

## DECLARATION OF PRESIDENT ABRAHAM

[English Original Text]

1. I voted in favour of the present Judgment, in which the Court finds that it cannot examine the merits of the Marshall Islands' Application against India, because I believe such a finding to be fully consistent with the Court's jurisprudence relating to the requirement for a "dispute" to exist between the parties, as established by a series of Judgments handed down in recent years, in particular the Judgment of 1 April 2011 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, the Judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* and the Judgment of 17 March 2016 in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*.

2. In my view, that jurisprudence is clearly and accurately set out in paragraphs 33 to 40 of the Judgment.

3. It could be summarized in the following three propositions.

First, the existence of a dispute between the parties to a case is not only a condition for the exercise of the Court's jurisdiction, but, more fundamentally, a condition for the very existence of that jurisdiction.

Second — and this proposition largely follows on from the previous one — in order to determine whether that condition has been met, the date to be referred to is not that on which the Court delivers its judgment, but the date of the institution of the proceedings, elements subsequent to this latter date possibly allowing to confirm the existence of the dispute, but not to establish it.

Finally, for the Court to find that a dispute exists between the parties on the relevant date, it is necessary for that dispute to have been revealed by exchanges between the parties — in whatever form — prior to that date, in circumstances such that each party was — or must have been — aware that the views of the other party were opposed to its own. In particular, the respondent must not discover the existence of a claim against it by the applicant in the document instituting proceedings; it has to have been informed of it beforehand.

4. In the past, it does not seem to me that the Court was always so rigorous as regards the condition relating to the existence of a dispute.

In truth, prior to 2011, the Court's jurisprudence was not completely unequivocal and it would certainly be possible to find decisions going in

fairly varied directions. Nevertheless, a number of precedents that reflect a more flexible and pragmatic approach could be cited: I myself mentioned them in my separate opinion in the *Georgia v. Russian Federation* case (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, separate opinion of Judge Abraham, p. 224).

5. That more flexible approach could be understood as being based on the idea that the existence of a dispute was not, strictly speaking, a condition for the Court's jurisdiction itself, but rather a condition for the Court's exercising of its jurisdiction; on the ensuing conclusion that it had to be determined whether that condition was met on the date of the Court's judgment and that the date of the institution of proceedings was not particularly relevant in this regard; and that, accordingly, since it was necessary and sufficient for the dispute to exist on the date of the Court's judgment, the positions expressed by the parties in the actual course of the proceedings had to be taken into account to the same extent as the exchanges that had taken place between them — if any — before the proceedings started.

6. In my view, the Court began to depart from this approach in its Judgment in the *Georgia v. Russian Federation* case, which marks a shift, albeit still an ambiguous one, with regard to the conditions that are necessary in order to establish that a dispute exists.

I expressed my concern, since I was not in favour of such a shift, in my separate opinion appended to that Judgment (cited above).

7. It was with its Judgment in the *Belgium v. Senegal* case (cited above) that the Court clearly set the new course of its jurisprudence, by declaring that it had no jurisdiction over one of Belgium's claims (the one relating to an alleged obligation of Senegal, under customary international law, to prosecute or extradite Hissène Habré for "international crimes" other than acts of torture). The reason given by the Court to justify its lack of jurisdiction was that Belgium, in the protests it addressed to Senegal prior to the institution of proceedings, had made no mention of any such legal claim. Yet the positions on the merits adopted by the parties before the Court made it clear that a dispute existed between them on the matter at issue; the Court, however, declined to take those into account.

8. I voted against the point in the operative part of the *Belgium v. Senegal* Judgment in which the Court found that it lacked jurisdiction to entertain the above-mentioned claim on the grounds that there was no dispute between the parties with regard to the subject-matter of that claim on the date the proceedings were instituted. In a separate opinion appended to the Judgment (*I.C.J. Reports 2012 (II)*, separate opinion of Judge Abraham, p. 471), I explained the reasons for that vote, regretting that the Court had not referred to the date of its own Judgment in order to determine whether the condition was met, which would have led it to form an opposite conclusion.

9. I nonetheless take the view that even 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.

10. It is indeed a judicial imperative which the Court has always recognized, and which in my view is incumbent upon all its Members, that it must be highly consistent in its jurisprudence, both in the interest of legal security and to avoid any suspicion of arbitrariness.

11. It is true that precedent is not inviolate, and that the Court always has the power to change course or overturn its jurisprudence if, exceptionally, it considers that there are compelling reasons to do so, for example because of a change in the general context surrounding some particular judicial solution.

12. I am not sure that the Court was right, with its *Georgia v. Russian Federation* and especially *Belgium v. Senegal* Judgments, to make a significant change to its earlier approach to the condition relating to the existence of a dispute. But given that it did so by adopting a clear and well-considered solution, there would be no justification, to my mind, for it to depart from that course now.

13. That is why, in the *Nicaragua v. Colombia* case (cited above), I joined with the majority (in that regard, the unanimity) in voting in favour of point (1) (c) of the operative clause, which applied the same criteria as in the *Belgium v. Senegal* Judgment.

And I also agree with the Judgment in the present case in that it is strictly applying those criteria.

14. As regards the application in this case of the — now settled — jurisprudence relating to the existence of a dispute on the date of the institution of proceedings, it is my view that, for the reasons set out in paragraphs 42 to 53 of the Judgment, it has not been demonstrated that a dispute had clearly manifested itself between the Parties, on the relevant date, on the question forming the subject-matter of the Application submitted to the Court by the Marshall Islands.

(Signed) Ronny ABRAHAM.