SEPARATE OPINION OF JUDGE BHANDARI

Concur with the conclusions of the majority — Existence of a dispute is central to the exercise of the Court's jurisdiction — On the basis of documents and pleadings of the Parties, no dispute existed — ICJ lacks jurisdiction — Greater emphasis ought to have been given that no dispute existed and lesser on the Respondent's awareness — Other preliminary objections ought to have been adjudicated in the facts of this case — Monetary Gold *principle — The Applicant lacks standing to bring this case — The Judgment would amount to an advisory opinion.*

1. I concur with the conclusions of the majority Judgment upholding the objection to jurisdiction raised by Pakistan based on the absence of a dispute. However, I wish to append a separate opinion to expand the basis of the reasoning of the Judgment. I also propose to deal with another aspect of this case, that in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by Pakistan because the issues raised in the case affect not only the Parties, but also the entire humanity. Additionally, adjudicating these objections would have further crystallized the controversy involved in the case, particularly when all documents, pleadings and submissions were placed on record *in extenso*.

2. The question, which needs to be decided, is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of filing the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence.

3. Under Article 36, paragraph 2, and Article 38, paragraph 1, of the Statute of the Court, it can only exercise its jurisdiction in case of a dispute between the parties. The concept of "dispute", and more specifically "legal dispute", is thus central to the exercise of the Court's jurisdiction. The majority Judgment acknowledges this and reflects on certain key aspects from the Court's jurisprudence on this concept.

4. Any analysis of the existence of a dispute should start with a definition of the term "dispute". *Black's Law Dictionary* offers the following definitions, which may help in guiding the analysis:

> "Dispute: A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."

> "Legal dispute: Contest / conflict / disagreement concerning lawful existence of (1) a duty or right, or (2) compensation by extent or type, claimed by the injured party for a breach of such duty or right."

5. In *Georgia* v. *Russian Federation*, in determining whether a legal dispute existed between the Parties at the time of the filing of the Application, the Court undertook a detailed review of the relevant diplomatic exchanges, documents and statements. The Court carried out an extensive analysis of the evidence, covering numerous instances of official Georgian and Russian practice from 1992 to 2008. The Court found that most of the documents and statements before it failed to evidence the existence of a dispute, because they did not contain any "direct criticism" against the Respondent, did not amount to an "allegation" against the Respondent or were not otherwise of a character that was sufficient to found a justiciable dispute between the Parties, and in this case the Court also held that it is a matter of substance and not a question of form or procedure (*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)*, pp. 84-91, paras. 30-46).

6. In *Belgium* v. *Senegal*, the Court similarly carried out a systematic review of the diplomatic exchanges that had preceded the filing of the Application in order to ascertain if the dispute had been properly notified to Senegal. The Court, in that case, concluded that at the time of the filing of the Application, the dispute between the parties did not relate to breaches of obligation under customary international law and that it had thus no jurisdiction to decide Belgium's claims (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 433-435, paras. 24-26).

7. In another important case, *Mavrommatis Palestine Concessions*, the Court considered that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In the *South West Africa* cases, the Court laid down the criterion for the existence of a dispute, which is that the claim of one party be positively opposed by the other (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

8. On application of the Court's Statute and its jurisprudence to the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, the Court lacks jurisdiction to deal with this case.

9. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute. The Judgment considers that "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" (Judgment, para. 38).

10. The Court has the freedom to choose any preliminary objection when examining its own jurisdiction. In doing so, it usually chooses the most "direct and conclusive one". Christian Tomuschat summarized the situation in clear terms in his contribution on Article 36 to the handbook *The Statute of the International Court of Justice — A Commentary* (Second Edition). He stated:

> "The Court is free to choose the grounds on which to dismiss a case either for lack of jurisdiction or as being inadmissible. It does not have to follow a specific order, nor is there any rule making it compulsory to adjudge first issues of jurisdiction before relying on lack of admissibility. The Court generally bases its decisions on the ground which in its view is 'more direct and conclusive'. In pure legal logic, it would seem inescapable that the Court would have to rule by order of priority on objections related to jurisdiction. However, such a strict procedural regime would be all the more infelicitous since the borderline between the two classes of preliminary objections is to some extent dependent on subjective appreciation. The Court therefore chooses the ground which is best suited to dispose of the case ('direct and conclusive')."[1]

11. This freedom of the Court was first stated in the *Certain Norwegian Loans (France* v. *Norway)* case, where the Court considered that its jurisdiction was being challenged on two grounds, and that the Court is free to base its decision on the ground which in its judgment is more direct and conclusive (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 25).

12. This position has consistently been taken by the Court in the years since the *Certain Norwegian Loans* matter (see, for example, *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 146; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, pp. 16-17; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 24, para. 26; and *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 298, para. 46).

13. In the instant case, by choosing the lack of awareness on the part of the Respondent as the main ground for the dismissal of the claim, it appears, with respect, that the Court has chosen not to give emphasis to the most "direct and conclusive" element of that ground for the dismissal of

[1] Christian Tomuschat, *The Statute of the International Court of Justice — A Commentary* (Second Edition), p. 707, para. 138, footnotes omitted.

the claim. The consequence is serious: lack of awareness on the part of the Respondent can be easily cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the Marshall Islands could simply bring the case again before the Court. In my view, that would be an undesirable result and should be discouraged. The real ground for the dismissal of the case ought to have been the absence of a dispute between the Parties. The majority Judgment has only dealt with preliminary objection number one, and even while dealing with that objection greater emphasis was not placed on the analysis of the documents and pleadings of the Parties, which reveals that there is no dispute between them.

14. The Parties have already submitted documents and pleadings *in extenso*. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in adjudicating this matter.

15. On careful consideration of all documents and pleadings, the irresistible conclusion is that no dispute exists between the Parties. The majority Judgment ought to have rejected the Marshall Islands' Application mainly on this ground.

OTHER PRELIMINARY OBJECTIONS

16. In the facts of this case the Court should have examined other preliminary objections taken by the Respondent, namely:

— the Republic of the Marshall Islands' case against Pakistan was brought in bad faith;
— the Republic of the Marshall Islands' claims against Pakistan are manifestly without legal merit or substance;
— the Republic of the Marshall Islands' Memorial does not conform to the Rules of the Court and the ICJ Practice Directions;

— the Republic of the Marshall Islands has the burden of proving that the Court has jurisdiction and that its Application is admissible, and it has failed to discharge its burden of proof in its Application and Memorial;
— the Republic of the Marshall Islands' claims do not come within the scope of the Parties' consent to the Court's jurisdiction for reason of the reservations included with their Article 36 (2) declarations;

— the Application is inadmissible because no dispute existed between the Republic of the Marshall Islands and Pakistan at the time the Application was submitted to the Court;
— the Application is likewise inadmissible because the Republic of the Marshall Islands does not have *jus standi* in connection with the claims as formulated in the Application;

— the Application of the Republic of the Marshall Islands is an impermissible attempt to re-open the question of the legality of nuclear weapons and to obtain what would, in effect, amount to an advisory opinion;
— the Application of the Republic of the Marshall Islands is inadmissible because it has failed to bring indispensable parties before the Court;
— the judicial process is inherently incapable of resolving questions of nuclear disarmament involving multiple States; and
— entertaining the Republic of the Marshall Islands' claims would compromise the sound administration of justice and judicial propriety and integrity.

17. Out of this long list of preliminary objections, in my considered view, three preliminary objections ought to have been examined by the Court. These are:

(a) *Monetary Gold* principle, i.e., the absence of essential parties not party to the instant proceedings;
(b) the Applicant lacks standing to bring this case; and

(c) the Judgment would amount to an advisory opinion.

18. Each of these is analysed in turn in the following paragraphs.

Monetary Gold *Principle*

19. I deem it proper to very briefly deal with the other preliminary objections to demonstrate that those objections are also substantial in character and should have been adjudicated by the Court.

20. The Respondent argues that the adjudication of the Republic of the Marshall Islands claims would necessarily implicate the rights and obligations of other States, i.e., that essential parties are absent (Counter-Memorial of Pakistan, hereinafter "CMP", Part 8, Chapter 4, pp. 56-59). Pakistan stated in its Counter-Memorial that

> "The RMI's Application contravenes the principle of consent which bars the adjudication of the legal obligations of States parties under the NPT and other States without their agreement. Pakistan contends that the *Monetary Gold* principle is directly applicable to the case brought by the RMI, because the Court cannot decide this case without deciding whether the NWS [nuclear-weapon states] that are party to the NPT are in breach of their obligations under Article VI of the NPT, which the RMI seeks to enforce against Pakistan under the guise of customary international law obligations."[2]

[2] CMP, para. 8.78.

21. The Applicant in its Application submitted a chart, which indicates that India, Pakistan and the United Kingdom, Respondents in these three proceedings put together, possess less than 3 per cent of the total nuclear weapons in the world (Application of the Marshall Islands, p. 9). The other countries, who possess the other more than 97 per cent of the nuclear weapons in the world, are not before the Court and consequently the Court is precluded from exercising its jurisdiction in this matter with respect to those States (the States possessing 97 per cent of the nuclear weapons). Therefore, it is indispensable to have the participation of the other countries who possess such a large quantity of the world's nuclear weapons.

22. The Court considered in its 1996 Advisory Opinion on nuclear weapons that any realistic search for general and complete disarmament would require the co-operation of all States (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 100).

23. This preliminary objection is substantial in character and it ought to have been adjudicated by the Court.

Lack of Standing of the Applicant

24. Pakistan bases its arguments on this point on two grounds:

> "First, the RMI has no standing to claim in its own right in this case, because it has failed to (i) identify the existence of a legal dispute between the RMI and Pakistan at the time of the filing of the Application and (ii) submit even prima facie evidence of any concrete or imminent harm fairly traceable to the challenged action or inaction of Pakistan that would be redressed by a favourable decision by this Court.
>
> Second, given that the Court has not been presented with even prima facie evidence of the existence of an obligation *erga omnes* to conduct negotiations and 1996 Advisory Opinion provides no support for the RMI's 'essential contention' that 'the customary obligation to conduct negotiations is an obligation *erga omnes*' and that, '[a]s such, every State [including the RMI] has a legal interest in its timely performance', the RMI cannot claim a legal interest in the timely performance of a non-existing obligation and hence has no right to an adjudication of its claims as formulated in the Application."[3]

25. The Application of the Republic of the Marshall Islands is based on the premise that there is an *erga omnes* obligation to negotiate nuclear

[3] CMP, p. 52, paras. 8.50-8.51, citing Memorial of the Republic of the Marshall Islands (MMI), para. 31.

disarmament, which entitles it to come before the Court invoking the international responsibility of States that in its view have failed to fulfil this obligation. The determination of the existence of such an obligation, independent of Article VI of the Non-Proliferation Treaty, is a question more appropriate for an analysis of the merits of this case. But even assuming, for the purposes of argument, that such an obligation exists, the absence of any prima facie evidence of harm, realized or potential, deprives the applicant of standing to bring this claim.

26. I would like to point out, for the sake of completeness, that these considerations do not ignore the serious effects of nuclear testing in the past in the territory of the Republic of the Marshall Islands when it was a protectorate of the United States of America. However, such unfortunate circumstances are not and cannot be the basis for their claims as they would be excluded from the temporal scope of the alleged dispute.

27. This preliminary objection is also of a substantial character and it ought to have been adjudicated by the Court.

Any Judgment Given by the Court Would Amount to an Advisory Opinion

28. Pakistan submits that "[t]he RMI's assertion that the 'Application is not an attempt to re-open the question of the legality of nuclear weapons' must be rejected as self-serving"[4]. It further contends that the Statute of the Court does not provide a basis for revisiting or appealing from the Court's advisory opinions. Of course, the Respondent is here making reference to the 1996 Advisory Opinion issued by the Court on the *Legality of the Threat or Use of Nuclear Weapons*, which was requested by the United Nations General Assembly and where 22 countries participated, including the Republic of the Marshall Islands but not Pakistan.

29. In Pakistan's submission,

> "[the] Court has already exhaustively addressed the question of the legality of the threat or use of nuclear weapons in the exercise of its advisory jurisdiction, after hearing a large number of States and intergovernmental organizations, including the RMI"[5].

30. As I have discussed above, the absence of essential parties for achieving effective global disarmament from these proceedings renders any potential decision by this Court on the claims submitted devoid of any practical effect. In such circumstances, it appears that indeed a decision from this Court in this matter would more closely resemble an advi-

[4] CMP, p. 55, para. 8.64, citing Application of the Republic of the Marshall Islands (AMI), para. 2.

[5] *Ibid.*, p. 56, para. 8.71.

sory opinion as a general statement from the Court on a particular aspect of international law without any immediate binding effect on the Parties.

31. This preliminary objection also deserved to be considered.

32. The majority Judgment ought to have held clearly that, on the basis of documents and pleadings of the Parties, no dispute existed between the Parties at the time of filing the Application while upholding Pakistan's first preliminary objection.

(Signed) Dalveer BHANDARI.