SEPARATE OPINION OF JUDGE OWADA

1. I concur with the conclusions of the Judgment as contained in its operative part *(dispositif)* (para. 59). Yet I am particularly sensitive to the tragic history of the Republic of the Marshall Islands (hereinafter the "RMI"), which as a nation suffered as a consequence of the extensive nuclear testing that took place on its territory. As recognized in the present Judgment, this experience has created reasons for special concern about nuclear disarmament on the part of the RMI, including its compelling interest with respect to the obligation of nuclear-weapon States under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (para. 44). It is for this reason not too difficult to comprehend the position adopted by the RMI in the present case in relation to the duties of the nuclear-weapon States under Article VI of the NPT. And yet, when it comes to the question of whether this court of law is able to exercise jurisdiction in relation to the claim advanced by the Applicant, something more than a mere divergence of positions between the Applicant and the Respondent is required as a matter of law. More specifically, it has to be demonstrated that this factual divergence of positions between the Parties has crystallized into a concrete legal dispute capable of adjudication by this Court at the time of the filing of the Application.

2. The task of the Court in the present case is therefore to ascertain, not the existence *vel non* of a divergence of opinions between the Parties, but whether this divergence had developed into a concrete *legal dispute* by the time the Application was filed. The International Court of Justice, as a court of law, has to confine its role strictly to the legal examination of the claim submitted to it. It is for this reason that I feel it is incumbent upon me to elaborate upon a few key issues in the present Judgment, with a view to clarifying the reasoning of the Court in this legal, though politically charged, context.

I. The Criteria for Ascertaining the Existence of a Dispute

3. The first issue concerns the standard applied by the Court in determining whether or not a dispute existed at the time of the filing of the Application by the RMI. Relying on the established jurisprudence of the Court, the Judgment begins with the definition of a dispute as a disagreement on a point of law or fact, a conflict of legal views or of interests, and states that, for the purpose of establishing the existence of a dispute, it

must be shown that the claim of one party is positively opposed by the other (Judgment, para. 37). However, beyond this generally accepted statement of principle, which is an abstract and general formulation, the case law of the Court does not reveal much more in terms of the concrete legal standard to be applied in determining how this requirement of "positive opposition" could be established.

4. It is important to recognize in this context that, as stated by the Judgment, the "determination of the existence of a dispute is a matter of substance, and not a question of form or procedure" (*ibid.*, para. 38). Indeed this point is not a mere formality but a matter of cardinal significance as an *indispensable precondition* for the seisin of the Court by the Applicant. The filing of an application concerning a claimed dispute can stand only on the basis of *the consent of the parties*, particularly when carried out through the parties' declarations accepting the compulsory jurisdiction of the Court under the Optional Clause. In fact, these declarations endow the Court with jurisdiction to entertain only those disputes falling within the scope of the declarations of the parties (*ibid.*, para. 36). This means that a dispute must first of all be shown to exist between the parties in the sense of, and to the extent of, these declarations. It is for this reason that the Court has held that "[a] mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). In this way, the precondition of the existence of a dispute goes to the very heart of the exercise of jurisdiction by the Court. In this sense, this is not a mere technicality.

5. It may be recalled, on the other hand, that the Permanent Court of International Justice observed that the Court, as an international court, "is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). The Permanent Court in that case determined on that basis that "[e]ven 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" inasmuch as "it would always have been possible for the applicant to re-submit his application in the same terms" *(ibid.)*. It is also true that this Court, as its successor institution, has from time to time accepted this approach (see, e.g., *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. 438-440, paras. 81-82). Yet in the present case there is in my view no place for the application of this doctrine. The absence of the alleged dispute at the time of the filing of an application is an essential flaw that serves to invalidate the very cause of action which constitutes the legal basis on which the application is founded, and as such is not a mere pro-

cedural imperfection that could be cured by a subsequent supplementary act of perfection, as was the case with the *Mavrommatis Palestine Concessions* precedent. In finding that a dispute did not exist at the time of the filing of the Application, the Court is therefore bound to conclude that it cannot proceed to an examination of the merits of the case.

6. A legal dispute for this purpose must be clearly distinguished from a mere divergence or difference in the views or positions that could exist in fact between the respective parties on the subject-matter at issue. In international relations between States, as is so often the case between individuals, States frequently adopt different or divergent positions on a given issue. Such differences or divergences, even when they are well established, do not *ipso facto* represent a legal dispute of which a court of law can be seised for adjudication.

7. Judge Morelli cogently highlighted this important distinction between a divergence of views as a matter of fact and a conflict of legal interests as a matter of law in his opinion in the *South West Africa* cases, as follows:

> "a dispute consists, not of a conflict of interests as such, but rather in a contrast between the respective attitudes of the parties in relation to a certain conflict of interests. The opposing attitudes of the parties, in relation to a given conflict of interests, may respectively consist of the manifestations of the will by which each of the parties requires that its own interest be realized . . .
>
> It follows from what has been said that a manifestation of the will, at least of one of the parties, consisting in the making of a claim or of a protest is a necessary element for a dispute to be regarded as existing." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*; dissenting opinion of Judge Morelli, p. 567, para. 2.)

It is this positive opposition manifested between the parties which transforms a mere factual disagreement into a legal dispute susceptible of adjudication.

8. As the Court has repeatedly confirmed in its jurisprudence, the existence of a legal dispute in this sense is a matter for objective determination by the Court (*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. 26, para. 50). In making this objective determination, the Court has always been led to consider whether the party claiming the existence of a dispute (i.e., the applicant) has established by credible evidence that its claim is positively opposed by the other party (i.e., the respondent).

9. It must be emphasized that the context in which this issue of the existence of a dispute *vel non* has arisen is unique in each case. By my calculation, there are 19 cases throughout the case history of the PCIJ

and the ICJ in which this issue has been raised. An analysis of the jurisprudence of the Court could create the impression that the Court has applied changing criteria in assessing whether there is a dispute for the purpose of its jurisdiction in these cases. In each of these cases, however, the Court has carefully considered the specific facts and unique circumstances of the case and assessed the evidence as presented by the parties, leading to a careful assessment of factors such as the existence *vel non* of any notification of the dispute through prior diplomatic exchanges, of an exhaustion of negotiations between the parties on the subject-matter at issue, and even of any reaction to certain statements of one party by the other party.

10. It might be tempting to conclude from these cases that the Court's reliance on each of these factors evidences a certain threshold that must be met in order to establish the existence of a dispute. Such an interpretation of the jurisprudence of the Court might appear to offer a neat legal standard deliberately developed over time by the Court and applicable to all cases, including the present one. Yet, in my view, the jurisprudence of the Court on this issue is not quite so linear. These cases, many of which are discussed in the present Judgment, simply represent case-specific instances in which the evidence presented by the parties was adjudged by the Court to be sufficient — or insufficient, as the case may be — to establish the existence of a dispute. There is thus an inherent danger in any attempt to formulate the Court's consideration of these case-specific types of evidence into a threshold capable of serving as a litmus test determinative of the existence of a legal dispute in each case.

11. This point must be borne in mind when appreciating the true meaning of the element of the respondent's awareness, as introduced by the present Judgment. The Judgment states that what is required is that the "evidence must show that . . . the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41). The Judgment could appear to introduce this element of "awareness" out of the blue, as if it were a new yardstick to be applied in the context of the present case. This could invite the criticism that the Court has conjured up yet another new criterion for judging whether or not there is a legal dispute. In my view, however, this aspect of the Judgment must be understood in the context of what has been stated above.

12. The reality, as stated earlier, is that the issue of the existence of a dispute has arisen in cases with diverse factual and legal claims. The evidence presented by the applicants in these cases includes direct diplomatic exchanges between the parties, statements made in multilateral fora, and inferential conduct. The Court has demonstrated its willingness to weigh each of these disparate factors in their respective contexts. In the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, for example, the Court examined statements made in multilateral

settings, but paid "primary attention" to statements made by the Executive because "it is the Executive of the State that represents the State in its international relations and speaks for it at the international level" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 87, para. 37). In other words, it was only those statements that could serve to make the respondent *aware* of the claims that were considered relevant; positive opposition could also be inferred from "the failure of a State to respond to a claim in circumstances *where a response is called for*" (*ibid.*, p. 84, para. 30; emphasis added). On the other hand, in considering the conduct of the parties in assessing the existence of a dispute, the Court has observed that "the position or the attitude of a party can be established by inference, whatever the professed view of that party" in order to establish the requisite positive opposition between the parties (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89). It should thus be clear that the Court has considered a wide array of multifarious factors in answering the question as to whether a dispute existed at the time of the filing of the application.

13. The crucial point is that the common denominator running through these diverse cases is the element of awareness; as stated in the Judgment, it is the awareness of the respondent which demonstrates the transformation of a mere disagreement into a true legal dispute between the parties. This principle requires the applicant to establish that the respondent "was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, para. 41). It may not strike one as a strict legal standard that is easy to establish in all concrete situations, but it nevertheless forms an essential common denominator underlying the reasoning of the Court in its analysis of the existence of a dispute throughout its case history.

14. I have tried to demonstrate that this element of awareness is not being introduced in the present Judgment as another new criterion that could be used as an alternative to other factors to establish the existence of a dispute. In my view, this element is critical, inasmuch as it is the "objective awareness" of the parties that transforms a disagreement into a legal dispute. The element of awareness therefore constitutes an essential minimum common to all cases where the existence of a dispute is at issue.

II. The Critical Date for Determining the Existence of the Dispute

15. Another important aspect of the present case is the time at which a dispute must be shown to exist. As stated in the Judgment, the Court has

made clear that "the date for determining the existence of a dispute is the date on which the application is submitted to the Court" (Judgment, para. 42). However, the RMI argued that the Judgments of the Court in several previous cases support its contention that statements made *during* the proceedings may serve as evidence to establish the existence of a dispute. In addition to the example of the *Certain Property (Liechtenstein* v. *Germany)* case, the RMI relies on the Judgment of the Court in the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (*ibid.*, para. 54). The Court cogently explained the correct meaning of these precedents in the Judgment, but the latter case would seem to require a more detailed account of the unique circumstances presented by that case in order to correct this understanding of the Applicant.

16. It is true that the Court in its 1996 Judgment in the *Genocide* case did not make an explicit reference to any evidence before the filing of the Application in affirming the existence of a dispute. However, it is important to highlight the two key elements unique to that case. They are both highly relevant and serve to distinguish this 1996 Judgment from the rest of the Court's jurisprudence on the issue of the existence of a dispute at the time of the filing of the application. The first is that, in that case, Bosnia and Herzegovina invoked the Convention on the Prevention and Punishment of the Crime of Genocide as the source of the Court's jurisdiction. Article IX of the Convention provides that:

> "'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'" (*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. 614, para. 27.)

Yugoslavia, as the Respondent, argued that there was no "international dispute" falling under the terms of Article IX of the Genocide Convention. In other words, in this case Yugoslavia did not contest the "existence of a dispute" for the purposes of the seisin of the Court, but rather questioned the "existence of a dispute for the purposes of the compromissory clause of the Convention (i.e., Article IX)", as in its view this was not an *international* dispute for the purposes of the Convention. This clearly serves to distinguish that case from other cases, where the issue was purely "the existence of a legal dispute".

17. Furthermore, in weighing the statements made by the parties during the course of the proceedings, the Court "note[d] that there *persists*" a situation of opposing views, thus signifying that a dispute had been in existence

at the time of the filing of the Application (*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. 614, para. 29; emphasis added). The use of this language could be taken as an indication of the position taken by the Judgment that the statements made after the filing of the Application were referred to only as an affirmation of the *continuation* of a pre-existing dispute.

18. In sum, the mixed questions of law and fact tied to the merits of that case made the question to be decided by the Court very different from the question at issue in the present proceedings. In light of these factors, the reference in that Judgment to statements made after the filing of the Application were due to the special circumstances of that case and therefore should not be understood as signalling a departure from the Court's consistent jurisprudence on this subject.

III. The Question of the Evidence Presented by the Marshall Islands

19. Finally, the Judgment of the Court in this case may appear to some to adopt a piecemeal approach with regard to the evidence presented by the Applicant. Specifically, some may feel that the Court considers and ultimately rejects as insufficient each individual category of evidence submitted by the RMI, but does not weigh the evidence in a comprehensive way. It may be recalled in this context that the Applicant argued that:

> "the RMI and the United Kingdom, by their opposing statements and conduct, have manifested the existence of a dispute over the United Kingdom's non-compliance with its Treaty and customary international law obligations 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" (Memorial of the Marshall Islands, para. 102).

In other words, the Applicant argued that the evidence when taken as a whole demonstrated the existence of a dispute.

20. It is my view, however, that the Court did examine all of the evidence presented and did correctly determine that the evidence — *even when taken as a whole* — was not sufficient to demonstrate the existence of a dispute.

21. Having stated this, however, it may be useful to add that a new legal situation might emerge as a result of the present proceedings in which the existence of a dispute could be said to have crystallized. A new Application could be filed on this basis, which might not be subject to the same

preliminary objection to jurisdiction as upheld in the present case. This would be the case to the extent that the present Judgment reflects the position of the Court with respect to the legal situation that existed at the time of the filing of the Application in the present case. In this sense, the present Judgment arguably might not automatically constitute a legal bar to the examination of a new claim on its merits in the future. The viability of such a new application would naturally remain an open question and its fate would depend upon the Court's examination of *all* of the objections to jurisdiction and to the admissibility of the claim. The Court would only be in a position to examine the merits if it were satisfied that it had jurisdiction and the claim was admissible with regard to such a new case.

(Signed) Hisashi OWADA.