the legality of use of nuclear weapons was irrelevant to the WHO's work of preventing and alleviating their health effects; it thus lacked standing to request the opinion.[8]

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[1] Nuclear Tests (N.Z. v. Fr.), 1974 ICJ REP. 457 para. 65 (Dec. 20) [hereinafter Nuclear Tests-NZ]; Nuclear Tests (Austl. v. Fr.), 1974 ICJ REP. 253 para. 62 (Dec. 20).

[2] Nuclear Tests-NZ, Application Instituting Proceedings 9 (May 9, 1973).

[3] Nuclear Tests-NZ, *supra* note 1, para. 63.

[4] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* Case, 1995 ICJ REP. 288 (Sep. 22).

[5] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* Case, Application Instituting Proceedings paras. 19–20 (Aug. 21, 1995).

[6] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ REP. 66 (July 8) [hereinafter WHO-Nuclear Weapons].

[7] WHO-Nuclear Weapons, Request for an Advisory Opinion 6 (Sep. 3, 1993).

[8] WHO-Nuclear Weapons, *supra* note 6, at paras. 22, 31.

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The *Marshall Islands* judgments rely on a fresh pretext: that there was no dispute between the applicant and the respondent states, because it could not be established that the latter were "aware, or could not have been unaware" of the dispute. The Marshall Islands had not done enough to bring the "opposition of views" to their notice.[9] In this respect, a few points are worth noting. Thereafter, the essay focuses on the Court's function in nuclear weapons cases, in view of the shape taken by nuclear governance in recent years.

On the Marshall Islands *Judgments*

The first point is that the Court has made a new and unforeseen requirement of "objective awareness" the basis of its decision.[10] In doing so, it has made inaccurate use of its own previous jurisprudence.[11] Given that the Court's President defended his affirmative vote on the basis of the "judicial imperative" for the Court to be "highly consistent in its jurisprudence, both in the interest of legal security and to avoid any suspicion of arbitrariness," this is ironic.[12]

The Court has also achieved another dubious first: rejecting cases in entirety on a basis that, even if reflecting a minor procedural flaw in the applicant's approach (perhaps it could have previously voiced its opposition to the respondents' nuclear postures in more specific terms), was easily cured. As several dissenting judges noted, the Marshall Islands' statement at the Nayarit Conference, referring to failures by "states possessing nuclear arsenals," sufficiently indicated an incipient dispute, which became crystallized by the pleadings before the Court.[13] Were the state to refile the cases now, the Court could not find the respondents unaware of the dispute, and would have to proceed to other issues. Knowing this, it would have been in the interests of judicial economy and sound administration of justice not to treat lack of awareness as a procedural bar.[14] Judge Crawford went further, distinguishing multilateral disputes brought in the collective interest from bilateral ones.[15] The former could crystallize at multilateral fora. And the Marshall Islands' statement, viewed in context of a broader multilateral disagreement on the progress of disarmament negotiations, was sufficient to establish a dispute without the Court needing to overlook any procedural flaw.[16]

A third point relates to the specific reasoning adopted by two judges. Vice-President Yusuf was the only one to distinguish the case against the United Kingdom from those against India and Pakistan. In the latter cases, he agreed that there was no dispute because India and Pakistan had consistently supported disarmament

[9] *See, e.g.,* Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. UK), Preliminary Objections paras. 50, 52 (Oct. 5, 2016) [hereinafter Marshall Islands-UK].

[10] Marshall Islands-UK, Dissenting Opinion of Judge Crawford para. 1.

[11] *See id.* at paras. 3–19. *See also,* Marshall Islands-UK, Dissenting Opinion of Judge Robinson paras. 23–39; Declaration of Judge Tomka paras. 19–28.

[12] Marshall Islands-UK, Declaration of President Abraham para. 10.

[13] Marshall Islands-UK, Separate Opinion of Judge Sebutinde para. 15; Dissenting Opinion of Judge Bennouna 5; Declaration of Judge Tomka para 28; Separate Opinion of Vice-President Yusuf para. 5.

[14] Marshall Islands-UK, Dissenting Opinion of Judge Robinson para. 52–55; Dissenting Opinion of Judge Bennouna 4; Declaration of Judge Tomka paras. 26–28; Separate Opinion of Vice-President Yusuf paras. 24–26. Even judges joining the majority agreed: Marshall Islands-UK, Declaration of Judge Gaja; Separate Opinion of Judge Bhandari para. 13.

[15] Marshall Islands-UK, Dissenting Opinion of Judge Crawford para. 20.

[16] *Id.* at paras. 21, 31. *See also,* Marshall Islands-UK, Dissenting Opinion of Judge Cançado Trinidade para. 19; Dissenting Opinion of Judge Robinson para. 67.

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negotiations. There was no divergence of views between them and the Marshall Islands.[17] Judge Bhandari joined the majority in all three cases for the same reason, although only in the case against India did he explain his view that there was "more convergence than divergence" between the relevant states.[18]

Leaving aside the accuracy of their assessments, the two judges wrongly characterized the dispute itself. The claim brought by the Marshall Islands related to the existence and violation of an obligation to negotiate. It could not be dispelled by a finding that the respondents sympathized with the concerns that had actuated it. To be clear, at the merits stage the judges could have found that the respondents did not have, or were not in breach, of an obligation to negotiate. But, this finding would not mean that such issues had not been in dispute at all.

In sum, the Court wrongly concluded that there was no dispute between the Marshall Islands and the respondents. The remainder of this essay will explain why, in doing so, it betrayed its own judicial function.

The Shadow of that Nuclear Weapons *Case*

I want to first refer to the case that I have not yet mentioned: the Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in response to the UN General Assembly's request.[19] Delivered on the same day as the WHO opinion, it is (in)famous for a pair of conclusions:

> [T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict …;
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;[20]

These sentences are viewed as having left the issue confused. Indeed, individual judges in the case read different meanings into them, including that the use of nuclear weapons is always illegal, is legal in a carefully-defined exceptional circumstance, or is legal in a broader and unspecified range of circumstances. For many commentators, this was yet another example of the Court proving unable to provide a definitive answer on nuclear weapons.

Nevertheless, there is reason to appreciate the Court's approach. An alternative would have been to specify the measurements of necessity and proportionality governing legal use of nuclear weapons. As Martti Koskenniemi notes, that would have led the Court onto terrain that it wished to avoid: it would have expressly conceded the legality of the use of nuclear weapons under certain circumstances, and redescribed the pure horror of nuclear explosion in a normalizing language of proportionality calculation.[21] By remaining silent, the Court left "room for the workings of the moral impulse, the a-rational, non-foundational appeal against the killing of the innocent."[22]

[17] Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Preliminary Objections, Declaration of Vice-President Yusuf paras. 25, 32 (Oct. 5, 2016) [hereinafter Marshall Islands-India]; Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Preliminary Objections, Declaration of Vice-President Yusuf paras. 23, 30 (Oct. 5, 2016) [hereinafter Marshall Islands-Pakistan].

[18] *See* Marshall Islands-India, Separate Opinion of Judge Bhandari para. 41.

[19] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 1996 ICJ Rep 226 (July 8) [hereinafter UNGA-Nuclear Weapons].

[20] *Id.* at para. 105(2)(E).

[21] Martti Koskenniemi, *The Silence of Law/The Voice of Justice*, *in* International Law, the International Court of Justice and Nuclear Weapons 488, 496–497 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

[22] *Id.* at 497–498.

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Nor was that its only contribution. In an unexpected coda, the judges unanimously declared that the 1968 Nuclear Non-Proliferation Treaty (NPT) gave rise to an obligation to pursue in good faith and, moreover, bring to a conclusion, negotiations relating to nuclear disarmament: i.e., an obligation of result as well as an obligation of conduct.[23] Then-President, Mohammad Bedjaoui further declared that the obligation had also "acquired *a customary character*."[24] The Court's conclusion on the negotiation obligation is the foundation for the present cases, and Bedjaoui's declaration no doubt a reason why the Marshall Islands nominated him as ad hoc judge.

Furthermore, the Advisory Opinion was one instance in which the Court set aside its reticence on nuclear issues, acknowledging—in the President's words—"a duty to play its part, however small, in this rescue operation for humanity" from "unremitting nuclear blackmail."[25] I will say more on this below, to make the argument that it is precisely this duty that the Court has reneged on in the present cases.

The Court's Part

At the time of the two advisory opinions, Judge Shigeru Oda had suggested that the Court decline *both* requests. For, both were outcomes of lobbying by nongovernmental organizations and nonaligned states that sought to instrumentally use the Court to "laterally achiev[e]" an end unattained by other means: complete nuclear disarmament. He did not think it appropriate for the Court to be used in such a "political" way.[26]

He was partially right: the opinions *were* sought in the hope that they would generate impetus for disarmament. Delegations at the World Health Assembly and the General Assembly expressly voiced the need to recruit the Court.[27] In a poignant statement, the delegate from Vanuatu—another small Pacific state reeling from the effects of past nuclear tests—noted that progress in obtaining a ban on atmospheric nuclear testing in the Pacific was only achieved once Australia and New Zealand took the matter to the Court.[28] In the present instance too, her speech suggested, the attempt to seek the Court's intervention was guided by awareness of an otherwise insurmountable cause.

Judge Oda's apprehension of the political use of legal institutions was lop-sided. The requests for advisory opinions arose in a context where the bargain underlying the NPT—that states possessing nuclear weapons would negotiate disarmament while all others would refrain from acquiring such weapons—was unravelling. Developments in the preceding years had aimed at strengthening one end of the bargain, i.e. nonproliferation. These included revival of the Nuclear Suppliers Group (NSG), expansion of the International Atomic Energy Agency (IAEA)'s verification mechanisms, and the United States' 1994 Nuclear Non-Proliferation Act. Although not unwelcome, they shifted the focus away from the other end of the bargain, i.e. disarmament. Negotiations had languished, with diminishing support for UN resolutions calling for a binding prohibition on the threat or use of nuclear weapons, and stalled conclusion of a comprehensive test ban treaty.[29] States like the United Kingdom asserted the "legality" of their nuclear deterrent under the NPT,[30] signaling the infinite

[23] UNGA-Nuclear Weapons, *supra* note 19, at paras. 99–103, 105(2)(F).

[24] UNGA-Nuclear Weapons, Declaration of President Bedjaoui para. 23.

[25] *Id.* at para. 6.

[26] UNGA-Nuclear Weapons, Dissenting Opinion of Judge Oda paras. 8, 25.

[27] *See* UNGA-Nuclear Weapons, Request for Advisory Opinion paras. 21 ff. (Jan. 6, 1995); World Health Assembly, 46th Meeting, Verbatim Records of Plenary Meetings, WHA46/1993/REC2 (May 3–14, 1993) [hereinafter WHA records].

[28] WHA records, *id.* at 275.

[29] UNGA-Nuclear Weapons, Dissenting Opinion of Judge Oda paras. 15 ff.

[30] WHA records, *supra* note 27, at 275.

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postponement of complete disarmament. It was not inappropriate to ask the Court to assess the validity of such claims; its advice could clarify the rights and expectations of all states, and, perhaps, restore balance to the NPT bargain.

The Court to its credit dismissed the suggestion that it should be inhibited by the political motivations underlying the request, noting that the General Assembly's question would not entail deviation from its routine task of assessing "the legality of the possible conduct of States."[31] Importantly, aware that its findings would be a political prize for either side, it also asserted that "in situations in which political considerations are prominent it may be particularly necessary" to obtain its opinion on the law; this would provide "an additional element in the negotiations."[32] With this recognition of its influence, it proceeded to pronounce—*ultra petita*, per some judges[33]—on the character of the obligation to negotiate provided in the NPT. Evidently, the Court did not fear being politically coopted; in fact, it showed itself ready to play a part in the campaign against nuclear weapons, perceiving its contribution as not only compatible with, but also fully part of its judicial function.[34]

Nuclear Governance Today

To discuss how the Court should have thought of its role in the current cases, let us first recollect the environment in which they were filed. In the past two decades, the NPT bargain has further eroded. Proliferation rather than disarmament remains the focus.[35] Moreover, a discursive shift catalyzed by the United States in the 2000s in how both the problem of proliferation and solutions to it are understood, remains in place. This shift emphasizes actors rather than actions;[36] and informal networks like the NSG, Proliferation Security Initiative, Missile Technology Control Regime, and Global Nuclear Energy Partnership rather than NPT rules and IAEA verification processes. While this might occasionally enable creative diplomatic engagement, it promotes differential treatment of states based on political friendships and enmities. Corresponding outcomes, such as the de facto recognition of India's nuclear weapons and uncriticized renewal of UK's Trident system, have resulted in arguments of unequal treatment, a muddling of the nonproliferation principle, and further recession of the disarmament goal.[37] The period since the advisory opinions has witnessed not only a rise in the number of states with

[31] UNGA-Nuclear Weapons, *supra* note 19, para. 13.

[32] *Id.* at para. 17.

[33] UNGA-Nuclear Weapons, Separate Opinion of Judge Guillaume para. 13; Dissenting Opinion of Vice-President Schwebel para. 329; Dissenting Opinion of Judge Weeramantry 437.

[34] In this context, see also UNGA-Nuclear Weapons, Declaration of Judge Vereshchetin 281.

[35] *See, e.g.,* Daniel H. Joyner, Interpreting the Nuclear Non-Proliferation Treaty 35–108 (2011). Joyner notes efforts by the Obama administration to restore balance to the bargain; but its record is mixed, including a recent vote against a UNGA resolution convening multilateral disarmament negotiations: GA Res. 71/258 (Jan. 11, 2016).

[36] *See, e.g.,* Condoleeza Rice, Opening Remarks to the US Senate Committee on Foreign Relations (Apr. 5 2006): "It is simply not credible to compare India to North Korea or to Iran. While Iran and North Korea are violating their IAEA obligations, India is making new obligations by bringing the IAEA into the Indian program and seeking peaceful international cooperation. Iran and especially North Korea are, of course, closed non-democratic societies. India is a democracy. In fact, India is increasingly doing its part to support the international community's efforts to curb the dangerous nuclear ambitions of Iran." In the 2000s, the United States made a major effort to play down India's proliferation record, on the basis that India was a responsible ally rather than a "rogue" state.

[37] On these implications of India's nuclear treatment, see Surabhi Ranganathan, Strategically Created Treaty Conflicts and the Politics of International Law 306 ff. (2014).

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declared nuclear weapons capability, but also the emergence of well-resourced nonstate actors with unforeseen levels of access to strategic information and weaponry, leading to real fears about their acquiring control over nuclear weapons.

In this context, the Marshall Islands, encouraged by NGOs, filed its cases obviously with a similar aim as that animating the WHO and General Assembly requests. Its move was both an act of hope—from a state preoccupied by another threat of near-certain destruction (climate change)—that a nuclear weapons-free future remains a collective interest worth fighting for; and an act of faith, that the Court would once more prove an ally in the fight. Let us now turn to what the Court might have said.

The Court and its Function

It is interesting to consider the arguments made in support of the view that it was not compatible with the Court's judicial function to address the issues raised by the Marshall Islands. Prominent in the respondents' submissions, and referenced by some of the judges,[38] were two points. First, in reference to the Monetary Gold principle, that the cases engaged the interests of third states who were not before the Court.[39] Second, and related, that any order made by the Court would have no practical effect: A direction to the respondents to undertake negotiations could not be fulfilled without cooperation from other states, and the Court could not mandate such cooperation.[40] Thus, the argument went, it should not pass judgment at all. For, "it is not the function of the Court merely to provide a basis for political action."[41] Perhaps to distinguish the Court's advisory function in view of its assertions in *General Assembly-Nuclear Weapons*, it was stated that "[w]hen the Court adjudicates on the merits of a dispute, one or other or both parties should … be in a position to take some … action or avoidance of action which would constitute compliance with the Court's judgment."[42] (Pakistan, indeed, described the Marshall Islands' application as "a veiled request for an advisory opinion."[43])

Cumulatively, these objections point to the question of what findings would have been appropriate in the present cases. The first point, i.e. the *Monetary Gold* principle, represents a well-rehearsed argument, but is not here an insuperable objection. As Judge Crawford—who once successfully argued against it in Certain Phosphate Lands and for it in East Timor—noted, the case-law has set limits to its application.[44] Although the principle precludes findings against third states, it remained open to the Court to determine that the respondents had breached an obligation to negotiate by their own conduct.

The second objection amounts to an argument that because achieving disarmament (or effective negotiations) rests on factors other than the respondents' will, there is no purpose to the Court's finding them in breach of their negotiation obligations. In effect, the Court should recognize that politics, not law, was the determining factor. And

[38] *See* Marshall Islands-UK, Declaration of Judge Tomka para. 39; Separate Opinion of Judge Bhandari para. 18 ff.

[39] Marshall Islands-UK, Preliminary Objections of the United Kingdom para. 83 ff. (June 15, 2015). The case referred to is Monetary Gold Removed from Rome in 1943 (It. v. Fr., UK, and US), 1954 ICJ REP. 19 (June 15).

[40] Marshall Islands-UK, Preliminary Objections of the United Kingdom para. 104 ff.

[41] *Id.* at para. 106. The United Kingdom here relies on Northern Cameroons (Cameroon v. UK), 1963 ICJ REP. 15 (Dec. 2).

[42] Marshall Islands-UK, Preliminary Objections of the United Kingdom para. 106.

[43] Marshall Islands-Pakistan, Counter-memorial of Pakistan para. 1.12 (Dec. 1, 2015).

[44] *See* Marshall Islands-UK, Dissenting Opinion of Judge Crawford paras. 32–33. On Crawford's previous arguments, see Certain Phosphate Lands (Nauru v. Austl.), Verbatim Record, ICJ Doc. CR 91/20, at 49–79 (Nov. 19, 1991), and East Timor (Port. v Austl.), Verbatim Record, ICJ Doc. CR 95/7, at 51–60 (Feb. 6, 1995).

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it should construe its judicial function by reference to that recognition, confining its focus to cases of less political import. Put this way, the argument seems absurd.[45] There are, however, two material issues raised by it that deserve specific rebuttal.

One is the implied suggestion that there was no relevant legal point to be settled by this case. That is not so: the Court was asked whether three states had fulfilled their legal obligations to pursue negotiations in good faith. Its response might have clarified how to evaluate this still vague concept, which, apart from settling the dispute on this issue in the present cases, could have relevance also in other contexts.[46]

The other is what factors are relevant to the Court's assessment of whether the respondents will be "in a position to take some … action or avoidance of action." In *Northern Cameroons*, where this criterion was articulated, the treaty on which a declaration was sought had expired, and a new status established; thus, there was no *legal* basis for action. The Court noted in that case that a declaratory judgment which "expounds a rule of customary law or interpreted a treaty which remains in force," is a different matter; here the Court's judgment "will naturally have 'a continuing applicability'."[47] The present cases have this character.

The argument made is rather one of *factual* impediments, i.e., the postures of other nuclear weapons-possessing states. There are good reasons why this argument should not be accepted as determinative: neither are those postures the sole condition for the respondents' actions, nor the only limit upon them. Regardless of those states' cooperation, the respondents might take various steps in furtherance of their obligations to negotiate and achieve disarmament. For instance, they might have supported the recent General Assembly resolution convening multilateral negotiations.[48] As it happens, the United Kingdom voted against the resolution, while India and Pakistan abstained; none are likely to participate in the conference that will begin this year.

Moreover, the postures of other states will be a factor in practically any case that concerns a collective international interest. In many such cases, each state might find it sensible to act only if other states also play their part: climate change action and conservation of global commons are examples. International law recognizes such situations as giving rise to obligations of interdependent character, such that each state's performance or breach affects the rights and interests of other states. Such obligations are no less binding for that reason; the Articles on State Responsibility even provide expansive rules of standing in their respect.[49] But what is the point of such developments if the Court is asked to construe its judicial function to exclude them from its consideration?

In fact, unless it sees itself purely as an arbitral body, the Court should embrace the role of promoting and protecting obligations in the collective interest. Doing so will not entail any radical transformation of approach. There is enough that it can do while staying within familiar norms of propriety such as that encapsulated in the *Monetary Gold* principle. Perhaps, this might imply the occasional obiter dictum, as well as pronouncing purely declaratory judgments or confining the relief ordered to directions to act in good faith, as elaborated in the exercise of legal reasoning. Such orders do not overreach the Court's judicial function. Nor, in adding the weight of clarified legal obligation to states' policy choices, do they seem without "practical effect." The change that *is* entailed is a simple one: not dismissing cases on specious grounds, and perhaps a less reserved approach to admissibility.

[45] Though it has a long pedigree: see Martti Koskenniemi, *The Function of Law in the International Community: 75 Years After*, 79 BRI. Y.B. INT'L L. 353 (2008).

[46] *E.g.*, Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), currently on the Court's docket.

[47] *See* Juliette McIntyre, *Declaratory Judgments of the International Court of Justice*, 25 HAGUE Y.B. INT'L L. 107, 119, 127 ff. (2012).

[48] GA Res. 71/258 (Jan. 11, 2016).

[49] Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts arts. 42, 48, UN Doc. A/56/10 (2001).

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In the conclusion to his dissenting opinion, Judge Robinson writes "with this Judgment, it is as though the Court has written the Foreword in a book on its irrelevance to … settlement of disputes that implicate highly sensitive issues such as nuclear disarmament."[50] This would be a sad outcome indeed for an institution that had once adopted a stance of procedural *flexibility* in the bid to restore trust in itself as capable of acting independently of the influence of the most powerful states.[51]

[50] Marshall Islands-UK, Dissenting Opinion of Judge Robinson para. 70.

[51] *E.g.*, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 ICJ Rep. 3, paras. 33–34 (Feb. 5); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US), 1984 ICJ Rep. 392 (Nov. 26).

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