

NEW NUCLEAR CASES AT THE HAGUE COURT

Vanda Lamm*

professor of international law

Abstract The International Court of Justice (ICJ) has dealt with the problems connected with nuclear weapons already in several cases, both in contentious cases and advisory opinions. The latest cases were instituted at the end of April 2014 when the Republic of the Marshall Islands submitted applications against nine nuclear weapon states, for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and nuclear disarmament (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament cases*). The author offers a close analysis of the applications with special regard to the jurisdictional problems and some questions connected with the merits of the cases. The jurisdictional problems are emerging from the fact that from the nine states against which the Marshall Islands instituted proceedings only three are parties to the Court's optional clause system and the case of the other six states depends on whether these states will accept the Court's jurisdiction for the cases instituted by the Marshall Islands. As regards the merits of the cases, the outcome of the cases will depend on how the Court will interpret the notion of nuclear disarmament, and whether it will accept that in contemporary international law there exist a customary norm of nuclear disarmament.

1. The old cases

The International Court of Justice (ICJ), which is the principal judicial forum of the United Nations, has dealt with the problems connected with nuclear weapons already in several cases, both in contentious cases and advisory opinions.

The first instances were in the 1970s when Australia and New Zealand separately instituted proceedings against France with respect to the atmospheric nuclear tests conducted by France in the South Pacific, causing radioactive fallout in their territories. More than twenty years after these cases New Zealand submitted a request to the Court for an examination of the situation in accordance with para. 69 of the Court's 1974 judgment in the *Nuclear Tests Case* (New Zealand v. France).⁽¹⁾

In the 1990s the World Health Organization and UN General Assembly separately turned to the Court for its advisory opinion on the questions of the use of nuclear weapons.

The latest cases were instituted at the end of April 2014 when the Republic of the Marshall Islands submitted applications against nine nuclear weapon states, namely the United States, the Russian Federation, the United Kingdom, France, China, India, Pakistan, the Democratic People's Republic of Korea and Israel, for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and nuclear disarmament (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament cases*).

Before discussing the nine new cases one should say a few words about the previous cases.

* Hungarian Academy of Sciences, Research Centre for Social Sciences; Széchenyi István University, Győr (Hungary). Tel: + 36 20 924 76 86; E-mail: lamm.vanda@tk.mta.hu; drlamm@t-online.hu

In the *Nuclear Tests Cases* the two applicants, Australia, New Zealand separately requested the Court to adjudge and declare that carrying out nuclear tests in the South Pacific Ocean was contrary to international law and the Court should order France not to carry out any further such tests.

In the two judgments of 20 December 1974 the Court didn't state the essence of the problem nor examine the consistency of the French nuclear tests with international law, although the applications' aim was not only to achieve a termination of nuclear tests in the region, but also have the Court declare that the nuclear tests were contrary to international law. In both cases the Court's decisions were based on the fact that after the submission of the application France, through various public statements (by the President of the Republic, the minister of foreign affairs, the minister of defence, etc.) announced its intention, following completion of the 1974 series of atmospheric tests, to cease conducting such tests. According to the judgments these statements „were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.”⁽²⁾ The Court's conclusion was that by that undertaking the objective of the applicants was in effect accomplished, since France committed itself to hold no further nuclear tests in the region.⁽³⁾

Thus in the *Nuclear Tests Cases* the Court avoided a statement on the essence of the applications, since it found a handhold on which it could base its decision and, thus could assuage the applicants.

More than two decades after the *Nuclear Tests cases* the World Health Organization requested an advisory opinion from the Court regarding one of the most important questions connected with nuclear weapons, on the legality of the use of nuclear weapons. In the advisory opinion concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*⁽⁴⁾ the question submitted for the Court's decision reads as follows:

„In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?”

In that case again the Court shunned to respond to the question submitted to it and, for the first time in its jurisprudence, it refused to give the WHO the advisory opinion it requested. According to the Court although the World Health Organization is a specialized agency, having the right to request an advisory opinion from the Court, the question submitted to the Court was legal one, however, it was outside the scope of the WHO's legitimate sphere of interest, since it related „not to the effects of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects*”.⁽⁵⁾

Those states which were promoters of the World Health Organization's request for an advisory opinion advanced the same idea in the General Assembly which by its Resolution 49/75 adopted on 15 December 1994 decided to request the Court to render an advisory opinion practically on the same problem as that of the WHO, with some changes in drafting, namely:

„Is the threat or use of nuclear weapons in any circumstance permitted under international law”?

This time the Court didn't find a „compelling reason” to exercise its discretion not to give the opinion requested.⁽⁶⁾ It found that the question submitted to the Court by the General Assembly was a legal one, and in the interpretation of the Court it considered „the compability of the threat or use of nuclear weapons with the relevant principles and rules of international law.” In the jurisprudence of the Court this was the first case of an abstract interpretation and the Court took a liberal view of its advisory jurisdiction,⁽⁷⁾ It should be added that both the member states of the United Nations and members of the Court were much divided on the appropriateness of the opinion, however, the Court by thirteen votes to one decided to comply with the General Assembly's request for an advisory opinion.⁽⁸⁾ Judge Oda much opposed the giving of the opinion, since according to him, there was no

need nor rational justification for the request of an advisory opinion by the General Assembly, and this was simply „a caricature of the advisory procedure.”⁽⁹⁾

The reason behind the request regarding the legality of the threat and use of nuclear weapons was that the General Assembly and other fora have dealt with nuclear disarmament and the total prohibition of nuclear weapons already for years without having any real progress. The motion regarding the request of an advisory opinion was submitted by Indonesia on behalf of the non-aligned states, with the aim of breaking the deadlock in respect of the prohibition of nuclear weapons by getting an opinion of the Court. They hoped that the Court would state that the threat or use of nuclear weapons was not permitted by international law. It should be added that the motion requesting the Court’s advisory opinion was strongly opposed by the great powers and the General Assembly’s resolution 49/75 on the request was adopted with rather close voting.

Without entering into details one could state that the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* didn’t meet the expectations of its promoters, since the Court didn’t say what they wanted to hear. Especially because the Court held that

„There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such” (Paragraph 2 A and B); and „in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” (Paragraph 2 E, adopted by seven votes to seven, using the President’s casting vote).

II. Why the Marshall Islands?

Returning now to the new cases, as it was already said on 24 April 2014 the Republic of the Marshall Islands submitted separate applications against nine nuclear weapon states, accusing them of the failure to fulfil their obligations with respect to cessation of the nuclear arms race at an early date and nuclear disarmament. Among the nine nuclear weapon states there are five states which are parties to the NPT, China, France, the Russian Federation, the United Kingdom, and the United States, four non-NPT states known to possess nuclear weapons, namely India, Pakistan, Israel and the Democratic People’s Republic of Korea (DPRK).⁽¹⁰⁾

The applicant requested the Court to order the respondent states „to take all steps necessary to comply” with their obligations with respect to the cessation of the nuclear arms race at an early date and nuclear disarmament „within one year of the Judgement(s), 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.”

According to the applications „the Marshall Islands has a particular awareness of the dire consequences of nuclear weapons;” especially because – between 1946 to 1958 – 67 nuclear weapons of warring explosive power were detonated in the Marshall Islands when it was under the trusteeship of the United States of America. It should be added that after the Marshall Islands gained independence the United States accepted responsibility for its nuclear testing in the Marshall Islands and under the 1983 Compact of Free Association between the United States and the Marshall Islands the Washington Government has accepted responsibility for compensation owed to the citizens of the Marshall Islands for loss or damage to property and people. ⁽¹¹⁾

III. Jurisdictional Problems

As it is well known the International Court of Justice doesn't have compulsory jurisdiction and in any concrete case the jurisdiction of the Court depends on the will of the parties, who may express their consent to the Court's jurisdiction in a compromise made after a dispute has arisen, in a jurisdictional clause of a treaty, or in a declaration of acceptance (of compulsory jurisdiction, also termed as "optional clause declaration").

In the case of three states, the United Kingdom, India and Pakistan, the Marshall Islands for the Court's jurisdiction has relied on Art. 36. Para. 2 of the Statute, since both the applicant and respondent states are parties to the optional clause system and the Marshall Islands has based the Court's jurisdiction on its own declaration of acceptance made precisely a year earlier, on 24 April 2013, and those of the respondent states, made by India on 18 September 1974, Pakistan on 13 September 1960 and the United Kingdom on 5 July 2004. Thus in three cases from the nine the Court has *prima facie* jurisdiction.

This view was not shared by India and Pakistan and both of them after receiving the applications expressed their views that the Court lacks jurisdiction and the applications should be dismissed. The President of Court after consultation with the representatives of the two states fixed the time limits for the filing of the Memorials by the Republic of the Marshall Islands and the Counter Memorials of the two states stating also that in both cases the written pleadings shall first address the questions of the Court's jurisdiction and admissibility of the applications.⁽¹²⁾ Thus in these two cases the Court, following the provisions on preliminary objections in Art. 79. para. 2. of the Rules of Court, will consider all the questions of its jurisdiction separately before any proceedings on the merits.

In the dispute between the Marshall Islands and the United Kingdom the Court has also fixed time limits, however, till now there were no signs that the United Kingdom has disputed the Court jurisdiction.⁽¹³⁾ This does not mean that the United Kingdom could not challenge the Court's jurisdiction either in a preliminary objection under Art. 79 para. 1 of the Rules of Court, or at a later stage of the proceedings, but in that case the objection would not be considered separately from the merits of the dispute.

Since two respondents already stated that they would challenge the Court's jurisdiction and the admissibility of the applications it is interesting to consider what might be the arguments of these states. With all probability they will advance a long list of arguments, in that respect states are very inventive, but in the following we will only refer to some of the arguments which might be raised.

The respondent states could refer first of all to the reservations joined to their own declarations of acceptance or by reliance on reciprocity on the limitations of the applicant's declaration acceptance.

The 1974 Indian declaration of acceptance is one of the most complicated declarations made under Art. 36 para. 2 of the Statute accepting the International Court's compulsory jurisdiction, especially because it contains a long list of disputes which are excluded from the Court's compulsory jurisdiction. Of course it is difficult to foresee the arguments of the Government of India regarding the lack of the Court's jurisdiction, but it might be possible for there to be a reference to the so-called reservation on "surprise applications" in point 5 of the declaration excluding

„disputes with regard to which any other party to dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute, or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filling of the application bringing the dispute before the Court.”

One can find a similar reservation in the 2004 British declaration of acceptance.

The reservations on surprise applications consist of two parts. The first one excludes disputes with states which have accepted the Court's compulsory jurisdiction less than twelve months prior to the

filing of the application. The second part of the reservation relates to any disputes with states that have adhered to the optional clause system only for the purpose of bringing a given dispute before the Court (*ad causam* acceptance). Since the Marshall Islands deposited its declaration of acceptance on 24 April 2013 and submitted the nine applications against the nuclear weapons states exactly 12 months (on 24 April 2014) after, that part of the reservation could not be referred to by these states as an obstacle to the Court's jurisdiction. With all probability in view of that reservation the Marshall Islands submitted the nine applications after the expiration of the 12 months period.

In connection with the second part of the reservation excluding surprise applications it should be mentioned that this part of the reservation (and only this part) can be found in the 2013 declaration of acceptance of the Marshall Islands as well, excluding from the Court's compulsory jurisdiction

“any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute.” (Para. 1. subpara. ii)

Thus if the respondent states parties to the optional clause system could succeed in proving that the Marshall Islands has accepted the Court's compulsory jurisdiction for the purpose of submitting the disputes concerning the non-compliance of disarmament obligations to the Court's decision then, by reliance on reciprocity, they could refer to the reservation joined to the applicant's declaration of acceptance.

It should be mentioned that, although the first appearance of the above mentioned reservation excluding surprise applications occurred more than 50 years ago, when after the Court's judgment in the case concerning the *Right of Passage over Indian Territory* (Portugal v. India) the United Kingdom joined this limitation to its 1957 declaration of acceptance, in the jurisprudence of the Court one can mention only one case where there was a reference to that part of reservations excluding surprise applications. That happened in the case concerning *Legality of Use of Force* (Yugoslavia v. United Kingdom), when the United Kingdom based one of its arguments on that part of the reservation joined to the British declaration of acceptance.⁽¹⁴⁾ However, the reservation was not considered by the Court since in the case of the *Legality of Use of Force* (Yugoslavia v. United Kingdom) the Court declared that the Yugoslav applications in all the cases against NATO member states were inadmissible since at the time of the filing of the applications Yugoslavia was not a member of the United Nations and was not party to the Statute thus the Court was not open to it.

The 1960 Pakistani declaration of acceptance is much less complicated than the declaration acceptance of India and it contains only three reservations: the limitation on the settlement of disputes entrusted by the parties to another tribunal, the objective reservation of domestic jurisdiction, and the multilateral treaty reservation (or considering its common name the Vandenberg reservation). That later limitation might have some relevance in the dispute submitted by the Marshall Islands against Pakistan, if Pakistan would be a contracting party to the NPT.

That reservation excludes “disputes arising under multilateral treaty unless 1. all parties to the treaty affected by the decision are also parties to the case before the Court, or 2. the Government of Pakistan specially agree to jurisdiction;...”.⁽¹⁵⁾ However, as it was already mentioned Pakistan is not party to the NPT and no other treaty was mentioned in the application against Pakistan, thus the reservation has no pertinence to the dispute at hand.

The Marshall Islands has instituted proceedings not only against three states having accepted the Court's compulsory jurisdiction, but against six other states, the United States, the Russian Federation, the United Kingdom, France, China, India, Pakistan and Israel. Among these six states there are four nuclear weapon states and two other states which are *de facto* nuclear weapon states.

At the time of the submission of the applications against the above mentioned six states there was no basis for the Court's jurisdiction. These states were not parties to the optional clause system, and

there were neither treaty provisions in force between the Marshall Islands and any of these states conferring jurisdiction on the dispute at hand, nor a compromise on the submission of the dispute to the Court's decision. The Marshall Islands brought its dispute with the six states before the Court in the hope that each of these states would consent to the Court's jurisdiction over the disputes and the claims formulated by the Marshall Islands, thus the Court's jurisdiction could be based on the principle of *forum prorogatum*.⁽¹⁶⁾ According to Art. 38 para. 5 of the Rules of Court if a state submits a dispute to the Court's decision without having any kind of previous consent to the Court's jurisdiction by the state against which the application is made, it shall be transmitted to that state. Such cases should not be entered in the General List, nor even released, and no action should be taken in the proceedings, „unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.” If the respondent state accepts the offer for judicial settlement of the dispute he/she no longer can refer to the lack of the Court's jurisdiction.⁽¹⁷⁾

Thus the future of the six above mentioned disputes referred by the Marshall Islands to the Court's decision depends on the reaction of the six states against which the applications were made.

Before 1978 the situation in such cases was different and after their submission all applications were released. Under the previous system these cases were put on the General List, and if the state against which the application was submitted didn't give its consent to the Court's jurisdiction then the case was removed from the List. Since the applications were submitted without any basis of the Court's jurisdiction, they were used as a demonstrative political step, thus the system introduced in 1978 is more in line with the principle that the Court's jurisdiction should be based on the parties' consent. In that connection Geneviève Guyomar rightly pointed out that if the state refuses such an invitation, which is its right, then any unnecessary publicity the case receives that might be used for political purposes should be avoided.⁽¹⁸⁾

In the practice of the Court and its predecessor, the Permanent Court of International Justice, there were very few cases where the Court's jurisdiction was based on the concept of *forum prorogatum*.⁽¹⁹⁾ In most cases where a state instituted proceedings while the opposing party had not yet accorded its consent to the Court's jurisdiction, the opposing parties have refused the invitation.

Regarding the expectations of the consent of these six states it could be stated that there is little chance that any of them will accept the invitation to consent to the Court's jurisdiction on a dispute regarding their obligations concerning negotiations on the cessation of the nuclear arms race and nuclear disarmament.

Considering each of the six states one by one, several reasons could be detected compelling them not to accept the invitation, however, such a short overview will concentrate only on the relations of these states to the International Court of Justice.

As it is well known the United States is one of the founding states of the principal judicial organ of the UN, accepting the Court's compulsory jurisdiction in 1946, however, that declaration was terminated in 1985, after the Court delivered its judgment on preliminary objections in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America); since that time the United States hasn't joined the optional clause system. It's true that subsequently the United States was party before the Court in nine cases, however, with the exception of one case, in all these cases the United States was the respondent and practically in all of them the Washington Government either raised preliminary objections under Art. 79 of the Rules of Court, or presented certain objections to the Court's jurisdiction.

France was also among the founding fathers of the Court and made a declaration accepting the Court's compulsory jurisdiction in 1947. In 1974 France left the optional clause system and terminated its declaration in force while it was a respondent before the Court in the *Nuclear Test Cases* instituted by Australia and New-Zealand separately in 1973. It should be noted that France is one of the few states who accepted another state's invitation to recognize the Court's jurisdiction to deal with a case

against it, and that happened in two instances in the 2000s. It is very doubtful whether France will have the same attitude in the dispute submitted by the Marshall Islands especially because the subject of the dispute is a politically very sensitive matter and differs very much from the above mentioned two cases.⁽²⁰⁾

What concerns the two other great powers who were also founders of the Court and parties to the NPT, the People's Republic of China and the Russian Federation (or its predecessor the Soviet Union) have always been reluctant towards the Court.

The negative attitude of the former USSR towards the Court has had a long tradition. But after the fall out of the Soviet Union some changes could be detected; the Russian Federation was a party before the Court only in a single case when in the 2000s Georgia instituted proceedings against it regarding the dispute concerning „actions on and around the territory of Georgia” in breach of the International Convention on the Elimination of All Forms of Racial Discrimination, and in that case Russia filed preliminary objections which were adopted by the Court; otherwise Russia has never been party to the optional clause system.

China never appeared as a party in any case before the Court, and, although till 1972 it was a member of the optional clause system, after its membership in the United Nations was normalized, and it replaced the Republic of China in the United Nations with the People's Republic of China, it announced that it did not recognize the acceptance of the compulsory jurisdiction of the Court made by the „defunct Chinese” government.

Till 1985 Israel was a party to the optional clause system, however, its declaration was terminated in 1986. In view of the sharp critics by Israel on the Court's advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it would be a nativity to believe that Israel will give a positive answer to the Marshall Islands invitation.

There is also little chance that the Democratic People's Republic of Korea, a state which has consistently contravened its obligations under the NPT, evaded the IAEA safeguard system and openly opposed the IAEA Board of Governors' decisions would consent to the Court's jurisdiction in the dispute submitted by the Marshall Islands.

IV. The twofold obligations of disarmament

The key element of the Marshall Islands applications was Art. VI of the NPT which 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 ²¹nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.”

The Marshall Islands in the three applications that were made public – practically with the same wording – argued that in contemporary international law not only treaty norm is considered, specifically Art. VI of the NPT providing for the cessation of the nuclear arms race and nuclear disarmament, but customary norms of international law as well, and the nine respondent states are not fulfilling their obligations resulting from these norms. It should be added that although only three of the applications were made public, according to the information made public by the Court, as regards the states parties to the NPT the Marshall Islands asserts claims similar to those asserted against the United Kingdom; as regards the states non-parties to the NPT claims are similar to those asserted against India and Pakistan.

The Marshall Islands interpreted Art. VI of the NPT first of all in light of the Court's advisory opinion delivered in *Legality of the Threat or Use of Nuclear Weapons*, but referred also to the General Assembly's resolutions and documents adopted at the NPT revision conferences.

No question with respect to the perspective of disarmament the most important provision of the operative part of the advisory opinion is paragraph 2 F adopted unanimously stating that

„There is an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

In the applications there were highlighted those parts of the opinion in which the Court stated that the obligation to negotiate in good faith on nuclear disarmament

„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.”⁽²²⁾

Without entering into details of the questions of disarmament which is out of scope of this paper, it should be mentioned that although paragraph 2 F was adopted unanimously both experts in the literature of international law and some members of the Court expressed their reservations and criticised the Court for interpreting Art. VI. in its advisory opinion, especially because that was not in the General Assembly's request. According to Judge Guillaume the Court acted *ultra petita* while ruling on nuclear disarmament.⁽²³⁾ Christopher Ford – who was the US delegate at several conferences on non-proliferation and disarmament – called *obiter dictum* the Court's statements regarding disarmament as it was not requested to make a statement on that question.⁽²⁴⁾ It should be emphasized that in view of the applications submitted by the Marshall Islands it is irrelevant whether the Court had acted *ultra vires* when it dealt with the problems of disarmament and interpreted Art. VI. of the NPT, not least because the problem of *ultra petita* in advisory opinions emerges totally differently than in contentious cases, and the Court has greater power for interpretation and reformulation of the question to which it is to respond than in contentious proceedings.⁽²⁵⁾

Other authors hold the view that the International Court of Justice made an invaluable service to the international community when, although the specific question was not before it, in connection with nuclear disarmament it dealt with Art. VI. of the NPT.⁽²⁶⁾ This view might be supported by the fact that the NPT provisions regarding disarmament are some of the weakest points of the treaty. This is especially the case because while the two other pillars of the NPT, the non-proliferation and peaceful uses of nuclear energy, are rather dealt with in detail, the third pillar, nuclear disarmament, is treated only in the preamble and in a single article. Without questioning the importance of the Court's advisory opinion in the perspective of disarmament, it should be mentioned that it suffers from the same defect as the NPT since there is no mention of the delays or the fora where negotiations on disarmament should proceed;⁽²⁷⁾ furthermore there are no answers on how to achieve nuclear disarmament, and what should be understood under nuclear disarmament.

In the applications against India and Pakistan, the Marshall Islands emphasized that the above mentioned twofold obligation is opposable *erga omnes*, since the „39. The Court's declaration is an expression of customary international law as it stands today. *All* States are under that obligation, therefore.” (39. point of the application against Pakistan; 44. point of the application against India). In this connection the applications quoted President Bedjaoui's declaration joined to the Court's opinion that „this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired a *customary character*.”⁽²⁸⁾

After deciding on its jurisdiction then the Court has to deal with the merits of the cases, provided that it establishes its jurisdiction in the cases in which the respondents are challenging the Court's jurisdiction and the admissibility of applications.

In the phase of merits of the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* cases the Court would be faced with a number of legal problems. First of all, what should be understood under the term nuclear disarmament, since it could have at least two meanings: it could cover all the acts of partial disarmament, or it could refer only to the total nuclear disarmament.⁽²⁹⁾ The other question is, in contemporary international law does exist an *erga omnes* customary rule of disarmament. Just mentioning the above two problems, the outcome of cases will much depend on the answers given by the Court to these questions.

*

The applications submitted by the Marshall Islands against the nuclear weapon states voiced the dissatisfaction of the non-nuclear weapon states with the progress of disarmament and requested the Court's help and support in order to promote the cause of nuclear disarmament.

The NPT was a "grand bargain" between the nuclear weapon states and between those states which are considered as non-nuclear weapon states. The nuclear weapon states committed themselves to "pursue negotiations in good faith" as a concession for other states to give up the nuclear weapon option.⁽³⁰⁾ However, according to several states, among them the Marshall Islands, the majority of the non-nuclear weapon states, with the exception of some of them, have observed their commitments; but the nuclear weapon states have been neglecting their obligations; and the non-nuclear weapon states are challenging the nuclear weapon states for disproportionality prioritizing the non-proliferation pillar and marginizing the disarmament pillar.⁽³¹⁾

No question that the nine applications submitted by the Marshall Islands against the nuclear weapon states are serving the cause of nuclear disarmament, since they are calling the attention of the international community to that problem. Nevertheless one could have some fears that this time again the Court was asked to resolve a problem which the politicians were not willing or unable to resolve.

¹ In its order of 22 September 1995 the Court dismissed New Zealand's request to reopen the *Nuclear Tests Case*, since the request did not fall within the provisions of para. 63 of the 1974 judgment. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*. Order of 22 September 1995, *I.C.J. Reports 1995*, 288

² *Nuclear Tests Case* (Australia v. France) Judgment of 20 December 1974, *I.C.J. Reports 1974*, 253, 269

³ *Ibid.* 270

⁴ Regarding that case see BOTHE, MICHAEL: The WHO request; and LEARY, VIRGINIA: The WHO case: implications for specialised agencies. in BOISSON DE CHAZOURNES, LAURENCE – SANDS, PHILLIPPE (eds.): *International Law, the International Court of Justice and Nuclear Weapons*. Cambridge University Press, 1999. 103-111 and 112-127

⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. Advisory Opinion of 8 July 1996. *I.C.J. Reports 1996*, 66, 76

⁶ The Court has discretionary power to give the opinion Cf. FROWEIN, JOCHEN ABR. – OELLERS-FRAHM, KARIN: 'Advisory Opinions' in ZIMMERMANN, ANDREAS – TOMOUSCHAT, CHRISTIAN – OELLERS-FRAHM, KARIN (eds): *The Statute of the International Court of Justice. A Commentary*, Oxford University Press 2006, 1411

⁷ Cf. GAVAN GRIFFITH and CHRISTOPHER STAKER, The jurisdiction and merits phase distinguished, in BOISSON DE CHAZOURNES – SANDS, 75

⁷ *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion. *I.C.J. Report*, 1996. 266

⁸ Para. 1. of the Advisory Opinion.

⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion. of 8 July 1996, Dissenting Opinion of Judge Oda, *I.C.J. Reports 1996*, 369

¹⁰ The Marshall Islands regarding the world nuclear forces used the data published by the Stockholm International Peace Research Institute.

¹¹ The details of compensation were regulated by an agreement between the two states and the Marshall Islands Nuclear Claims Tribunal was established in 1988. Cf. LOUKA, ELLI: *Nuclear Weapons, Justice and the Law*. Edward Elgar 2011. 161

¹² See the President's Orders of 16 June 2014 and 10 July 2014. The President of the Court has fixed 16 December 2014 and 16 June 2015 as respective time limits for the filing of a Memorial by the Republic of the Marshall Islands and a Counter Memorial by India; and 12 January 2015 and 17 July 2015 as respective time limits for the filing of a Memorial by the Republic of the Marshall Islands and a Counter Memorial by Pakistan.

¹³ See Order of 16 June 2014; 16 March 2015 and 16 December 2015 as respective time-limits for the filing of a Memorial by the Marshall Islands and a Counter Memorial by the United Kingdom.

¹⁴ The reservation came into question in connection with the fact that Yugoslavia made a declaration of acceptance on 26 April 1999 and filed applications with the Court against ten NATO states three days later, i.e. on 29 April 1999.

¹⁵ See para. c. of Pakistan's 1960 declaration of acceptance.

¹⁶ On the *forum prorogatum* see. ROSENNE, SHABTAI.: *The Law and Practice of the International Court 1920–2005* (4th edition with the assistance of Yaël Ronen, Martinus Nijhoff Publishers 2006) vol. II., 672-676

¹⁷ GUYOMAR, GENEVIÈVE: *Commentaire du Règlement de la Cour internationale de Justice*. Éditions A. Pedone 1983, 244

¹⁸ *Ibid.* 245.

¹⁹ At the time of the Permanent Court these were the Mavrommatis Jerusalem Concessions, the Rights of Minorities in Upper Silesia, after the second world war *The Corfu Channel, Certain criminal proceedings in France* (Republic of Congo v. France), and *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France).

²⁰ See *Certain criminal proceedings in France* (Republic of Congo v. France) and *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France) cases.

²² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports* 1996, 264

²³ *Ibid.* Separate Opinion of Judge Guillaume, 287

²⁴ FORD, CHRISTOPHER A.: DEBATING DISARMAMENT: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. *Non-proliferation Review*, vol. 14, No.3, November 2007, 402

²⁵ Cf. KOLB, ROBERT: *The International Court of Justice*, Hart Publishing 2013, 1077-81

²⁶ BOSCH, MIGUEL MARIN: The Non-Proliferation Treaty and its Future. in Boisson de Chazournes – Sands, 388

²⁷ MATHESON, MICHAEL J.: The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons. *American Journal of International Law* 1997, 367-397

²⁸ Cf. *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion of 8 July 1996, Declaration of President Bedjaoui, *I.C.J. Reports*, 1996, 274

²⁹ KIERMAN, PAUL M: „Disarmament” under the NPT: Article VI in the 21st century. *Michigan State International Law Review*, 2012, 385

³⁰ CORTRIGHT, DAVID – VÄYRYNEN, RAIMO: *Towards Nuclear Zero*. Routledge, 2010, 40

³¹ JOYNER: Daniel H.: *Interpreting the Nuclear Non-Proliferation Treaty*. Oxford University Press, 2011. 108