SEPARATE OPINION OF JUDGE TOMKA

Jurisdiction of the Court under Article 36 (2) of Statute — Existence of a dispute — No prior negotiations or notice necessary before seising Court — Existence of a dispute a condition for exercise of jurisdiction — Dispute in principle to exist at date of Application — Court has applied condition flexibly and taken into account subsequent events — Proceedings clarified that a dispute between the Marshall Islands and Pakistan exists — Court should have considered other arguments against jurisdiction.

Admissibility — Obligations relating to nuclear disarmament alleged to exist under customary international law — Nature of these alleged obligations — Disarmament requires co-operation between all States, in particular nuclear States — Court cannot consider position of one nuclear State without considering and understanding positions of other nuclear States — Absence of other nuclear powers before Court prevents consideration of claims in proper multilateral context — Application inadmissible.

1. For the first time in almost a century of adjudication of inter-State disputes in the Peace Palace, the "World" Court (the Permanent Court of International Justice and the International Court of Justice) has dismissed a case on the ground that no dispute existed between the Applicant and the Respondent prior to the filing of the Application instituting proceedings[1]. The Court seems not to be interested in knowing whether a dispute between them exists now.

2. I am not convinced by the approach taken by the Court, despite many references to its case law. In my view, other decisions of the Court, and its predecessor, point in a different direction. Therefore, to my regret, I am unable to support the Court's conclusion based on the absence of a dispute.

[1] This does not include requests for interpretation under Article 60 of the Court's Statute, which also — at least in the English version — uses the term "dispute" (the French text of the Statute uses the term "contestation") (see, e.g., *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), Judgment, I.C.J. Reports 1950*, p. 403). Where there is no disagreement between the parties about the meaning and scope of a Judgment, there is nothing to interpret (see *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 17, para. 45). Requests for interpretation cannot serve the purpose of seeking a decision of the Court on matters not brought before the Court in the original proceedings (see, e.g., *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Judgment, I.C.J. Reports 2013*, pp. 303-304, para. 56).

3. Is it really the case that the Marshall Islands and Pakistan did not, by April 2014, have a dispute relating to the latter's compliance with the obligations relating to nuclear disarmament that the Marshall Islands alleges to exist under customary international law, and that they do not have such a dispute now? Do the positions of the Marshall Islands and Pakistan on the latter's performance of its alleged obligations coincide?

4. The Marshall Islands in its Application alleges, *inter alia*, that

> "Pakistan has not fulfilled its obligation under customary international law to pursue in good faith negotiations to cease the nuclear arms race at an early date, and instead is taking actions to improve and expand its nuclear forces and to maintain them for the indefinite future.
>
> Similarly, Pakistan has not fulfilled its obligation under customary international law to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament." (Application instituting proceedings, p. 12, paras. 13-14.)

On the basis of these allegations, the Marshall Islands requests the Court to issue a declaratory judgment finding "that Pakistan has violated and *continues* to violate its international obligations under customary international law" through various acts and omissions (emphasis added)[2]. The Marshall Islands further requests the Court

> "to order Pakistan to take all steps necessary to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control" (*ibid.*, p. 38, para. 62).

5. It is a question for the merits whether obligations under customary international law exist in the terms for which the Marshall Islands contends, thus binding also on Pakistan. However, Pakistan denies the claims made by the Marshall Islands in this case. In its Counter-Memorial, it "submit[ted] that the [Marshall Islands'] claims against Pakistan are manifestly without legal merit or substance".

[2] For the full text of the request, see paragraph 11 of the Judgment.

I. Jurisdiction

6. Pakistan has raised nine grounds on which it claims "that the Court must decline to entertain the [Marshall Islands'] claims". Among these grounds, Pakistan argues that there was an "absence of a dispute (legal or otherwise) between the [Marshall Islands] and Pakistan, existing at the time of the filing of the Application".

7. The Court has concluded that it "does not have jurisdiction under Article 36, paragraph 2, of its Statute" (Judgment, para. 54).

8. It is to be recalled that the basis of jurisdiction relied upon by the Marshall Islands is two declarations under Article 36, paragraph 2, of the Statute of the Court, one deposited by the Marshall Islands on 24 April 2013 and the other by Pakistan on 13 September 1960.

9. When analysing issues of jurisdiction, caution has to be taken in relying on different pronouncements of the Court, in particular, depending upon whether the basis invoked is Article 36 (2) declarations or a compromissory clause contained in a treaty. Both declarations and compromissory clauses may set certain preconditions for the seising of the Court. The Court's jurisprudence has to be viewed in light of the relevant provisions underpinning its jurisdiction in any given case.

10. The Court in the present Judgment (see paragraph 35) recalls its previous view, that when "[i]t has been seised on the basis of declarations made . . . which . . . do not contain any condition relating to prior negotiations to be conducted within a reasonable time" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109), no such negotiations are required prior to the filing of the Application. In the same Judgment, the Court clarified that a State is "not bound to inform [the other State] of its intention to bring proceedings before the Court" (*ibid.*, p. 297, para. 39).

11. Pakistan argues that "[i]n order for the Court to exercise its judicial function, it must . . . confirm the existence of a dispute between the States parties to a case before the Court at the time the Application was submitted to the Court".

12. Although the Court has, on a number of occasions, stated that the existence of a dispute is a condition for its jurisdiction, in my view, it is more properly characterized as a condition for the exercise of the Court's jurisdiction. The jurisdiction of this Court is based on the consent of States. If States make declarations under Article 36 (2) of the Statute "they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning [the matters specified in letters *(a)* to *(d)* of that paragraph]". The Court's jurisdiction in relation to a State which has made a declaration is established from the moment the declaration is deposited with the Secretary-General of the United Nations, and remains in force as long as it is either not withdrawn or has

not lapsed if it has been made for a specified period of time. The Court has explained that

> "by the deposit of its Declaration of Acceptance [of the Court's jurisdiction under Article 36 (2) of the Statute] with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The *contractual relation* between the Parties and the *compulsory jurisdiction* of the Court resulting therefrom are *established*, '*ipso facto* and without special agreement', *by the fact of the making of the Declaration*." (*Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146; emphasis added.)

The Court further specified that it is on the date when the second declarant State deposits its Declaration of Acceptance "that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned" *(ibid.)*.

13. Thus, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. The emergence of a dispute is a necessary condition, in the event that one of the disputing parties which has accepted the Court's jurisdiction decides to bring an Application instituting proceedings before the Court against another State with an Article 36 declaration in force, for the Court to exercise that jurisdiction. The disappearance of the dispute during the proceedings, either because the parties have reached a settlement or because of intervening circumstances, does not deprive the Court of its jurisdiction. However, the Court in such a situation will not give any judgment on the merits, as there is nothing upon which to decide. It would limit itself either to taking note of the settlement in its Order and directing the Registrar "that the case be removed from the list" (see, e.g., *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 349) or concluding that a claim "no longer has any object and that the Court is therefore not called upon to give a decision thereon" (see, e.g., *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 62; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 478, para. 65).

14. The function of the Court "is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute). The Court does so as the principal judicial organ of the United Nations, thus contributing to the achievement of its purposes, one of them being "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes" (Article 1, paragraph 1, of the Charter of the United Nations). In order to discharge this function, the dispute must still exist when the Court decides on its merits, provided that it has jurisdic-

tion and the Application is admissible. While the formulation of Article 38, paragraph 1, of the Statute implies that the dispute will already exist when proceedings before the Court are instituted, the phrase about the Court's function, added to the text of Article 38 at the Conference in San Francisco, was not intended to constitute a condition for the Court's jurisdiction. Article 38 concerns the law to be applied by the Court, while for its jurisdiction — in addition to Articles 34 and 35 — Articles 36 and 37 are particularly relevant. What the Court says in paragraph 39 of its present Judgment should thus be viewed as a mere observation and not as determinative for its jurisdiction.

15. As the Court has stated on a number of occasions the "dispute must *in principle* exist at the time the Application is submitted to the Court" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46, quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30 (emphasis added); see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80, quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26).

16. Despite repeating this general rule (see Judgment, para. 39), the Court has, however, adopted rather a very strict requirement that the dispute *must* have existed prior to the filing of the Marshall Islands' Application.

17. In some cases, circumstances will dictate that the dispute must indeed exist as at the date of the Application. Such was the situation in the recent case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for in that case Colombia's denunciation of the Pact of Bogotá took effect almost immediately after the Application was filed (see *Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 49-50, para. 17, pp. 52-53, para. 24, p. 56, para. 34, and p. 60, para. 48). As Colombia's acceptance of the jurisdiction of the Court under the Pact had thus been terminated upon the taking effect of its denunciation, Nicaragua could not have subsequently filed an Application and the Court thus considered whether a dispute had previously emerged (*ibid.*, paras. 52 *et seq.*). Likewise, in the *Georgia* v. *Russia* case, the Court was considering a specific compromissory clause contained in the International Convention on the Elimination

of All Forms of Racial Discrimination that required that there be a "dispute . . . with respect to the interpretation or application of this Convention, *which is not settled by negotiation or by the procedures expressly provided for in this Convention* . . ." (Article 22, quoted in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 81, para. 20; emphasis added). There thus had to be a dispute that "is not settled by negotiation", a requirement which the Court characterized as among the "preconditions to be fulfilled before the seisin of the Court" (*ibid.*, p. 128, para. 141). If a compromissory clause requires prior negotiations before filing the Application as one of the "preconditions" for seising the Court, logically the dispute should have arisen prior to instituting the proceedings before the Court. Moreover, the dispute and the required negotiations should have been related to the subject-matter of the Convention which contains the compromissory clause — racial discrimination in the *Georgia* v. *Russia* case. Any kind of bilateral political talks would not satisfy that requirement. The Judgment in *Georgia* v. *Russia* should be viewed in this light. Therefore, I cannot agree with the view of those who consider that it indicates the beginning of a more formalistic approach to the existence of a dispute in the Court's jurisprudence.

18. Where there are no circumstances requiring that the dispute exist by a particular date, the Court has been rather more flexible in not limiting itself only to the period prior to the filing of the Application in order to ascertain whether a dispute existed between the parties before it.

19. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* case, that Court, when "verify[ing] whether there [was] a dispute between the Parties that falls within the scope of [the] provision [of Article IX of the Convention]" (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 27), observed that

> "[w]hile Yugoslavia has refrained from filing a Counter-Memorial on the merits and has raised preliminary objections, it has nevertheless wholly *denied* all of Bosnia and Herzegovina's *allegations*, whether at *the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections*" (*ibid.*, para. 28; emphasis added).

Manifestly, a very serious military conflict in Bosnia and Herzegovina had been going on already for a year prior to the filing of the Application on 20 March 1993. The war on the territory of Bosnia and Herzegovina broke out shortly after its declaration of independence on 6 March 1992. The Court, however, did not inquire whether any allegation or claim of a

breach of the obligations under the Genocide Convention had been made prior to the submission of the case to the Court. It limited itself to noting that "the principal requests submitted by Bosnia and Herzegovina are for the Court to adjudge and declare that Yugoslavia has in several ways violated the Genocide Convention" (*I.C.J. Reports 1996 (II)*, p. 614, para. 28) and then noting, in the passage quoted above, the denial of these allegations by the Respondent in the course of the proceedings before the Court. The Court did not refer to a denial of such allegations prior to its seisin by the Applicant.

20. Moreover, from an early period of its adjudication the World Court has shown a reasonable amount of flexibility, not being overly formalistic, when it comes to the timing at which jurisdictional requirements are to be met (see similarly *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81).

21. In a case decided in 1925, the Respondent argued, *inter alia*, "that the Court has no jurisdiction because the existence of a difference of opinion in regard to the construction and application of the Geneva Convention had not been established *before* the filing of the Application" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13; emphasis added). The Court looked at the compromissory clause, and noticed that it "does not stipulate that diplomatic negotiations must first of all be tried" and that under that clause "recourse may be had to the Court as soon as one of the Parties considers that a difference of opinion arising out of the construction and application of [certain Articles of the Convention] exists" (*ibid.*, p. 14). In dismissing the objection the Court made a pronouncement which, in my view, is clearly apposite to the case at hand. It said:

> "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 [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." *(Ibid.)* [3]

22. This dictum originated from the principle which the Permanent Court had enunciated a year earlier, in 1924, in the *Mavrommatis Palestine Concessions* case (see *Application of the Convention on the Prevention*

[3] The force of this statement is strengthened by the fact that it seems all elected judges were in agreement with it; only a "National Judge", as judges *ad hoc* were at that time designated, chosen by the Respondent, dissented.

and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). In response to an argument that the proceedings were not validly instituted because "the application was filed before [the relevant protocol] had become applicable", the Permanent Court stated:

> "Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

23. The Court applied this principle in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26. As the Court there observed *(ibid.)*, it also did so in *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28, and in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83. Indeed, in the former Judgment, the Court highlighted that "the Court, like its predecessor, the Permanent Court of International Justice, 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" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added).

24. More recently, the Court invoked this principle in 2008 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412. The Court "emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted" (*ibid.*, p. 438, para. 80). Nonetheless, the Court went on that it "has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied" (*ibid.*, p. 438, para. 81). It referred (*ibid.*, p. 439, para. 82) to the principle outlined in the *Mavrommatis* case,

noted above, whereby the Court "is not bound to attach to matters of form the same degree of importance which they might possess in municipal law". The Court concluded that

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 441, para. 85.)

It explained the rationale behind the principle as follows:

> "it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings." (*Ibid.*, p. 443, para. 89.)

25. If the existence of a dispute is considered necessary for the Court's jurisdiction (as stated above in paragraph 12, I consider it rather a condition for the exercise of the Court's jurisdiction), there is no compelling reason why the principle cannot be applied to such a condition. As I have already outlined, that was the position taken in the *Certain German Interests* case, which was cited by the Court in the more recent *Croatia* v. *Serbia* case (see *ibid.*, p. 439, para. 82). Indeed, the Court in the latter case highlighted that "it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently" (*ibid.*, p. 442, para. 87).

26. This is, as I understand it, the jurisprudence of the Court on the conditions to be met for its jurisdiction — not excessively formalistic, but rather reasonable, allowing it to exercise its function to resolve disputes between States brought before it. I cannot agree with the view that the Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*I.C.J. Reports 2012 (II)*, p. 422) represents a departure in the Court's jurisprudence. That case was about the failure of Senegal to bring to justice Hissène Habré to account for acts committed during his rule as President of Chad. In the diplomatic exchanges prior to bringing the matter before the Court, Belgium always argued in terms of obligations under the Convention against Torture (*ibid.*, pp. 444-445, para. 54). It was only in the Application instituting proceedings that the

alleged crimes against humanity under customary international law were mentioned. The Court concluded that there existed a dispute in regard to "the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), I.C.J. Reports 2012 (II)*, p. 444, para. 52), but that it "did not relate to breaches of obligations under customary international law" (*ibid.*, p. 445, para. 55). The Court knew that it thus had jurisdiction, under the compromissory clause contained in Article 30, paragraph 1, of the Convention against Torture, to deal with the matter brought before it, and it could thus resolve the dispute. It was clear that Belgium would not contemplate re-submitting to the Court a dispute relating to obligations under customary international law. In fact, Belgium welcomed the Judgment and was among those States which, in addition to the African Union and the European Union, assisted Senegal — in particular financially — to comply with the Judgment. Senegal is to be commended for the measures it has taken in the implementation of its obligations. It charged Hissène Habré, who was found guilty of, *inter alia*, torture by a Judgment rendered on 30 May 2016 and sentenced to life imprisonment. The victims finally, after more than a quarter of a century, have seen justice delivered. In light of these facts, the Court's Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* should rather be seen as wise and not overly formalistic. The Court was certainly prudent not to foreclose any future developments in respect of obligations of States that might exist under customary international law to prosecute perpetrators of alleged crimes against humanity.

27. It is true that the Marshall Islands had, for some time, not taken a particularly active position on nuclear disarmament in multilateral fora, including in its voting until 2012 in the United Nations on these issues, for reasons which do not need elaboration. However, as it appears from the record, the Marshall Islands has, since at least 2013, revisited its position and voiced its dissatisfaction about the compliance, or rather lack thereof, with obligations related to nuclear disarmament alleged to exist under, *inter alia*, customary international law by nuclear powers, among them Pakistan. In September 2013, its Foreign Minister diplomatically "urge[d] *all* nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament" (see Judgment, para. 46, emphasis added). I do not take issue with the Court's analysis of this statement, although it does indicate a shift in the Marshall Islands' approach.

28. In February 2014, the Marshall Islands, while renewing its call to all nuclear powers made in the United Nations in September 2013,

expressed its views more openly, asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" regarding "multilateral negotiations on achieving and sustaining a world free of nuclear weapons [which] are long overdue" (Judgment, para. 26). The allegation is made against all nuclear-weapon States, without exception. This has been subsequently confirmed by the fact that the Marshall Islands filed, on 24 April 2014, nine Applications against the nine States which are known or believed to possess nuclear weapons. Pakistan did participate at that Conference in Nayarit. No doubt, the Marshall Islands' assertion was aimed at all nuclear States, including Pakistan.

29. In my view, a State is not required under international law to give notice to another State of its intention to institute proceedings before the Court. A State can formulate its claim in the Application seising the Court if it believes that it has a dispute with another State, or considers that the other State is in breach of international obligations owed to the Applicant. To require a State to give prior notice may entail, in the present optional clause system of the Court's compulsory jurisdiction, a risk that the Court will be deprived of its jurisdiction prior to receiving an Application instituting proceedings. A number of declarations made under Article 36, paragraph 2, of the Court's Statute may be modified or withdrawn with immediate effect by simple notification to the Secretary-General of the United Nations. And it is not unknown that some declarations have been modified in the past, including recently, in order to prevent another State from bringing before the Court a particular dispute or a particular category of disputes.

30. The proceedings before the Court in this case have clarified that there is a dispute between the Marshall Islands and Pakistan about the latter's performance of obligations related to nuclear disarmament and alleged to exist under customary international law. Therefore, in my view, the conclusion that the Court has no jurisdiction in the absence of a dispute is not justified in the case at hand. In order to affirm its jurisdiction the Court would have to deal with the other grounds raised by Pakistan against its having jurisdiction. The Court did not consider it necessary to proceed that way in light of the conclusion it reached.

II. Admissibility

31. Assuming that all of the grounds raised by Pakistan against the Court's having jurisdiction were to be rejected, the Court would proceed to the merits, provided that the Application and the claims formulated therein are admissible. In my view, however, the nature of the obligations said to exist under customary international law in the field of nuclear disarmament which are relied upon in this case renders the Application inadmissible under the present, rather unsatisfactory, system of the Court's jurisdiction.

32. The Marshall Islands does not invoke, in this case, the provisions of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter the "NPT"), as Pakistan is not a party thereto. Nonetheless, the obligations that it alleges to exist under customary international law are in similar terms to Article VI thereof.

33. Article VI of the NPT reads as follows:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

34. The Court in its advisory opinion analysed this provision and expressed its view in the following terms:

> "The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 99.)

The Court characterized the obligation as "twofold" — as an "obligation to pursue and to conclude negotiations" (*ibid.*, para. 100). It emphasized that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" *(ibid.)*.

35. Indeed, "disarmament treaties or treaties prohibiting the use of particular weapons" have been regarded as an instance of the kind of treaty, "the objective of which can only be achieved through the interdependent performance of obligations by all parties"[4]. One respected scholar, and now international judge, observes in this respect:

> "It is clear . . . in the context of a disarmament treaty, that each State reduces its military power because and to the extent that the other parties do likewise. Non-performance, or material breach, of the treaty by one of its parties would threaten the often fragile military balance brought by the agreement."[5]

[4] Bruno Simma and Christian J. Tams, "1969 Vienna Convention, Article 60: Termination or suspension of the operation of a treaty as a consequence of its breach", in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, Oxford University Press, 2011, p. 1365. See also *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 119, paragraph 13 of the commentary to Article 42, or James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 259.

[5] Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility" (2002) 13 (5) *European Journal of International Law*, p. 1134.

In other words, the performance of the obligation by a State is conditional on the performance of the same obligation by the other States[6]. If customary obligations were found to exist in the terms for which the Marshall Islands has contended, these considerations would be more generally relevant. In the field of nuclear disarmament, it is unrealistic to expect that a State will disarm unilaterally. International law does not impose such an obligation. In respect of the treaty-based obligations of the NPT, it rather provides for achieving that goal through negotiations in good faith, through the co-operation of all States. Customary obligations in this field, if they were proved to exist, would most likely not differ.

36. The most noble and important goal of getting the world rid of nuclear arms, to which the absolute majority — if not all — nations subscribe, can realistically be achieved only through balancing the security interests of the States concerned, in particular all nuclear powers and other countries with significant military capabilities.

37. It seems that the Marshall Islands is aware of this reality. It has filed Applications against all nuclear powers alleging that they are in breach of their obligations under the NPT and/or customary international law. Six of the nuclear powers are not before the Court as they have not accepted the Marshall Islands' invitation to accept the Court's jurisdiction under Article 38, paragraph 5, of the Rules of Court.

38. Enquiry into the compliance by one nuclear power with its obligations relating to nuclear disarmament, including any obligation to negotiate in good faith, invites consideration of the position taken by all other nuclear powers in relation to the same obligations which are or may be binding on them. It is only with an understanding of the positions taken by other States that the Court can stand on safe ground in considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that one State alone is open to achieving the goal of nuclear disarmament through *bona fide* negotiations. This is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the *Monetary Gold* principle would apply. It is rather a question of whether it is possible for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negoti-

[6] The nature of the obligation is well described in the commentary to the Articles on State Responsibility as referring to an obligation "where each party's performance is effectively conditioned upon and requires the performance of each of the others": *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 119, paragraph 13 of the commentary to Article 42; see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 259.

ated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

39. The issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and Pakistan. I am convinced that the Court cannot meaningfully engage in a consideration of Pakistan's conduct when other States — whose conduct would necessarily also be at issue — are not present before the Court to explain their positions and actions.

40. This case illustrates the limits of the Court's function, resulting from the fact that it has evolved from international arbitration, which is traditionally focused on bilateral disputes. The Statute of the Court is expressly based on the Statute of its predecessor, the Permanent Court of International Justice. That Statute was drafted in 1920 and major powers opposed the idea of granting the Court compulsory jurisdiction. That approach did not change in 1945 when the International Court of Justice was conceived as the principal judicial organ of the United Nations. Had the founders of that Organization endowed the Court with universal compulsory jurisdiction, all Members of the United Nations would have been subject to its jurisdiction. There would not have then existed obstacles to the Court's exercising its jurisdiction fully and thus contributing to the achievement of the purposes and goals of the Organization.

41. To my sincere and profound regret, I have to conclude that the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context, which is also determined by the positions taken by those other powers, and thus renders the Application inadmissible. For this reason I have joined those of my colleagues who have concluded that the Court cannot proceed to the merits of the case.

(Signed) Peter TOMKA.