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 should have been adjudicated in the facts of this case — Monetary Gold *principle — Judgment falls outside the judicial functions of the Court.*

1. I concur with the conclusions of the majority Judgment upholding the objection to jurisdiction raised by the United Kingdom 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 the United Kingdom 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. 41).

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 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

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

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, pleadings and submissions *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, pleadings and submissions 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 the other preliminary objections taken by the Respondent. All five preliminary objections advanced by the United Kingdom are reproduced below:

(i) The Court lacks jurisdiction because "there is no justiciable 'dispute' between the Marshall Islands and the United Kingdom . . . within the meaning of this term in Articles 36 (2), 38 (1) and 40 (1) of the Court's Statute, Article 38 (1) of the Rules, and relevant applicable customary international law and jurisprudence" (Preliminary Objections of the United Kingdom of Great Britain and Northern Ireland of 15 June 2015, hereinafter "POUK", para. 6).

(ii) The Court lacks jurisdiction "pursuant to the Optional Clause Declarations of the United Kingdom and the Marshall Islands, these Declarations being the sole basis relied upon by the Marshall Islands to found the jurisdiction of the Court" (POUK, para. 7).

(iii) Additionally or alternatively, "the Marshall Islands, by its Optional Clause Declaration of 24 April 2013, accepted the compulsory jurisdiction of the Court only 'for the purpose of the dispute' that it now alleges with the United Kingdom. As such disputes are excluded from the jurisdiction of the Court by operation of paragraph 1 (iii) of the United Kingdom's Optional Clause Declaration, the Court has no jurisdiction to decide on the claims in question" (*ibid.*, para. 8).

(iv) The Application is inadmissible and/or that the Court lacks jurisdiction to address the claim on the ground of the absence from the proceedings of States whose essential interests are engaged by it (POUK, para. 9).
(v) Any judgment of the Court would have no practical consequences, the Application falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction in any event (POUK, para. 10).

17. Out of these five preliminary objections, in my considered view, some preliminary objections are direct and conclusive, which in the facts and circumstances should have been adjudicated by the Court so that the Applicant may not be able to re-open the same proceedings later on. These are:

(a) *Monetary Gold* principle, i.e., the absence of essential parties not party to the instant proceedings;
(b) the Marshall Islands claim is excluded in consequence of the Optional Clause Declaration of the Parties; and
(c) the Marshall Islands' claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the Claim.

Monetary Gold *Principle*

18. As to *Monetary Gold*, 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.

19. 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).

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

The Parties' Optional Clause Declarations

21. In its submission on preliminary objections, the United Kingdom argued that, if the Court were to find that there was a justiciable dispute between the Parties (which it denies), in that case it would not be a dis-

pute "that is properly amenable to adjudication by the Court simply by reference to situations or facts subsequent to 17 September 1991", as required by the Marshall Islands' Optional Clause Declaration. This is so because any dispute that could be found to exist would necessarily turn on the alleged continuous conduct of the United Kingdom stretching from the entry into force of the NPT on 5 March 1970 until the present. The Respondent argues that given that "a material component of the dispute falls outside the Court's jurisdiction *ratione temporis*, the Marshall Islands' claim against the United Kingdom falls outside the jurisdiction of the Court *in toto*" (POUK, para. 64).

22. This is a substantial objection in character, and it should have been considered by the Court.

The Claim Falls Outside the Jurisdiction of the Court

23. The United Kingdom argues that the claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the claim (POUK, paras. 104-112). In its Counter-Memorial, the Respondent submitted that "even if the Court finds that it has jurisdiction in a particular case, it may decline to exercise that jurisdiction if it considers that to do so would be incompatible with its function" (*ibid.*, para. 104). Reliance was placed on this Court's decision in the *Northern Cameroons* case, where the Court considered that

> "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore . . . The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

In application of this concept of judicial integrity, the Respondent argued that the Court should decline to exercise its jurisdiction in circumstances where it would not be in a position to "render a judgment capable of effective application" (*ibid.*, p. 33).

24. This preliminary objection also deserved adjudication.

25. 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 the United Kingdom's first preliminary objection.

(*Signed*) Dalveer BHANDARI.