The dispute that wasn't there: judgments in the *Nuclear Disarmament* cases at the International Court of Justice

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On 5 October 2016, the International Court of Justice upheld preliminary objections to its jurisdiction in three separate cases relating to nuclear disarmament brought by the Republic of the Marshall Islands, India, Pakistan, and the United Kingdom – the three respondent States – argued that the absence of a dispute with the Marshall Islands when the cases were filed meant that the Court lacked jurisdiction to consider the claims. In each case, a narrow majority of the Court agreed. These judgments brought to a halt the legal actions mounted by the tiny Marshall Islands against three nuclear powers. They also consolidated a trend in the Court's approach to the determination of whether a dispute exists for the purpose of the exercise of jurisdiction. In addition, the judgments sparked debate over whether individual judges cast their votes in line with the preferences of their home governments or sought to protect the interests of powerful States. This article provides an overview of the proceedings and the parties' claims (Part 2). It then analyses the Court's reasoning with respect to whether a dispute was present (Part 3) and explains how the Court's approach to the 'dispute requirement', a means to protect the judicial function, has taken a wrong turn (Part 4). The article next challenges the proposition that the voting record in the Nuclear Disarmament judgments should be interpreted to support the proposition that judges vote in accordance with national interest (Part 5) before offering some concluding thoughts on the wisdom of the decision by the Marshall Islands to bring these cases, which invoked claims that may not have been amenable to judicial solutions (Part 6).

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1 INTRODUCTION

On 5 October 2016, the International Court of Justice ('ICJ' or 'the Court') upheld preliminary objections to its jurisdiction in three separate cases relating to nuclear

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disarmament brought by the Republic of the Marshall Islands.¹ India, Pakistan, and the United Kingdom, the three respondent States, argued that the absence of a dispute with the Marshall Islands when the cases were filed meant that the Court lacked jurisdiction to consider the claims. In each case, a narrow majority of the Court agreed. The Court found by nine votes to seven that there was no dispute between the Marshall Islands and either India or Pakistan on the relevant date. In the case against the United Kingdom, the Court reached the same conclusion by an 8-8 vote, with President Ronny Abraham deciding the matter by his casting vote.² These judgments brought to a halt the legal actions mounted by the tiny Marshall Islands against three nuclear powers. They also consolidated a trend in the Court's approach to the determination of whether a dispute exists for the purpose of the exercise of jurisdiction. In addition, the judgments have also sparked debate over whether individual judges cast their votes in line with the preferences of their home governments or sought to protect the interests of powerful States.³

This article provides an overview of the proceedings and the parties' claims (Part 2). It then analyses the Court's reasoning with respect to whether a dispute was present (Part 3) and explains how the Court's approach to the 'dispute requirement' in its recent case law has taken a wrong turn (Part 4). It next challenges the proposition that the *Nuclear Disarmament* judgments should be interpreted to mean that judges vote in accordance with national interest (Part 5) before offering some concluding thoughts on the wisdom of the decision to bring these cases and the nature of the challenges they posed to the Court (Part 6).

2 BACKGROUND

On 24 April 2014, the Marshall Islands filed separate applications against the nine States which possess, or are believed to possess, nuclear weapons: China, France, India, Israel, North Korea, Pakistan, Russia, the United Kingdom and the United States. In the cases against India, Pakistan, and the United Kingdom, the Marshall Islands invoked the optional clause declarations of those States as the basis for the Court's jurisdiction.⁴ Lacking a jurisdictional basis to pursue its claims against the other six nuclear States, the Marshall Islands invited their acceptance of the

1. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* (Preliminary Objections) 2016 <www.icj-cij.org/docket/files/158/19134.pdf> accessed 24 February 2017 (*RMI v India*); *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* (Preliminary Objections) 2016 <www.icj-cij.org/docket/files/159/19166.pdf> accessed 24 February 2017 (*RMI v Pakistan*); *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) 2016 <www.icj-cij.org/docket/files/160/19198.pdf> accessed 24 February 2017 (*RMI v UK*).

2. The President of the Court shall decide by a casting vote in the event of a tie. Statute of the International Court of Justice, art 55 (ICJ Statute).

3. N Krisch, 'Capitulation in The Hague: The Marshall Islands Cases' (*EJILTalk!*, 10 October 2016) <www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/> accessed 24 February 2017.

4. *RMI v India* (n 1) [1]; *RMI v Pakistan* (n 1) [1]; *RMI v UK* (n 1) [1].

Court's jurisdiction.⁵ As no State did so, those cases were not entered on the Court's General List.⁶

In the cases that proceeded, the Marshall Islands alleged that each respondent State had failed to fulfil its obligation to pursue in good faith and to conclude 'negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.⁷ This obligation was alleged to derive from customary international law and, where applicable, the 1968 Nuclear Non-Proliferation Treaty (NPT).⁸ This wording from the submissions tracked the operative clause of the 1996 Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons*.⁹ The Marshall Islands also claimed that efforts by the three respondent States to modernise and maintain their nuclear weapons systems had breached the obligation to pursue in good faith and achieve nuclear disarmament, and that each respondent State was 'effectively preventing the great majority of non-nuclear-weapon States' from fulfilling their own obligations with regard to nuclear disarmament.¹⁰ Although the Marshall Islands was the site of extensive nuclear testing by the United States during the 1950s,¹¹ it did not present itself as an injured State. Rather, it sought to enforce the obligations *erga omnes* of the respondents.

India, Pakistan, and the United Kingdom each filed preliminary objections challenging the Court's jurisdiction and the admissibility of the claims.¹² Although the precise formulations varied, the preliminary objections of each respondent State referred to: the absence of a legal dispute – or, in the submission of the United Kingdom, a 'justiciable' dispute – between the Marshall Islands and the respondent State at the time of the filing of the application; reservations set forth in their optional clause declarations; the absence from the proceedings of 'indispensable' third parties or third parties whose 'essential interests' were engaged; and the fact that a judgment on the merits would have no 'practical significance' or 'legal effect'.¹³ Pakistan also argued that the Marshall Islands lacked standing.¹⁴

5. See ICJ, Rules of Court (adopted 14 April 1978, entered into force 1 July 1978, amendment entered into force on 14 April 2005) art 38(5).

6. All nine of the applications, including those not available on the ICJ website, can be accessed at <www.nuclearzero.org/in-the-courts> accessed 24 February 2017, a website hosted by the Nuclear Age Peace Foundation, a non-governmental organisation based in the United States.

7. *RMI v India* (n 1) [11]; *RMI v Pakistan* (n 1) [11]; *RMI v UK* (n 1) [11].

8. Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT) art VI. The United Kingdom is a party to the NPT; India and Pakistan are not. The Marshall Islands acceded to the treaty on 30 January 1995.

9. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 267 [105(2)(F)].

10. *RMI v India* (n 1) [11]; *RMI v Pakistan* (n 1) [11]; *RMI v UK* (n 1) [11].

11. For an account of the historical background that explains the particular interest of the Marshall Islands in nuclear disarmament, see D Zak, 'A Ground Zero Forgotten', (*Washington Post*, 27 November 2015) <www.washingtonpost.com/sf/national/2015/11/27/a-ground-zero-forgotten/> accessed 24 February 2017.

12. All three respondent States filed written preliminary objections, but, unusually, Pakistan did not avail itself of the opportunity to appoint a judge *ad hoc* and declined to give its consent to requests by India and the United Kingdom for copies of its pleadings in advance of the oral hearings. *RMI v Pakistan* (n 1) [6]. In addition, India and the United Kingdom participated in the public hearings held in March 2016, but Pakistan did not. *Ibid* [8]. This may speak to the awkwardness of Pakistan finding its litigation interests aligned with those of India, its traditional adversary.

13. *RMI v India* (n 1) [22]; *RMI v Pakistan* (n 1) [22]; *RMI v UK* (n 1) [23].

14. *RMI v Pakistan* (n 1) [22].

In each of the three judgments – which are largely identical in form and substance – the Court found that no legal dispute had existed between the Marshall Islands and the respondent State prior to the filing of the application. The Court held that it therefore lacked jurisdiction under Article 36, paragraph 2, of the Statute and that consideration of any other objections was unnecessary.¹⁵ Nor did the Court need to address the existence or extent of any customary international law obligations relating to nuclear disarmament.¹⁶

3 THE COURT'S REASONING ON THE EXISTENCE OF A LEGAL DISPUTE

The Court began its reasoning by recalling that Article 36, paragraph 2, of the Statute gives the Court jurisdiction over 'legal disputes' between States that have made declarations accepting the compulsory jurisdiction of the Court, and that Article 38 of the Statute specifies the sources of international law that the Court shall use to settle a 'dispute submitted to it'. The existence of a dispute is thus 'a condition of the Court's jurisdiction'.¹⁷ The Court also rehearsed the classic formulations on the definition and existence of a dispute from the case law, most notably that a dispute 'is a disagreement on a point of law or fact, a conflict of legal views or of interests',¹⁸ that for a dispute to exist 'it must be shown that the claim of one party is positively opposed by the other',¹⁹ and that the existence of a dispute is 'a matter for objective determination by the Court' and does not turn on the subjective assertions of the parties.²⁰

By the date of the Court's judgments on the preliminary objections, there could be little doubt about the existence of disputes between the Marshall Islands and the respondent States. The proceedings had demonstrated the opposing views of the parties relating to the respondent States' legal obligations relating to nuclear disarmament.²¹ Referring to its case law, however, the Court recalled that '[i]n principle, the date for determining the existence of a dispute is the date on which the application

15. *RMI v India* (n 1) [55]; *RMI v Pakistan* (n 1) [55]; *RMI v UK* (n 1) [58].

16. *Ibid.*

17. *RMI v India* (n 1) [33]; *RMI v Pakistan* (n 1) [33]; *RMI v UK* (n 1) [36].

18. *RMI v India* (n 1) [34]; *RMI v Pakistan* (n 1) [34]; *RMI v UK* (n 1) [37] (quoting *Mavrommatis Palestine Concessions (Greece v UK)* (Jurisdiction) [1924] PCIJ Rep Series A No 2, 11).

19. *Ibid* (quoting *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 328).

20. *RMI v India* (n 1) [36]; *RMI v Pakistan* (n 1) [36]; *RMI v UK* (n 1) [39] (citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Judgment) 2016 <www.icj-cij.org/docket/files/155/18948.pdf> accessed 24 February 2017 [50]. The language from *Alleged Violations* draws on the Court's oft-repeated statement from an early advisory opinion: 'Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence.' *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65, 74.

21. For example, the United Kingdom referred in the proceedings to its active efforts to promote nuclear disarmament and asserted that it 'considers the allegations to be manifestly unfounded on the merits'. *RMI v UK* (n 1) (Preliminary Objections of the United Kingdom) <www.icj-cij.org/docket/files/160/18912.pdf> accessed 24 February 2017 [4]–[5]. See also *RMI v India* (n 1) (Counter-Memorial of India) <www.icj-cij.org/docket/files/158/18900.pdf> accessed 24 February 2017 [6]–[14]; *RMI v Pakistan* (n 1) (Counter-Memorial of Pakistan) <www.icj-cij.org/docket/files/159/18920.pdf> accessed 24 February 2017 [4.1]–[4.6].

is submitted to the Court'.²² The dispositive question was thus whether the disputes had existed before 24 April 2014, the date when the Marshall Islands had seised the Court, not on 5 October 2016, the date of the judgments.

To answer that question, the Court recalled that neither prior negotiations nor formal diplomatic protests are required to establish the existence of a dispute when the optional clause is invoked as the basis for the Court's jurisdiction, unless a party's optional clause declaration so requires.²³ India and the United Kingdom had argued, among other contentions, that as a matter of customary international law an applicant must put a respondent on notice of its claims to establish a dispute, a position they supported by reference to Article 43 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts.²⁴ The Court rejected that view, particularly in light of the ILC's commentary which states that the Articles are not addressed to questions of jurisdiction or the admissibility of cases before international courts and tribunals.²⁵ Instead, the Court explained that it 'treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute'.²⁶ Statements by the parties or documents exchanged between them prior to the filing of an application, including statements exchanged in multilateral settings, provide a means to confirm the existence of a dispute, but a dispute may also be inferred from conduct, including a State's failure to respond or react to another State's claims if a response or reaction could be expected.²⁷ The Court identified the relevant test as follows: '[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'.²⁸ Although building on the jurisprudence, this was a new formulation of the Court's approach to ascertaining the existence of a dispute.

For its part, the Marshall Islands argued that its statements in multilateral settings prior to the filing of the applications had established the existence of a dispute with each respondent State. At a UN General Assembly meeting on 26 September 2013, the Marshall Islands had urged all nuclear weapons States 'to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament'.²⁹ At an international conference held in Nayarit, Mexico on 13 February 2014 – roughly six

22. *RMI v India* (n 1) [39]; *RMI v Pakistan* (n 1) [39]; *RMI v UK* (n 1) [42] (citing *Alleged Violations* (n 20) [52]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, 84–5 [30]).

23. *RMI v India* (n 1) [35]; *RMI v Pakistan* (n 1) [35]; *RMI v UK* (n 1) [38].

24. *RMI v India* (n 1) [32]; *UK v RMI* (n 1) [27]. Article 43(1) of the ILC Articles states: 'An injured State which invokes the responsibility of another State shall give notice of its claim to that State.' UN Doc A/56/10 (2001).

25. *RMI v India* (n 1) [42]; *RMI v UK* (n 1) [45]. The Court did not explore the argument of the Marshall Islands that 'there is nothing to prevent the notice of claim by the injured State being given not prior to seising the Court, but precisely by seising it'. *RMI v India* (n 1) [29]. Judge Crawford, who had served as the ILC Special Rapporteur on State Responsibility when the ILC Articles were finalised, suggested the soundness of that view. *RMI v UK* (n 1) (Judge Crawford, diss op) <www.icj-cij.org/docket/files/160/19224.pdf> accessed 24 February 2017 [23]–[24]. Note that because individual judges appended identical declarations or separate opinions to each of the three judgments (in most cases), the citations to separate writings herein refer only to the *RMI v UK* case as a matter of convenience.

26. *RMI v India* (n 1) [42]; *RMI v Pakistan* (n 1) [42]; *RMI v UK* (n 1) [45].

27. *RMI v India* (n 1) [36]–[37]; *RMI v Pakistan* (n 1) [36]–[37]; *RMI v UK* (n 1) [39]–[40].

28. *RMI v India* (n 1) [38]; *RMI v Pakistan* (n 1) [38]; *RMI v UK* (n 1) [41].

29. *RMI v India* (n 1) [46]; *RMI v Pakistan* (n 1) [46]; *RMI v UK* (n 1) [49].

weeks before the applications were filed – the Marshall Islands had stated that the nuclear weapons States ‘are failing to fulfil their legal obligations’ under Article VI of the NPT and customary international law. The Marshall Islands also argued that the voting records of the respondent States in multilateral fora demonstrated the existence of a legal dispute.³⁰ In the alternative, the Marshall Islands urged the Court to find that even if past statements did not evidence the existence of a dispute prior to 24 April 2014, the filing of the applications themselves, as well as the opposing views expressed by the respondent States in the proceedings before the Court, had demonstrated the existence of a dispute in each case.³¹

The Court rejected these arguments. First, the Court found that neither statement relied upon by the Marshall Islands compelled a conclusion that the respondent States had been aware that the Marshall Islands held views opposed to their own concerning the legal obligations relating to nuclear disarmament. The September 2013 statement was ‘formulated in hortatory terms’, did not mention the obligation to negotiate, and called for an ‘intensification’ of efforts to pursue nuclear disarmament, rather than ‘deploring a failure to act’.³² The statement lacked the clarity or detail needed to make a respondent aware of a legal dispute with the Marshall Islands. As for the February 2014 statement, the Court acknowledged that it went ‘further’ towards asserting a legal claim, but its ‘very general content’ – and the fact that it was made at a conference on the humanitarian impact of nuclear weapons, not nuclear disarmament *per se* – meant that it ‘did not call for a specific reaction’ by any of the respondent States.³³ As a result, ‘no opposition of views’ could be inferred from the absence of any reaction on the part of the respondent States.³⁴ In addition, the Court found that evidence of different voting positions within political organs such as the UN General Assembly could not in itself demonstrate the existence of a legal dispute. The Court noted that a State’s vote on a given resolution may not be indicative of its position on every proposition within a given resolution.³⁵

Secondly, the Court rejected the argument that the filing of the application itself could generate a dispute for purposes of the Court’s exercise of its jurisdiction.³⁶ The Court explained that an application, or the conduct of the parties subsequent to an application, could confirm the continued existence of a dispute or clarify the subject-matter or scope of a dispute.³⁷ This was distinct from a situation in which an applicant seeks to ‘create a dispute *de novo*, one that does not already exist’ by commencing proceedings.³⁸ To allow that approach, the Court warned, would deprive a respondent ‘of the opportunity to react before the institution of proceedings to the claim made against its own conduct’.³⁹ However, the Court did not point to any legal requirement in the Statute or elsewhere to explain why a potential respondent is entitled to such an opportunity as a matter of course.

30. *RMI v India* (n 1) [30], [47]; *RMI v Pakistan* (n 1) [31], [47]; *RMI v UK* (n 1) [35], [50].

31. *RMI v India* (n 1) [43]; *RMI v Pakistan* (n 1) [43]; *RMI v UK* (n 1) [46].

32. *RMI v India* (n 1) [46]; *RMI v Pakistan* (n 1) [46]; *RMI v UK* (n 1) [49].

33. *RMI v India* (n 1) [47]; *RMI v Pakistan* (n 1) [47]; *RMI v UK* (n 1) [50].

34. *Ibid.* The United Kingdom had not attended the Nayarit Conference. *RMI v UK* (n 1) [50]. India and Pakistan attended the conference, but this did not change the Court’s analysis.

35. *RMI v India* (n 1) [53]; *RMI v Pakistan* (n 1) [53]; *RMI v UK* (n 1) [56].

36. *RMI v India* (n 1) [50]; *RMI v Pakistan* (n 1) [50]; *RMI v UK* (n 1) [54].

37. *RMI v India* (n 1) [40]; *RMI v Pakistan* (n 1) [40]; *RMI v UK* (n 1) [43].

38. *RMI v India* (n 1) [50]; *RMI v Pakistan* (n 1) [50]; *RMI v UK* (n 1) [54].

39. *RMI v India* (n 1) [40]; *RMI v Pakistan* (n 1) [40]; *RMI v UK* (n 1) [43].

In sum, the Court held that the failure of the Marshall Islands to have ‘offered any particulars’ in its prior public statements on nuclear disarmament meant that the respondent States could not be said to have been aware of the alleged breaches of their obligations.⁴⁰ This meant there was no basis to find a dispute between the Marshall Islands and the respondent States and that this condition of the exercise of the Court’s jurisdiction had not been met.

4 ANALYSIS: THE DISPUTE REQUIREMENT AND THE JUDICIAL FUNCTION

The *Nuclear Disarmament* judgments mark the first time the Court has dismissed an entire case – three cases, in fact – because no dispute existed prior to the filing of the application. Previous occasions on which the Court had dealt with this issue had removed certain claims from the proceedings, but not ended the proceedings altogether. Although the Court reaffirmed that ‘formal protest’ is unnecessary to establish the existence of a dispute prior to the filing of the application,⁴¹ the net effect of the Court’s ‘awareness’ formulation is a *de facto* requirement of prior notice. The modalities of notice remain fluid, but demonstrating that the respondent was aware, or could not have been unaware, of an applicant’s claims means that prior notice, whether by word or deed, is a ‘hard’ requirement. Moreover, a generic or vague allegation that a State is in breach of its international obligations is unlikely to satisfy the ‘awareness’ test. As a practical matter, it would not give the accused State enough information to formulate a response which confirms that the parties hold opposing views.⁴² In light of the Court’s current approach, a State that intends to initiate litigation at the ICJ is well advised to lay the necessary groundwork to avoid suffering the fate of the Marshall Islands in these cases (for example, by communicating its legal claims to a potential respondent State through diplomatic channels sufficiently in advance of filing an application).⁴³ Foreign ministries – or the private lawyers they may engage – should take note.

However, the close votes in the *Nuclear Disarmament* judgments and the numerous individual opinions appended by the judges put a spotlight on the internal tensions within the Court surrounding its move towards a restrictive view of the ‘dispute requirement’.⁴⁴

40. *RMI v India* (n 1) [52]; *RMI v Pakistan* (n 1) [52]; *RMI v UK* (n 1) [57].

41. *RMI v India* (n 1) [35]; *RMI v Pakistan* (n 1) [35]; *RMI v UK* (n 1) [38].

42. Judge Donoghue explained that the key question was not whether the respondent States knew of the statements made by the Marshall Islands. Even assuming such knowledge, the question was whether those statements described the claims of the Marshall Islands with ‘sufficient clarity’, since only then was there a basis to ‘expect a response’ or ‘to infer opposition from an unaltered course of conduct’. *RMI v UK* (n 1) (Judge Donoghue, decl) <www.icj-cij.org/docket/files/160/19214.pdf> accessed 24 February 2017 [8].

43. The ‘awareness’ test may affect how the Court approaches ‘new’ claims in a pending case. Under current doctrine, the Court considers whether a new claim introduced into the proceedings is ‘implicit’ in the application or ‘arise[s] directly out of the question which is the subject-matter’ of the application, see *Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)* (Merits) [2010] ICJ Rep 639, 657 [41]. In future cases, perhaps the Court will also examine whether the respondent State was ‘aware’ of the additional claim before its formal introduction.

44. Fourteen of the sixteen judges who heard the cases, including the judge *ad hoc* appointed by the Marshall Islands, Mohammed Bedjaoui, a former President of the Court (notably, at the time of the *Nuclear Weapons* advisory opinion), appended individual declarations or separate or dissenting opinions.

Three relatively recent cases demonstrate that development: *Georgia v Russia* (2011),⁴⁵ *Belgium v Senegal* (2012),⁴⁶ and *Alleged Violations (Nicaragua v Colombia)* (2016).⁴⁷ In these cases, the Court focused on whether the positions of the parties on points of fact or law were 'positively opposed' – a reference to its oft-repeated language from *South West Africa*, when the Court stated that the existence of a dispute requires that '[i]t must be shown that the claim of one party is positively opposed by the other'.⁴⁸ The Court also considered in each case whether the respondent had been aware of the applicant's claims prior to the filing of the application. This approach arguably left unclear whether a respondent's 'awareness' of the claims against it prior to the filing of the application functioned simply as compelling evidence of the existence of a dispute, or was itself a required element of the existence of a dispute.⁴⁹ The *Nuclear Disarmament* judgments resolved that ambiguity – a respondent must have been aware or had reason to be aware of the applicant's claims, prior to the filing of the application, for the dispute requirement to be met.

There are reasons to approach a comparison between these prior judgments and the *Nuclear Disarmament* judgments with a degree of caution; each earlier judgment can be distinguished from the *Nuclear Disarmament* judgments in certain respects. An overview of the Court's reasoning in those earlier decisions, however, suggests that the Court – prior to the October 2016 judgments – had already embraced 'awareness' as the central test of whether one State's claims are 'positively opposed' by another, thus satisfying the requirement of an existing dispute. The decisions in *Georgia v Russia*, *Belgium v Senegal*, and *Alleged Violations* had already signalled the Court's embrace of a more formalistic approach.

4.1 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russia*) (2011)

Launched following the outbreak of armed conflict between the two parties, *Georgia v Russia* concerned alleged violations by Russia of the 1965 International Convention on the Elimination of Racial Discrimination (CERD).⁵⁰ Georgia invoked Article 22 of the treaty, a compromissory clause that provided for the Court's jurisdiction over any dispute relating to the interpretation or application of the treaty 'which is not settled by negotiation'.⁵¹ The Court explained that to establish the existence of a dispute covered by Article 22, the applicant State did not need to have invoked the CERD in its previous exchanges with the respondent State, but had to have referred to 'the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter'.⁵² Applying that

45. *Georgia v Russia* (n 22).

46. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422.

47. *Alleged Violations* (n 20).

48. *South West Africa* (n 19) 328.

49. Judge Crawford noted that the Court had never previously referred to 'awareness' as 'a legal requirement', but 'only as a description of the factual situation.' *RMI v UK* (Judge Crawford, diss op) (n 25) [6].

50. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).

51. *Ibid* art 22.

52. *Georgia v Russia* (n 22) [30].

standard, the Court determined that a series of exchanges between high-ranking Georgian and Russian officials in the days immediately preceding the filing of the application had established a dispute concerning Russia's compliance with its obligations under the CERD, notwithstanding the fact that those exchanges concerned allegations of ethnic cleansing, not the CERD *per se*.⁵³ It was enough that Georgia had made Russia aware of claims of a legal nature that were 'on a subject-matter capable of falling under CERD'.⁵⁴ Significantly, however, the Court rejected Georgia's argument that the dispute had emerged far earlier, which contributed to the Court's determination that it lacked jurisdiction on a separate ground – namely, because the negotiation precondition specified in Article 22 had not been met.

4.2 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) (2012)

Following an unsuccessful attempt to have the ex-Chadian dictator Hissène Habré extradited from Senegal to Belgium to be prosecuted for offenses including torture, genocide, crimes against humanity, and war crimes, Belgium initiated litigation at the ICJ in 2009. Belgium claimed that Senegal's failure to have initiated criminal proceedings against Mr. Habré – or, in the alternative, to have extradited Mr. Habré to Belgium – put Senegal in breach of various obligations under the 1984 Convention Against Torture (CAT)⁵⁵ and customary international law. The Court had little difficulty finding that a dispute existed between the parties regarding the CAT because Senegal had 'positively opposed' Belgium's claims relating to Senegal's obligations under the treaty in diplomatic exchanges prior to the filing of the application.⁵⁶ The Court reached the opposite conclusion on Belgium's claim that Senegal was also in breach of its obligations under customary international law. Belgium's extradition request had referred to a wide range of offenses, not limited to torture, but had not specified that Senegal was obliged under customary international law to prosecute Mr. Habré for those offenses or to extradite him to a requesting State. The Court concluded that because the diplomatic exchanges between the parties referred only to Senegal's treaty obligations, the dispute did not encompass the claims based on customary international law, which had not been raised earlier.⁵⁷

4.3 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v Colombia*) (2016)

In *Alleged Violations*, the Court also found that a dispute over which it could exercise jurisdiction existed regarding some, but not all, of the claims set forth in the application. Nicaragua instituted proceedings in relation to alleged violations by Colombia of Nicaragua's 'sovereign rights and maritime zones' and the prohibition under Article 2(4) of the UN Charter and customary international law on the use or threat of force.⁵⁸ In the

53. Ibid 120 [113].

54. Ibid 139 [181].

55. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

56. *Belgium v Senegal* (n 46) [52].

57. Ibid [54].

58. *Alleged Violations* (n 20) [67].

Court's view, the public record made clear that Colombia had been 'aware' prior to the filing of the application that various actions taken by it relating to Nicaragua's maritime zones – including the proclamation of an 'integral contiguous zone' and its exercise of jurisdiction in maritime spaces that the Court had awarded to Nicaragua in 2012⁵⁹ – were 'positively opposed by Nicaragua', including through public statements made by high-ranking Nicaraguan officials, even though Nicaragua had not sent a formal diplomatic protest to Colombia until several months after instituting the ICJ proceedings.⁶⁰ This appeared to reverse the Court's typical approach in which it examines whether a respondent's reaction (or failure to react) to an applicant's claims demonstrates that the claims have been 'positively opposed'. However, the Court found that Nicaragua had not established the existence of a dispute prior to the filing of the application concerning the alleged breach of the prohibition on the use or threat of force.⁶¹ Nicaragua's application referred to various incidents at sea, but the Court found no evidence that Nicaragua had previously characterised Colombia's conduct as a breach of that prohibition.⁶²

* * *

These three judgments applying the 'dispute requirement' demonstrate the Court's close attention to the respondent's awareness of the claims against it.⁶³ On the one hand, these cases suggest that the Court's approach in the *Nuclear Disarmament* judgments did not mark a sharp break with recent practice – the Court was already focused on 'awareness' as the key to confirming that an applicant's claims were 'positively opposed'. On the other hand, several judges voiced their alarm (and, indeed, positive opposition) to the Court's decision to enshrine 'awareness' as a hard component of the dispute requirement – an act that, in the words of Judge Bennouna, amounted to 'pure formalism' on the part of the Court.⁶⁴

The arguments of the dissenting judges converge around the idea that the Court's focus on 'awareness' and, thus, a respondent's opportunity to react to an applicant's claims, disregards the purpose of the dispute requirement. As Judge Cançado Trindade wrote, the requirement that the Court confirm the existence of a dispute 'is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function.'⁶⁵ Judge Robinson made a

59. *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624.

60. *Alleged Violations* (n 20) [73]. Judge *ad hoc* Caron described in detail his view that the Court erred by inferring the existence of *any* dispute due to Nicaragua's failure to have advanced a specific claim capable of rejection by Colombia prior to the institution of proceedings. *Alleged Violations* (n 20) (Judge Caron, diss op) <www.icj-cij.org/docket/files/155/18964.pdf> accessed 24 February 2017 [5]–[53]. Judge Caron viewed the Court's lack of formalism in this instance as having signalled 'the end of the application of a reasoned requirement that a dispute exist'. *Ibid* [58].

61. *Alleged Violations* (n 20) [78].

62. *Ibid* [76].

63. Judge Owada emphasised that 'the issue of the existence of a dispute has arisen in cases with diverse factual and legal claims' throughout the Court's history, but that 'the common denominator running through these diverse cases is the element of awareness . . . which demonstrates the transformation of a mere disagreement into a true legal dispute'. *RMI v UK* (n 1) (Judge Owada, sep op) <www.icj-cij.org/docket/files/160/19204.pdf> accessed 24 February 2017 [12]–[13].

64. *RMI v UK* (n 1) (Judge Bennouna, diss op) <www.icj-cij.org/docket/files/160/19208.pdf> accessed 24 February 2017, 1.

65. *RMI v UK* (n 1) (Judge Cançado-Trindade, diss op) <www.icj-cij.org/docket/files/160/19210.pdf> accessed 24 February 2017 [13].

similar point: the existence of a dispute is necessary ‘to ensure that what the Court is being asked to decide is susceptible to its authority and competence’ and is ‘capable of engaging the judicial function of the Court’ (quoting Judge Fitzmaurice from *Northern Cameroons*).⁶⁶ Judge Crawford explained that the ‘rationale behind requiring a legal dispute is to ensure that the Court has something to determine: it protects the Court’s judicial function which, in a contentious case, is to determine such disputes.’⁶⁷ He viewed the Court as having adopted ‘a requirement of objective awareness . . . for no persuasive reason’ and transforming ‘a non-formalistic requirement into a formalistic one.’⁶⁸

These arguments reveal hostility to the introduction of ‘awareness’ as a formal requirement to confirming the existence of a dispute, but also suggest a broader discomfort with the underlying notion of ‘positive opposition’ – an idea that has been part of the Court’s case law on the existence of a dispute for more than half a century. It is not unreasonable to interpret the instruction that a claim be ‘positively opposed’ to mean that a *reaction* of some sort is required (otherwise, one might ask, what is the difference between views that are ‘*positively* opposed’ and the mere existence of ‘opposing views’?) As a result, the Court’s approach to what it means for claims to be ‘positively opposed’ has become intertwined over time with assumptions about the need for prior notice and evidence of a reaction.⁶⁹ Yet an objective determination by the Court that two States hold opposing views on a point of fact or law – the substantive basis of a legal dispute – need not turn on whether and when a respondent State becomes aware of that divergence of views. There is a gap between the rationale for the dispute requirement and how the Court enforces it.

It is significant that the requirement that a claim be ‘positively opposed’ finds its origin in the controversial *South West Africa* cases. In those proceedings, the opposing views of the parties – relating to the status of the territory of South West Africa and South Africa’s obligations under the mandate system established by the League of Nations – were well known to each other long before proceedings were instituted. The Court had little reason to be concerned with whether a sufficiently detailed claim had been communicated to the respondent prior to the filing of the applications for purposes of demonstrating the existence of a dispute.⁷⁰ Instead, the Court’s attention at the preliminary objections phase was focused on the question of the *locus standi* of the applicant States and whether a dispute within the scope of its jurisdiction had been presented if neither applicant State had a ‘material interest’ at stake.⁷¹ The highly-charged political context may explain why the Court in *South West Africa* nonetheless went beyond what it had said in earlier cases about the dispute requirement – namely, that it was

66. *RMI v UK* (n 1) (Judge Robinson, diss op) <www.icj-cij.org/docket/files/160/19222.pdf> accessed 24 February 2017 [5] (citing *Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 98 (Judge Fitzmaurice, sep op).

67. *RMI v UK* (Judge Crawford, diss op) (n 25) [3].

68. *Ibid* [4]–[5].

69. For example, Judge Xue asserted that “‘surprise” litigation should . . . be discouraged’ because prior notice ‘would facilitate the process of negotiation and settlement’. *RMI v UK* (n 1) (Judge Xue, decl) <www.icj-cij.org/docket/files/160/19212.pdf> accessed 24 February 2017 [6]. This describes a policy preference, however, not a legal argument, for interpreting ‘positive opposition’ to require the respondent’s awareness of the claims against it.

70. But see *South West Africa* (n 19) (Judge Morelli, diss op) 571–3.

71. *South West Africa* (n 19) 327. The Court also needed to determine that the dispute was one that ‘cannot be settled by negotiation’, a jurisdictional requirement set forth in the compromissory clause. *Ibid* at 346.

for the Court to make an objective determination that the parties hold opposing views⁷² – to add that a claim must be ‘positively opposed’ to transform a mere conflict of interests into a legal dispute for purposes of jurisdiction. This may have been a reaction on the Court’s part to the novelty of a claim to enforce what amounted to a set of obligations *erga omnes partes* – and a response to those who viewed the litigation as an improper attempt to use the contentious jurisdiction of the Court to obtain something equivalent to an advisory opinion with binding legal effect.⁷³ On a closely divided Court, it also may have been an effort to sway particular judges by co-opting the terms of their objections.⁷⁴ Ultimately, the majority’s decision to make clear that the claims presented by the applicant States had in fact been ‘positively opposed’ by South Africa over many years could thus be viewed as an attempt to demonstrate that the cases were not ‘different’ in some disqualifying way from a typical bilateral dispute – and indeed fell squarely within the judicial function of the Court⁷⁵ (notwithstanding the Court’s notorious *volte-face* at the merits stage).⁷⁶ Yet, since there was little question that the parties had long held opposing views concerning South Africa’s obligations towards South West Africa, the Court’s assertion that ‘[i]t must be shown that the claim of one party is positively opposed by the other’⁷⁷ to establish a dispute was unnecessary – an *obiter dictum* that has cast a long shadow.

As pointed out by several of the dissenting judges in the *Nuclear Disarmament* cases – and as *South West Africa* seems to reinforce rather than undermine – the rationale behind the dispute requirement is to ensure that the Court’s contentious jurisdiction is invoked in respect of actual, not theoretical or artificial, disputes. The requirement that the Court determine for itself that the positions of the States before it are ‘positively opposed’ provides a means to avoid a situation in which the Court is, in effect, asked by States working in concert to provide a *de facto* advisory opinion under the guise of a contentious case or to give ‘binding effect’ through judicial imprimatur to an existing agreement between States. This is not a far-fetched scenario. In the *Frontier Dispute* case between Burkina Faso and Niger decided in 2013, the Court rejected one party’s request to give *res judicata* effect to an uncontested prior agreement between the parties with respect to a section of their land boundary.⁷⁸ Notwithstanding that jurisdiction was based on a special agreement, the Court found that because there was no dispute over the settled section of the land boundary, Burkina Faso’s request did not fall ‘within the judicial function attributed to the

72. *Interpretation of Peace Treaties* (n 20) 74.

73. See, for example, *South West Africa* (n 19) (Judges Spender and Fitzmaurice, diss op) 552. The judges described as ‘common knowledge’ the fact that the proceedings were brought because the decision ‘would be *binding* on the Mandatory’. In a later account, lead counsel for the applicants explained that the objective of the litigation ‘was not to resolve doubt concerning the jurisprudence of the Mandate, which had its firm foundation in the Advisory Opinion of 1950, but to transform a dishonored, though authoritative, Opinion into an enforceable Judgment’. EA Gross, ‘The South West Africa Case: What Happened?’ (1966) 45 *Foreign Affairs* 36, 40.

74. See, in particular, *South West Africa* (n 19) (Judge Morelli, diss op) 565–6.

75. See, for example, *South West Africa* (n 19) (Judges Spender and Fitzmaurice, diss op) 467. The judges asserted that the claims of the applicants did not give rise to ‘the kind of disputes to which the compulsory adjudication clause of the Mandate was intended to, or did, apply’.

76. *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase, Judgment) [1966] ICJ Rep 6.

77. *South West Africa* (n 19) 328.

78. *Frontier Dispute (Burkina Faso/Niger)* (Judgment) [2013] ICJ Rep 44, 66–71 [35]–[53].

Court by its Statute'.⁷⁹ It did not matter whether the parties had consented to the Court exercising jurisdiction over the request; there were no opposing claims in respect of the section of the boundary already delimited and thus no dispute concerning that section of the boundary upon which the Court could adjudicate.

Thus one problem with how the Court has come to enforce the dispute requirement is that evidence of 'positive opposition' – a *reaction* of some sort, or a conspicuous failure to react when faced with a claim – is regarded as essential, although such evidence is not strictly necessary to making an objective determination that two parties have a 'disagreement on a point of law or fact' or 'a conflict of legal views' (that is, a legal dispute).⁸⁰ A second problem is that the Court's efforts to find a consistent approach to ascertaining the existence of a dispute – including how to apply the requirement that one State's claim be 'positively opposed' by the other – have come to operate on the assumption that a recognised dispute must exist in a formal sense *prior* to submission of the application. The *Nuclear Disarmament* judgments appear to close the door on the proposition that the existence of the requisite legal dispute may be proven through the formulation of claims in the application before the Court, so long as such claims relate to a situation – for example, the conduct of the respondent – that existed prior to the application.⁸¹ The *Nuclear Disarmament* judgments repeat the Court's familiar statement that 'the dispute must *in principle* exist at the time the Application is submitted to the Court',⁸² but the exception to the rule contemplated by 'in principle' appears to have been abandoned or narrowly circumscribed (for example, to cover situations of extreme urgency).⁸³

Yet this temporal aspect of the dispute requirement – as applied in *Belgium v Senegal* and *Alleged Violations* to dismiss the claims in those cases that had not been made known to the respondent States prior to the seisin of the Court⁸⁴ – finds limited support in the Court's Statute or case law.⁸⁵ The requirement that one

79. Ibid 70 [47].

80. *Mavrommatis* (n 18) 11.

81. See *RMI v India* (n 1) [49]; *RMI v Pakistan* (n 1) [49]; *RMI v UK* (n 1) [53].

82. *RMI v India* (n 1) [27], [39]; *RMI v Pakistan* (n 1) [27], [39]; *RMI v UK* (n 1) [42] (emphasis added).

83. The Court had no cause to address how the 'awareness' requirement might apply in a situation of urgency in which there may not be an opportunity to provide notice to the other party before filing an application and, presumably, a request for provisional measures. As Judge Crawford noted, the United Kingdom accepted during the proceedings that in some situations – such as a death penalty challenge – the urgency of a claim might not allow for a dispute to be established in the normal course. *RMI v UK* (Judge Crawford, diss op) (n 25) [17].

84. In *Georgia v Russia*, the jurisdiction of the Court was limited to a dispute which 'is not settled by negotiation'. In the Court's view, this required evidence that negotiations had failed prior to the filing of the application, such that the dispute brought to the Court necessarily had to have existed before proceedings commenced. *Georgia v Russia* was thus not relevant to whether a dispute could be established by the seising of the Court. See *RMI v UK* (n 1) (Judge Tomka, sep op) <www.icj-cij.org/docket/files/160/19206.pdf> accessed 24 February 2017 [19].

85. The idea that a dispute cannot be 'created' by the filing of an application has been raised from time to time in individual opinions, but the Court itself has rarely confronted this question. On one occasion, the Permanent Court of International Justice (PCIJ) declared a claim inadmissible because it had not been raised prior to the filing of the application and thus did not form the subject of an existing dispute between the parties. *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* [1939] PCIJ Rep Series A/B No 77, 83. The PCIJ did not explain its reasoning or address the apparent inconsistency of that holding with the 1925 judgment in *Polish Upper Silesia*. See text to n 88. In the seminal *Mavrommatis* case, the PCIJ stated 'that before a

State's claims must be 'positively opposed' by the other does not in itself indicate that a respondent State must react (or fail to react) to those claims *prior* to the submission of the application. It is unclear, for example, why the existence of a dispute cannot be inferred by the Court if the application sets forth a position on a point of law or fact that conflicts with a position of the respondent State that is evidenced by past statements or conduct.⁸⁶ Whether the respondent was aware of the applicant's claims prior to the filing of the application will nearly always be useful for establishing the existence of opposing views, and prior exchanges between the parties may be prudent as a matter of diplomacy. But the Court has failed to explain why the absence of prior notice (or 'awareness') is dispositive as a legal matter. If the purpose of the 'dispute requirement' is to safeguard the judicial function of the Court – rather than to 'protect' the respondent or to promote dispute settlement by other means – there is little reason for the Court to examine only the situation that pertained prior to the filing of the application, while ignoring the actual situation that pertains once the judicial function has been engaged.⁸⁷

The idea that the filing of an application can itself satisfy the 'dispute requirement' is not novel. As early as 1925, the Permanent Court of International Justice (PCIJ) in the *Polish Upper Silesia* case rejected the argument that 'the existence of a difference of opinion' had to be established between the parties prior to the filing of the application.⁸⁸ The judgment further explained:

Now a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views. Even if, under Article 23 [*the compromissory clause*], 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 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.⁸⁹

This passage suggests two propositions: first, that the existence of a dispute may be established by the filing of an application (unless, for example, the relevant jurisdictional title requires prior notice or negotiation); and, secondly, that the sound administration of justice counsels against the dismissal of a lawsuit when a defective claim – for example, the absence of a 'definite dispute' – is readily curable. The Court has recognised the latter principle on several occasions (not limited to situations involving the

dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations'. See *Mavrommatis* (n 18) 15. However, this statement appeared in a discussion about a prior negotiation requirement and is clearly inconsistent with the Court's current view.

86. This is the essence of how the Court approached some of Nicaragua's claims in *Alleged Violations*. See text to nn 58–60.

87. Judge Tomka described in detail the reasons that the Court should reject this temporal limitation on when a dispute may emerge. *RMI v UK* (Judge Tomka, sep op) (n 84) [17]–[27]. Judge Robinson made a similar case. *RMI v UK* (Judge Robinson, diss op) (n 66) [41]–[51]. See also *RMI v UK* (n 1) (Vice-President Yusuf, diss op) <www.icj-cij.org/docket/files/160/19202.pdf> accessed 24 February 2017 [27]–[29], [33]–[40].

88. *Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series A No 6, 13–14.

89. *Ibid* 14. The PCIJ had already expressed a preference for flexibility in *Mavrommatis* when it explained that even a 'premature' application filed before certain treaty obligations had entered into force did not provide an 'adequate reason' to dismiss the case as the treaty had since been ratified. *Mavrommatis* (n 18) 34.

existence of a dispute). For example, in its 1996 judgment on preliminary objections in *Bosnia and Herzegovina v Yugoslavia*, the Court explained that it ‘has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy’.⁹⁰ The Court further developed the idea in the 2008 judgment on preliminary objections in *Croatia v Serbia* when it addressed whether it lacked jurisdiction on the ground that the respondent State had not been capable of being brought before the Court when Croatia filed the case. The Court noted the ‘realism and flexibility’ that it had shown in past situations involving unmet conditions of jurisdiction on the date of an application’s filing.⁹¹ In light of that experience, the Court explained:

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.⁹²

Thus, as recently as 2008, the Court was willing to treat the date of decision on jurisdiction, rather than the date of the application, as the ‘critical date’ for assessing whether an ‘initially unmet condition’ to the exercise of its jurisdiction had been met. The notion of an ‘unmet condition’ is broader than ‘a mere defect of form’ and appears capable of covering *any* unmet condition to the exercise of the Court’s jurisdiction, including the requirement of a legal dispute between the parties.⁹³

The departure from that approach in the Court’s more recent cases is striking, and the *Nuclear Disarmament* judgments do little to explain it. The decisions do not engage with the principles articulated in *Polish Upper Silesia* and *Croatia v Serbia* or with the fact that the Marshall Islands could presumably at any time submit new applications making the same claims, having established *ex post* (by the Court’s way of thinking) the requisite disputes. Instead, the judgments refer to Article 38 of the Statute, which states that the function of the Court is to decide ‘such disputes as are submitted to it’: language that arguably implies that disputes must have manifested themselves prior to the filing of an application. Yet Article 38 addresses the sources of international law to be applied by the Court, not its jurisdiction, which is covered in Article 36.⁹⁴ It seems odd to

90. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, 613 [26]. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, 428–9 [83]. In *Nicaragua*, the Court explained that ‘[i]t would make no sense to require Nicaragua now to initiate fresh proceedings’ simply because it had not ‘expressly referred’ to the treaty violations alleged in the application in light of the fact that the United States had been ‘well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted’. *Ibid*.

91. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412, 438 [81].

92. *Ibid* [85]. The question was whether the Court lacked jurisdiction because the respondent State had not been a member of the United Nations when the case was filed in 1999, but was then admitted in 2000.

93. The Court stated expressly in *Croatia v Serbia* that ‘it is of no importance’ what particular condition of jurisdiction is unmet at the time a case is filed ‘once it has been fulfilled subsequently’. *Ibid* [87].

94. See *RMI v UK* (Judge Tomka, sep op) (n 84) [16].

ask the phrase in Article 38 to bear the weight placed upon it by the Court. Had the drafters of the Statute wanted to restrict the exercise of the Court's jurisdiction to situations in which a respondent has been given a clear opportunity to respond to the claims against it, the Statute could have imposed an express requirement of prior notice or objective 'awareness'.

It is also difficult to credit the argument, raised by Judge Xue, that if the Court were to consider the positions expressed by parties during the proceedings to decide whether a dispute exists, it would 'render the condition of the existence of a dispute without any meaning and value' and 'undermine the confidence of States in accepting the compulsory jurisdiction of the Court'.⁹⁵ This assumes that the 'meaning and value' of the dispute requirement relates to giving the potential respondent an opportunity to react to an applicant's claims before the case has been filed. It disregards the idea that the dispute requirement exists to patrol the judicial function of the Court, not to facilitate prior negotiations or protect a respondent State from the embarrassment or inconvenience of a lawsuit. Moreover, nothing prevents a State from making its declaration accepting the compulsory jurisdiction of the Court contingent on prior notice or negotiations.⁹⁶

Judge Tomka made a different observation regarding the optional clause. He suggested that the Court's *de facto* requirement of prior notice may lead a State that fears litigation to deprive the Court of jurisdiction by pre-emptively modifying or withdrawing its optional clause declaration before an application is filed.⁹⁷ This could be a consequence of requiring States to ensure that their adversaries are 'aware' of any nascent legal dispute before submitting an application to the Court. Indeed, the Court's preference for a prior exchange of views between the parties seems to disregard the possibility that filing a case at the ICJ may be an important source of leverage – a means to bring another State to the negotiating table. The Court's restrictive approach to the dispute requirement in the *Nuclear Disarmament* cases might perversely make it even harder for an applicant State to generate the pressure needed to persuade an adversary to engage in non-binding dispute settlement.

In view of these institutional factors and its case law, the Court could have examined whether the Marshall Islands fulfilled the dispute requirement through the submission of the applications in these cases. Did each application demonstrate the parties' opposing views on the international obligations of the respondent States in relation to nuclear disarmament?⁹⁸ Alternatively, the Court could have asked whether because statements made during the proceedings had demonstrated the existence of disputes between the Marshall Islands and the respondent States, the Marshall Islands would be free 'to initiate fresh proceedings' at any time. Since this appears to be the case,⁹⁹ the Court could have invoked the sound administration of justice or judicial economy as a reason to reject the respondents' arguments that the claims could not proceed

95. *RMI v UK* (Judge Xue, decl) (n 69) [5].

96. The United Kingdom has since taken that step by amending its optional clause declaration on 22 February 2017 to exclude any claim or dispute that has not been notified to it 'in writing, including of an intention to submit the claim or dispute to the Court failing an amicable settlement, at least six months in advance of the submission' to the Court. The declaration is available on the Court's website at <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB>> accessed 27 March 2017.

97. See *RMI v UK* (Judge Tomka, sep op) (n 84) [31].

98. Judge Donoghue warned that an application 'is not a means to elicit a respondent's opposing views in order to generate a dispute during those proceedings'. *RMI v UK* (Judge Donoghue, decl) (n 42) [5]. In some cases, however, the respondent's position on the subject-matter of the application may be well established when an application is filed.

99. See text to n 21.

because the disputes had not been established earlier. The Court did not follow either of these options in *Belgium v Senegal* or *Alleged Violations*, so it is perhaps unsurprising that it declined to do so here. Indeed, at least two of the judges in the majority cited the importance of procedural consistency with those other recent cases in upholding a strict approach to the dispute requirement – thus pitting one aspect of the sound administration of justice against another.¹⁰⁰ Other judges tried to explain why the Court's determination that no dispute existed with respect to some claims in *Belgium v Senegal* and *Alleged Violations* could be distinguished based on case-specific factors, thus undermining their value as precedents.¹⁰¹ This included the fact that upholding the preliminary objections regarding the non-existence of a dispute in those other cases had narrowed their scope, not resulted in the dismissal *in toto* of the proceedings.

In sum, it is left to the Marshall Islands to call the Court's bluff by filing new applications containing the same claims, at least as to India and Pakistan. Because the Court declined to address the other preliminary objections raised by those respondents, however, the Marshall Islands would presumably face another round of challenges to jurisdiction and admissibility, which may be a disincentive to continue.¹⁰² While the cases were pending, the United Kingdom in December 2014 amended its declaration of acceptance of the Court's compulsory jurisdiction to exclude 'any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another Party'.¹⁰³ It was not clear that this language would preclude a new application by the Marshall Islands since, in the Court's view, the very problem was that no 'dispute' had been submitted to it. However, the United Kingdom then further amended its optional clause declaration in February 2017 to exclude any claim or dispute arising from or relating to nuclear disarmament or nuclear weapons, 'unless all of the other nuclear-weapons States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question'.¹⁰⁴ There is no reasonable prospect of that scenario coming to pass.

5 BAD OPTICS: VOTING PATTERNS AND STATE INTERESTS

Some immediate reactions to the judgments – including a blog post by Nico Krisch on the on-line forum of the European Society of International Law – focused on the composition of the majority in each case.¹⁰⁵ It did not escape attention that each judge

100. See *RMI v UK* (n 1) (President Abraham, decl) <www.icj-cij.org/docket/files/160/19200.pdf> accessed 24 February 2017 [9]–[13]; *RMI v UK* (Judge Donoghue, decl) (n 42) [2].

101. See, for example, *RMI v UK* (Judge Tomka, sep op) (n 84) [19]–[28]; (Judge Crawford, diss op) (n 25) [15]–[19].

102. Judge Gaja expressed the view that the Court should have addressed all the preliminary objections to avoid the parties needing to repeat the same arguments in the event of the Marshall Islands instituting new proceedings. *RMI v UK* (n 1) (Judge Gaja, decl) <www.icj-cij.org/docket/files/160/19216.pdf> accessed 24 February 2017. See also *RMI v UK* (Judge Xue, decl) (n 69) [9].

103. On file with author.

104. See <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB>> accessed 27 March 2017. In addition, the UK revised the new language from December 2014 to exclude 'any claim or dispute' substantially the same as a prior submission. *Ibid* (emphasis added).

105. See Krisch (n 3). See also R Wayman, Nuclear Age Peace Foundation, 'Courage, Foresight and Accountability' (5 October 2016) <www.wagingpeace.org/courage-foresight-accountability/> accessed 24 February 2017.

possessing the nationality of a nuclear weapons State – President Abraham (France), Judge Greenwood (United Kingdom), Judge Xue (China), Judge Donoghue (United States), Judge Bhandari (India), and Judge Gevorgian (Russia) – found that the Court lacked jurisdiction because no dispute had existed prior to the filing of the applications. Judge Owada (Japan) and Judge Gaja (Italy) – hailing from two countries that benefit from the nuclear deterrent offered by their allies – also voted that way, although Judge Tomka, possessing the nationality of a NATO member State (Slovakia), and Judge Crawford, possessing the nationality of another State (Australia) that benefits from the nuclear deterrent, did not.

On first impression, it may be tempting to interpret this voting record to mean that judges from the nuclear weapons States (and some of their allies) sought to prevent the *Nuclear Disarmament* cases from proceeding to the merits – and seized upon a restrictive interpretation of the Court's 'dispute requirement' to make that happen. That impression may have been bolstered by a vote taken just a few weeks after the judgments that served to confirm the policy preferences of certain States. On 27 October 2016, a resolution approved by the First Committee of the UN General Assembly to open multilateral negotiations on 'a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination' passed by a vote of 123 to 38, with 16 abstentions.¹⁰⁶ States opposing the resolution included: Australia, France, Italy, Japan, Russia, Slovakia, the United States, and the United Kingdom; China and India abstained. Whether judges vote in accordance with the interests of their home States as a matter of course has been much debated, and it is hardly novel to suggest that there are political and personal dimensions to the administration of international justice.¹⁰⁷ A different argument suggests that a more restrictive approach to jurisdiction and admissibility may correspond to concerns about the Court's capacity to influence the underlying dispute or enforce a judgment on the merits.¹⁰⁸ The purpose of this section is not to revisit or promote any of these propositions as applied to the *Nuclear Disarmament* cases, but rather to argue that the focus on voting blocs merits further scrutiny – and considerable scepticism – before it becomes the dominant narrative to emerge from these judgments.

One approach is to look at how judges approached the dispute requirement in previous cases. For example, at least two judges from nuclear weapons States, President Abraham and Judge Donoghue, have had evolving positions on that question. In *Georgia v Russia*, President (then Judge) Abraham took the position that 'opposing views on the matters referred to the Court . . . may be evidenced in any manner'¹⁰⁹ and that the Court had typically addressed the question of the existence of a dispute based on all of the information available to it as of the date of its decision, albeit with regard to 'facts and situations predating the seisin of the Court; thus, it can be stated as a rule the dispute already exists when the proceedings are instituted'.¹¹⁰ In *Belgium v Senegal*, he repeated these points to argue that the Court should not have

106. UN Doc A/C.1/71/L.41 (14 October 2016) 8.

107. Compare EA Posner and MFP de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 J Legal Studies 599; EA Posner and J Yoo, 'Judicial Independence in International Tribunals' (2005) 93 California LR 1, with R Higgins, 'Reflections from the International Court' in M Evans, *International Law* (2nd ed OUP, Oxford 2006) 3; G Hernández, *The International Court of Justice and the Judicial Function* (OUP, Oxford 2014) 126–30, 140–45; AM Smith, 'Judicial Nationalism' (2005) 40 Tex Int'l LJ 197.

108. See WM Reisman, 'The Enforcement of International Judgments' (1969) 63 AJIL 1, 3.

109. *Georgia v Russia* (n 22) (Judge Abraham, sep op) [14].

110. *Ibid* [15].

found that it lacked jurisdiction over Belgium's customary international law claims because of the absence of exchanges between the parties over those questions prior to the seisin of the Court; what mattered was that as of the date of the Court's judgment, it had become 'quite certain' that a dispute existed between the parties regarding the application of customary international law.¹¹¹ Yet in *Alleged Violations*, President Abraham, without comment, joined the majority in rejecting Nicaragua's claim based on the prohibition on the use or threat of force – although Nicaragua raised the claim in its application and Colombia could be said to have 'positively opposed' it in the pleadings.¹¹² Judge Donoghue in *Georgia v Russia* took the position that a dispute does not require the prior notice of claims¹¹³ or evidence of one party's claims having been 'positively opposed' by the other prior to the seisin of the Court.¹¹⁴ However, in *Belgium v Senegal*, she joined the majority in finding that the Court lacked jurisdiction over the claim concerning Senegal's obligations under customary international law because it had not been raised prior to the application, and in *Alleged Violations* she was part of the majority that rejected the existence of a dispute over Colombia's alleged violation of the prohibition on the use or threat of force.

In sum, President Abraham and Judge Donoghue agreed with the Court in the *Nuclear Disarmament* cases that no dispute existed between the Marshall Islands and the respondent States prior to the filing of the applications, both judges in previous cases having already moved away from their earlier views on the dispute requirement. In his declaration appended to the *Nuclear Disarmament* judgments, President Abraham explained that his position having been rejected by the majorities in *Georgia v Russia* and *Belgium v Senegal*, his votes in *Alleged Violations* and the *Nuclear Disarmament* cases were informed by his understanding of the proper role of the international judge:

[E]ven if a judge has expressed reservations, or indeed his disagreement, at the time the Court established its jurisprudence, once the Court has done so, he must consider himself to be bound by it thereafter (not legally, of course, but morally), just as much as if he had agreed with it.¹¹⁵

This assertion will surely be scrutinised given the contentious role of judicial precedent in international law,¹¹⁶ but it finds support in the Court's past attention to the importance of ensuring consistency and predictability, particularly on procedural issues.¹¹⁷ For present purposes, it provides an alternative explanation to counter the presumption that only national bias could explain his approach to the dispute requirement in the *Nuclear Disarmament* cases. Similarly, Judge Donoghue, who also expressed a different view of the dispute requirement in *Georgia v Russia*, explained that her votes in the *Nuclear Disarmament* cases – which were consistent

111. *Belgium v Senegal* (n 46) (Judge Abraham, sep op) [12].

112. In denying the existence of a dispute concerning the use of force at sea, Colombia referred to facts and circumstances intended to demonstrate 'no problems' between the parties in that regard. *Alleged Violations* (n 20) [60]. Yet that evidence suggested a possible defence on the merits to Nicaragua's claim, not necessarily the absence of a dispute about the use of force.

113. *Georgia v Russia* (n 22) (Judge Donoghue, sep op) [6].

114. *Ibid* [10].

115. *RMI v UK* (President Abraham, decl) (n 100) [9].

116. See G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *JIDS* 5.

117. See E de Brabandere, 'The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea' (2016) 15 *LPICT* 24, 35–9.

(as regards the dispute requirement) with her votes in *Belgium v Senegal* and *Alleged Violations* – were ‘guided by the reasoning of the Court in these recent cases, thus promoting procedural consistency’.¹¹⁸ None of this can definitively disprove a hypothesis that votes in the *Nuclear Disarmament* cases were influenced in some way by individual judges taking into account the interests of their own countries – or their own views about the relationship between particular States and the Court – but the votes of President Abraham and Judge Donoghue were not a sudden departure from how they had approached the dispute requirement in other recent cases. Nor for that matter did the votes of Judge Greenwood (UK) or Judge Xue (China) demonstrate a sudden shift, as each judge had also voted in favour of the holdings in *Belgium v Senegal* and *Alleged Violations* that approached the dispute requirement restrictively, as had Judge Gevorgian (Russia) and Judge Bhandari (India) in *Alleged Violations*.¹¹⁹

As for the judges from non-nuclear weapons States (and excluding those from States that might be considered closely allied with nuclear weapons States),¹²⁰ Vice-President Yusuf (Somalia), Judge Bennouna (Morocco), Judge Cançado-Trindade (Brazil), Judge Sebutinde (Uganda), and Judge Robinson (Jamaica) each found that the dispute requirement was met in the case against the United Kingdom, and, except for Vice-President Yusuf, reached the same conclusion in the cases against India and Pakistan. For example, Judge Robinson asserted that the Court should have maintained a ‘flexible’ and ‘pragmatic’ approach to the dispute requirement, including by giving consideration to the existence of opposing views expressed during the course of proceedings.¹²¹ In a similar vein, Vice-President Yusuf suggested that evidence of a ‘nascent dispute’ must exist before the filing of the application, but that ‘crystallization’ of a dispute may result from the institution of proceedings.¹²² Yet this set of judges voted in favour of the Court’s determination in *Alleged Violations* that Nicaragua had failed to establish the existence of a dispute concerning the prohibition on the use or threat of force prior to the filing of the application¹²³ and (apart from Judge Robinson, who had not yet joined the Court) also voted in favour of the determination in *Belgium v Senegal* that Belgium had failed to establish the existence of a dispute concerning customary international law prior to the filing of the application. On this record, it might appear that it was these judges – from States that do not possess nuclear weapons – who deviated in the *Nuclear Disarmament* cases from their previous positions on the dispute requirement. Of course, one can only speculate about why the flexibility and realism urged by these judges in the *Nuclear Disarmament* cases does not seem to have informed their approaches in the previous cases. Their votes may have turned

118. *RMI v UK* (Judge Donoghue, decl) (n 42) [2].

119. Judge Bhandari would have dismissed the case on other grounds. *Alleged Violations* (n 20) (Judge Bhandari, decl) <www.icj-cij.org/docket/files/155/18962.pdf> accessed 24 February 2017. Judge Bhandari joined the Court in 2012 but did participate in *Belgium v Senegal*. Judge Gevorgian joined the Court in 2015.

120. Those members of the Court include: Judge Owada (Japan), Judge Tomka (Slovakia), Judge Gaja (Italy), and Judge Crawford (Australia). As noted above, Judge Owada and Judge Gaja were in the majority in the *Nuclear Disarmament* cases on the dispute question, while Judge Tomka and Judge Crawford were not.

121. *RMI v UK* (Judge Robinson, diss op) (n 66) [42].

122. *RMI v UK* (Vice-President Yusuf, diss op) (n 87) [28].

123. Among this set of judges, only Judge Cançado Trindade wrote separately in *Alleged Violations*, and his opinion did not address the point.

on distinctions of fact among the cases, reasoned views about the proper exercise of the judicial function, or other considerations specific to the relationship between international law and nuclear weapons.

The purpose of these comments is not to level accusations of bias or impropriety, but rather to illustrate the kind of loose speculation that tends to accompany the argument that judges vote in accordance with the preferences of their home States – a proposition that over-simplifies the wide range of factors that might explain a judge's vote or reasoning in any given case and assumes a great deal about State preferences.¹²⁴ This should call into question the supposition that votes in the *Nuclear Disarmament* cases are best explained by judges acting in accordance with their perceptions of national interest or exhibiting 'open deference to powerful States'.¹²⁵

The above considerations alone are unlikely to erase the 'bad optics' generated by these judgments.¹²⁶ As Krisch notes, it may indeed seem surprising that whether a judge's State of nationality does or does not possess nuclear weapons should correspond to a judge's views about what is required to demonstrate the existence of a dispute.¹²⁷ But considerable caution is warranted before jumping to conclusions about what factors may have influenced how judges have decided a case, or issues within a judgment, one way or another. The risk that observers will focus on the nationality of particular judges to understand the outcome of the *Nuclear Disarmament* cases, however, provides a further reason for the Court to have better explained its decision to adopt a rigid approach to the dispute requirement, especially given the evidence of an actual legal dispute between the Marshall Islands and each of the respondents by the time of the Court's judgments.

6 CONCLUDING THOUGHTS: NUCLEAR DISARMAMENT AND THE LIMITS OF THE JUDICIAL FUNCTION

The Court's decision to dismiss the three *Nuclear Disarmament* cases based on the non-existence of a dispute relieved the Court from having to address the other preliminary objections raised by the respondent States.¹²⁸ This left uncertain whether it would have found that it lacked jurisdiction or that the claims were inadmissible on other grounds. It further excused the Court from having to address the challenging questions reserved for the merits.

The difficulties avoided by the Court were discussed by some of the judges in their individual opinions. Judge Tomka took the position that the claims in these cases – concerning the enforcement of interdependent obligations – revealed 'the limits of

124. See Hernández (n 107) 126–55. For example, it is problematic to assume that the non-nuclear States who currently have judges on the Court necessarily favoured these cases reaching the merits, rather than, for example, the Court taking a restrictive approach to jurisdiction under the optional clause.

125. See Krisch (n 3).

126. For several reasons, it is difficult to draw useful comparisons between the voting records in the 1996 Advisory Opinion and the 2016 judgments. At a minimum, one may recall that the Court held unanimously – thus with the support of judges from nuclear weapons States – that there exists an obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects. *Legality of the Threat or Use of Nuclear Weapons* (n 9) 267 [105(2)(F)].

127. See Krisch (n 3).

128. See text to nn 13–14.

the Court's function' and may have been inadmissible on that basis.¹²⁹ He explained that because the issues raised were not bilateral and concerned the performance of an obligation that is 'conditional on the performance of the same obligation' by other States, the Court would be unable as a practical matter to 'meaningfully engage in a consideration' of the conduct of just one of those States.¹³⁰ In a similar vein, Judge Xue questioned whether 'a collective failure to deliver' on the promises embedded in the NPT could be 'turned into a series of bilateral disputes, and addressed separately'.¹³¹ These comments raised the prospect of the Court resurrecting some variety of the disfavoured and largely abandoned doctrine of non-justiciability in international law. Judge Crawford suggested that the *Monetary Gold* principle invoked by the respondents, that is, the absence of indispensable third States from the proceedings, may have been the 'most plausible' of the various preliminary objections and remarked that the Court could not have ordered 'third States to enter into negotiations, and that one cannot negotiate alone'.¹³² However, he also noted that how that principle might apply would have depended on the Court's consideration of 'the precise scope and application of Article VI of the NPT, or any parallel customary international law obligation'.¹³³ It is unclear whether a decision to dismiss the cases on one of these other grounds would have been more convincing, or any less controversial. A full treatment of these questions is beyond the scope of this article.

However, it is worth considering briefly what might have happened if the Court had rejected the preliminary objections in these cases and proceeded to the merits. The gravity of the existential threat posed by nuclear weapons is beyond question, and the cases filed by the Marshall Islands have proven timely in view of recent developments – including the First Committee resolution noted above – that suggest a renewed focus on nuclear disarmament at both political elite and grass-roots levels. But the importance of the subject matter does not make it unreasonable to question what practical effect a judgment favouring the positions advanced by the Marshall Islands would have had and whether these cases were suitable for judicial disposition.

Any number of controversies can be framed in legal terms – and thus characterised as legal disputes – but it is highly uncertain that approaching the political problem of nuclear disarmament through international litigation is a suitable or realistic means to generate concrete gains.¹³⁴ The argument is not that States should refrain from submitting 'hard' cases on important issues to the Court, but rather that potential litigants, and their supporters, should give appropriate consideration to whether a judicial decision would be capable of advancing their interests or addressing the problem in a meaningful way, and at what potential cost.¹³⁵ One cannot know whether a decision affirming

129. *RMI v UK* (Judge Tomka, diss op) (n 84) [40]. 'Interdependent' obligations (that is, obligations that cannot be 'split up into pairs of legal relations') are a subcategory of obligations *erga omnes*. C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge 2005) 56–7.

130. *RMI v UK* (Judge Tomka, diss op) (n 84) [35], [38]–[39].

131. *RMI v UK* (Judge Xue, sep op) (n 69) [15].

132. *RMI v UK* (Judge Crawford, diss op) (n 25) [32]–[33].

133. *Ibid.*

134. Judges also sounded this theme in the 1996 advisory proceedings. See, for example, *Legality of the Threat or Use of Nuclear Weapons* (n 9) (Judge Oda, diss op) [54]; (Judge Higgins, diss op) [41].

135. The prospect that a judgment may be difficult to implement or enforce does not necessarily mean that litigation should not be pursued. In some instances, a State's main objective may be the publicisation of an issue, rather than a genuine attempt at resolving the legal dispute. See SV

some or all of the positions advanced by the Marshall Islands would have influenced foreign ministries or brought greater clarity to the abstract notion of the obligation to negotiate in this context. Perhaps a judgment declaring a respondent in breach of its international obligations because of efforts to modernise or maintain a nuclear arsenal would have given grass-roots campaigners new leverage to seek changes in government policy.¹³⁶ A middle-of-the-road approach – for example, a judgment reaffirming an obligation to negotiate in good faith the terms of nuclear disarmament (as previously declared in the 1996 advisory opinion)¹³⁷ yet absolving the respondents of any breach of that obligation – would have had questionable significance and presumably been a setback for campaigners.¹³⁸ And however unlikely it may have been, a judgment ordering a respondent State to pursue a politically infeasible or unworkable course of action regarding nuclear weapons – including actions that might be perceived as posing an unacceptable risk to national or regional security – might have been dismissed out-of-hand and significantly strained the credibility of the Court, at least with some powerful actors. Instead, the Court may have suffered a degree of damage to its reputation in another way – by shutting the gates to the Peace Palace through the formal adoption of a test of prior ‘awareness’, a device that seems unnecessarily restrictive and disconnected from the rationale behind the basic requirement that a genuine legal dispute exist between the parties. It will be unfortunate if this outcome to the *Nuclear Disarmament* cases has undermined confidence in the role of the Court in international dispute settlement, notwithstanding the serious questions about whether the claims in these cases were amenable to judicial solutions.

Scott, ‘Litigation Versus Dispute Resolution Through Political Processes’ in N Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP, Cambridge 2014) 24, 39–40.

136. For example, discussion within the United Kingdom over ‘Trident’, a sea-based nuclear weapons system whose future has been a focal point of parliamentary debate, suggests a situation in which an ICJ judgment might have had political relevance. See ‘A Guide to Trident and the Debate About Replacement’ (*BBC News*, 18 July 2016) <www.bbc.co.uk/news/uk-politics-13442735> accessed 24 February 2017.

137. *Legality of the Threat or Use of Nuclear Weapons* (n 9) [98]–[100], [105(2)(F)].

138. A determination that the obligation to negotiate nuclear disarmament arises only from the NPT, and is not an obligation under customary international law applicable to India and Pakistan, would presumably have been a significant setback for proponents of these lawsuits, as well.