

The awareness requirement and its problematic consequences for the Court's jurisdiction

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1. Introduction

The paper of Béatrice Bonafé takes up a very important and basic question concerning proceedings before the ICJ, namely the issue of the existence of a dispute. It is absolutely evident that where there is no dispute, there is nothing to be decided by a court. But what exactly qualifies a dispute? The Statute and the Rules of the ICJ are not really helpful in answering this question. While Article 36(1) of the ICJ Statute only refers to 'cases' and 'all matters specially provided for in the Charter of the United Nations', Article 36(2) refers to legal disputes but only with regard to possible subject-matters of the dispute and Article 38(1) of the Statute which also uses the term dispute only concerns the law applicable for decision; in the same way Article 38(1) of the Rules of Court also explicitly uses the term 'dispute', without, however, defining the term.

In the absence of an official definition of the term, the formula given by the PCIJ in the *Mavrommatis case*¹ serves until today as the guiding definition. In the nearly 100 years of jurisdiction of the ICJ and its predecessor, the PCIJ, defendant States rather often objected that there was no dispute existing between the parties, but in no case did the Court dismiss a case – although sometimes specific claims – for the reason of the non-existence of a dispute. The practice of the ICJ rather shows a generous approach, sometimes even an extremely and rather

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¹ *The Mavrommatis Palestine Concessions (Greece v United Kingdom)* PCIJ Rep Series A No 2, 11, according to which 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons'.



controversial large definition of the dispute² which allows the conclusion that the Court, as the World Court, is aware of its role in the UN system, in particular the peaceful settlement of international disputes³ and is and should be, in principle, always willing to admit any application in order to contribute to the peaceful settlement of disputes. Thus the issue of the existence of the dispute was one that did never pose a real problem as the existence of a dispute could be and was admitted whenever the Court was ready to decide the case.

The decision in the *Marshall Islands cases* therefore may give in the first place reason for reflecting on why the Court took this unusual step, why it admitted the first objection although other objections could have led to a more convincing judgment.⁴ Such reflection can, however, only lead to speculation so that it must suffice in this context to cite the dissenting opinion of Judge Bennouna who referred to the role the Court could and should play in ‘questions of crucial importance for the security of the world’, a role that he characterized as the *raison d’être* of the Court leading him to the conclusion that the majority by taking its decision ‘shelter[ed] behind some kind of formalism, at the risk of witnessing a deterioration of the situation between the parties’ and that the majority is thus ‘not allowing the Court to fulfil its function as the principal judicial organ of the United Nations, whose task is to assist the Parties in settling their disputes and thereby to contribute to peace through the implementation of international law’.⁵ The use of the term ‘shelter behind...’ seems to refer to some hesitation in the majority of the Court to address the question concerning the obligation to negotiate and/or to reach a positive outcome of such negotiations.

Although it would be highly interesting to know the real motivation underlying the problematic decision in the case at stake, what is, however, rather impossible due to the confidentiality of the Court’s deliber-

² For the case law cf the separate and dissenting opinions to the Judgment of 5 October 2016 in the *Marshall Islands cases*, in particular the dissenting opinion of Judge Crawford, para 7 ff.

³ Cf *ibid* in particular the dissenting opinion of Judge Bennouna and Judge Robinson.

⁴ Cf *ibid* Declaration of Judge Gaja.

⁵ Cf *ibid* Dissenting Opinion Judge Bennouna 4.



ations,⁶ it seems more realistic to turn now to the consequences flowing from the new definition of what are the requirements defining the existence of a dispute, namely the requirement of the awareness of the existence of a dispute by the defendant at latest at the moment when the application is made.

2. Practice of the Court

The Court is without any doubt completely right in stating that there must be a dispute at the time of filing an application. Article 38(1) of the Rules requires the applicant to indicate *inter alia* ‘the subject of the dispute’, that is that a dispute is existing in the eyes of the applicant when bringing the application. As Béatrice Bonafé explains in detail the defendant has a series of means at its disposal to respond to the claim and to protect its position if it is of the opinion that no dispute exists. It is then up to the Court to decide. It is thus the appreciation by the Court of the behavior of the parties before the application was brought which implies a certain degree of discretion. But even if the Court comes to the conclusion that there was no dispute at that point of time, the practice of the Court, reaffirmed explicitly in the *Croatia v Serbia* case⁷, stands for a basic principle governing the approach of the ICJ, namely that formalism should not have a predominant place in international proceedings but that judicial economy should prevail.

In particular with regard to the existence of a dispute the mere controversial discussion of this question in the Court clearly reflects that at least at that time there is a disagreement on a point of law so that im-

⁶ Cf however to the contribution of N Krisch in the EJIL:Talk!, who raises the question whether it might be by pure accident that from the eight judges constituting the majority (including the casting vote of the President) six are nationals of nuclear-weapons States and the other two, Japan and Italy, are States that have benefitted from the protection offered by nuclear weapons States, a statement that shall remain uncommented here (‘Capitulation in The Hague: The Marshall Islands Cases’ EJIL:Talk! (10 October 2016) <www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/#more-14629>); cf also MA Becker, ‘The Dispute that Wasn’t There: Judgments in the *Nuclear Disarmament* Cases at the International Court of Justice’ (2017) 6 Cambridge Intl L J 4.

⁷ *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) Judgment [2008] ICJ Rep 439.



mediately after the dismissal of the application a new application could be brought, a fact that under pragmatic aspects should lead to avoid duplication of procedural steps⁸ which, by the way, are complicated and time consuming due to the requirements for bringing an application⁹. In the case at hand it would not have been too far-fetched to follow the precedent of the *Genocide case (Croatia v Serbia)*¹⁰ where the Court had found it convenient not to ‘attach to matters of form the same degree of importance which they may possess in municipal law’ as ‘it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew – or to initiate new proceedings – and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled’.¹¹

This would have been the more convenient in the present case, as the United Kingdom had meanwhile, in 2014, amended its declaration under Article 36(2) of the Statute in the sense that ‘any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another party’ shall be excluded from the Court’s jurisdiction. In the present case this could have led to the consequence that even though the ‘awareness’ of the existence of a dispute had been established through the procedure before the Court, the Marshall Islands could not bring the case to the Court due to the amendment of the declaration in 2014.¹² Moreover, a further amendment of the declaration in 2017 which used or rather misused the awareness requirement to its extremes, excluded definitely that the Marshall Islands could have the

⁸ Cf in particular the Separate Opinion of Judge Tomka in the *Marshall Islands* case, para 26.

⁹ Cf at the website of the ICJ ‘Notes for the Parties Concerning the Preparation of Pleadings’ (<www.icj-cij.org/en/other-texts/note-for-the-parties>) and ‘Instructions for the Registry’ (<www.icj-cij.org/files/texts-governing-the-registry/instructions-for-the-registry-en.pdf>). Cf also S Yee, ‘Article 40’ in A Zimmermann, C Tomuschat, K Oellers-Frahm, C Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 962 ff.

¹⁰ Cf *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (n 7) 438 para 82.

¹¹ *ibid* 441 para 85.

¹² Cf in this context L Palestini, ‘Forget About Mavrommatis and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligation to Negotiate Cessation of the Nuclear Arms Race and Nuclear Disarmament’ (2017) 8 *J Intl Dispute Settlement* 557-577.



dispute decided by the Court.¹³ By the way, the requirement of Article VI of the NPT and the behavior shown by the defendants, in particular in international fora, could reasonably have been assessed as demonstrating the existence of a dispute – if the Court had been willing to decide the question.¹⁴ Whether there was a breach of the Treaty, would then be another question that would have been the subject-matter of the decision on the merits.

As the Court was clearly conscious of this fact, in particular when compared to other cases where it had admitted the existence of a dispute in a much more ambiguous context, it introduced the new requirement of ‘awareness’. As Béatrice Bonafé demonstrates convincingly this new requirement simply is counterproductive. As she rightly states the awareness requirement is a subjective condition so that the Court has created a pitfall for itself as it would be rather difficult to prove the contrary. But what is more is that the Court opens a door for excluding its own involvement in the settlement of international disputes, a fact that completely contravenes the progress reached in international relations by the creation of judicial dispute settlement, before all the establishment of the World Court with universal competence, although dependent on the acceptance by the States. It is this aspect on which the following considerations will concentrate.

3. *The ‘Awareness Requirement’ and the ‘Withdrawal on Notice Reservation’*

In order to explain this concern it is necessary to go back to the *Nicaragua case*,¹⁵ which, by the way, was one of the first and in any case most important cases involving political questions – an aspect that played a relevant role in the argument of the defendant States in the *Marshall Islands cases* too. When in the Nicaragua conflict the United States became aware of the fact that Nicaragua would apply to the ICJ, it proceeded by withdrawing its declaration of acceptance of the Court’s jurisdiction un-

¹³ *infra* section 4.

¹⁴ Cf Becker (n 6).

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Preliminary Objections) Judgment [1984] ICJ Rep 392.



der Article 36(2) of the Statute three days before Nicaragua's application reached the Court. However, this step was not successful as the US had fixed a time-limit of five years of validity of its declaration and thereafter a time-limit of six months after notice for the expiration of its submission to the jurisdiction of the ICJ. Therefore, the withdrawal of its declaration under the optional clause was without effect for the case at stake. The consequence of this example was that an increasing number of States reserved in their declaration accepting the Court's jurisdiction under Article 36(2) of the Statute the right 'at any time, by means of a declaration addressed to the Secretary General of the United Nations, and with effect as from the date of receipt of such notification, to amend or withdraw this declaration'.¹⁶

Such reservation on *withdrawal on notice* combined with the new *requirement of awareness* of the existence of a dispute allows States to show an attitude of openness to the peaceful settlement of disputes in submitting to the jurisdiction of the Court, but to escape from their obligation in the case that they will be 'made aware' of an application to be brought against them before the Court. The requirement of awareness makes it possible for States to enjoy a rather comfortable situation: they have a judicial organ ready to hear their claims, but when a claim will be brought against them, they may withdraw their submission. Declarations under Article 36(2) of the Statute containing a 'withdrawal on notice clause' were always hard to accept and seemed to be 'the price to be paid for adherence by States to the optional clause',¹⁷ but in combination with the new awareness requirement they nearly make a mockery of the aim to promote the 'obligatory' jurisdiction of the ICJ. This situation is similar to the old 'domestic affairs reservation' because it lies in the hands of the State concerned to 'admit' whether a case can successfully be brought against it or not.

It may be supposed that after the decision in the *Marshall Islands cases* and the requirement of the new criterion of the awareness that a dispute is existing and may be brought before the Court, States will make even more use of the withdrawal on notice reservation.

¹⁶ Cf C Tomuschat, 'Article 36' (n 9) 678, MN 73 ff.

¹⁷ *ibid* MN 74.



4. *The new optional clause declaration of the United Kingdom*

A highly interesting and hardly acceptable example for such development is already in existence, namely the Optional Clause Declaration of the United Kingdom deposited on 22 February 2017 after the decision in the *Marshall Islands cases*.¹⁸ In that declaration the United Kingdom even twice reserves the right to withdrawal on notice. In the first paragraph it accepts in the usual terms the jurisdiction of the Court ‘... , until such time as notice may be given to terminate the acceptance, ...’. And in paragraph 2 of its declaration it states: ‘The Government of the United Kingdom also reserves the right at any time, by means of notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may thereafter be added’.

In this context the new reservation in subparagraph v of the declaration is relevant according to which the United Kingdom excludes from the Court’s jurisdiction ‘any claim or dispute in respect of which the claim or dispute in question has not been notified to the United Kingdom by the State or States concerned in writing, including of an intention to submit the claim or dispute to the Court failing an amiable settlement, at least six months in advance of the submission of this claim or dispute to the Court’. This reservation seems bluntly incompatible with the introductory terms of the declaration where it is said that the United Kingdom ‘accepts as compulsory ipso facto and *without special convention*, (emphasis added) ... the jurisdiction of the Court’. It is true that the United Kingdom does not require a ‘special convention’, meaning a special agreement, which clearly is the alternative means to a declaration under Article 36(2) of the Statute for seising the Court, but this reservation is even worse because the declaration as submitted allows the United Kingdom to terminate the jurisdiction of the Court if it becomes aware that a dispute, failing an amiable settlement, might be brought before the Court against it.

Such declaration makes an application dependent from sort of a consent of the State against which the application will be addressed, a fact that cannot but have a negative consequence for the peaceful settlement

¹⁸ Full text available at <www.icj-cij.org/en/declarations/gb>.

of disputes and the role that the ICJ, the World Court, can play in this context. Although it is true that in contentious cases the ICJ can only decide on legal disputes, it is as well true that it is for the Court to find whether a dispute exists or not. Each court of law may be confronted with frivolous claims, with claims which are devoid of any substantiation or claims which manifestly will be dismissed on the merits, but this decision lies with the Court and is part of the essence of its judicial function. And, by the way, it seems worth mentioning that conducting proceedings before the ICJ is rather expensive so that a State will not bring a claim just for fun. And even if it does so it is for the Court to react independently of any prior involvement of the defendant.

As only in cases where the clause establishing the Court's jurisdiction so provides negotiations have to be conducted before a case is brought to the Court, the new requirement seems to introduce a general new precondition to this effect. Although this is, in principle, admissible, the fact that a State must be informed of the intention to bring a claim, in combination with the withdrawal on notice reservation, can – under aspects of good faith – only be understood in the sense that the negotiations are in fact the only means to settle the dispute. Negotiations do have their merit and should be a normal means in case of dispute as reflected in Article 33 UN Charter, but they are only one of the methods of dispute settlement. And by combining the awareness requirement with the withdrawal on notice reservation the means to successfully resort to binding dispute settlement procedures, in particular through the ICJ, is limited if not excluded as it lies in the hands of the potential defendant who has reserved a way to escape its 'submission' to the obligatory jurisdiction of the ICJ under Article 36(2) of the Statute.

In the case at stake the attitude of the United Kingdom in the context of its obligations under the NPT could be considered as amounting to a breach of these obligations because the United Kingdom had taken a clear position against the enactment of negotiations. The position of the Marshall Islands pressing for the commencement of negotiations was also well-known so that a dispute concerning the interpretation of a treaty according to Article 36(2)(a) of the ICJ Statute was present. To require that this well-known situation should be made the subject-matter of direct talks between the Marshall Islands and the United Kingdom seems over-demanding since there was no doubt that the United Kingdom



would not alter its attitude by being addressed individually and invited to live up to its obligations under the Treaty.

5. *Concluding remarks*

The decision of the Court in the *Marshall Islands* cases can only be regretted as it marks a step backwards in enhancing the (judicial) peaceful settlement of disputes. It will be difficult for the interested public to understand why the Court shied away instead of finding a way to address a vital question in international relations by a highly controversial and contra-productive decision. In addressing the issue concerning the obligations under the NPT, even if dismissing the case finally on the merits, the World Court would at least have shown that it takes position whenever possible on such elementary questions and that it makes its voice heard on questions that are of universal concern as it has done previously in other highly controversial and also politically loaded cases.¹⁹

¹⁹ Cf the *Genocide* cases, the *Kosovo* case (although here the Court was only asked to deliver an advisory opinion) and a series of cases concerning armed conflicts, in particular *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary objections) Judgment [2011] ICJ Rep 70.

