'Establishing the existence of a dispute before the International Court of Justice': Between formalism and verbalism

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1. *Rather than a new approach, the* Marshall Islands *decisions are the culmination of a judicial trend towards formalism and verbalism*

'The Court, as a court of law, is called upon to resolve existing disputes between States. Thus, the existence of a dispute is the primary condition for the Court to exercise its judicial function'.[1] This mantra, oft repeated, has been seldom applied by the Court as an operative principle. While there have been cases in which the Court has rejected an application on the basis of a lack of subject-matter jurisdiction,[2] the *Marshall Islands* decisions are the first to dismiss a whole case at the preliminary stage on the grounds of an absence of a dispute. In doing so, Béatrice Bonafé considers that the Court set out a 'new approach'[3] for the determination of the existence of a dispute, which is inconsistent with previous case law (paras 15-27). It may indeed be that *Marshall Islands* decisions depart from older case law (like PCIJ jurisprudence, *Certain Property* case and *Cameroon v Nigeria*, discussed by Bonafé in para 24-26) but in fact they contrast less with the Court's latest decisions. I thus rather see them as the culmination of a judicial trend, in which formalism and verbalism have replaced the objective assessment of facts by the Court.

In the past ten years, the Court has progressively narrowed its own margin of appreciation when it comes to establishing the existence of a

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[1] *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253, para 55; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, para 58.

[2] The *Avena* (*interpretation*) case was dismissed because there was no dispute as to the meaning and scope of the *Avena* judgment.

[3] Béatrice Bonafé, 'Establishing the Existence of Dispute before the International Court of Justice: Drawbacks and Implications (2017) 45 QIL-Questions Intl L 3 para 3.

dispute. It appears to have abandoned its power to assess the factual evidence on an objective basis and has chosen to rely almost exclusively on diplomatic correspondence between the parties. When objections are raised on grounds of a lack of a dispute, the case often turns on finding *the* document which clearly sets out the parties' opposing views over the subject-matter of the case submitted to adjudication. This masterpiece evidence, in which a high official of one party clearly disagrees with the views of the other party, is the sesame which would open the gates in The Hague. If the right words have not been spelled out, there is a possibility for the case to be rejected by the ICJ *in limine litis*, on the grounds that the existence of a dispute was not established – in that respect the two States might as well fight on a battlefield!

In *Georgia v Russia*, the Respondent's first objection concerned the absence of a dispute on the Convention on the Elimination of All Forms of Racial Discrimination. The Court held that 'the exchanges [between the parties] must refer to the subject-matter of the treaty with sufficient clarity *to enable a State against which a claim is made to identify that there is, or may be, a dispute* with regard to that subject-matter'.[4] And, even though Georgia's Application and Memorial set out facts in relation to the ethnic cleansing of Georgians in Ossetia and Abkhazia, the preliminary objections turned on the examination of the correspondence between the parties in order to determine whether, prior to the filing of the Application, 'Georgia *made ... a claim* [in relation to racial discrimination] and whether the Russian Federation positively opposed it with the result that there is a dispute between them.'[5] The Court dissected numerous diplomatic exchanges and other documents. It found that some of them related to ethnic cleansing, but did not directly accuse Russia, while those accusing Russia referred to various violations of international law, but not to racial discrimination.[6] It rejected the first objection only because in August 2008, during the war, Georgia's accusations were directed at Russia and referred to racial discrimination.[7]

[4] *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, para 30 (emphasis added).

[5] ibid para 31.

[6] ibid paras 31-113.

[7] ibid para 113.

In *Belgium v Senegal*, the Court held that 'at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law'.[8] The reason for deciding so was that none of the diplomatic correspondence sent by Belgium to Senegal, prior to the application, made a reference to an obligation under customary law to prosecute or extradite Hissène Habré for torture. It mattered little that the same substantive obligation was provided by the Convention against torture, to which Belgium had repeatedly referred to.

Finally, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court held that there was no dispute over Nicaragua's claim that Colombia had violated the obligation prohibiting the use or threat of use of force under Article 2(4) of the United Nations Charter and corresponding customary international law. The absence of a dispute on the use of force was established on the basis of one public statement of the chief of military forces of Nicaragua, according to which there had been no conflicts.[9]

The three cases show that the Court is seeking evidence of an *expressis verbis* disagreement over the subject-matter of the case submitted to it. It does not analyse the facts of the Application to establish whether they could receive qualifications under the legal rules invoked as the basis of claim. And the Court is highly reluctant to refer to the conduct of the Parties to establish their disagreement. If in 1980, Ian Brownlie could consider that '[p]rovided the acts asserted to be in breach of international law are specified clearly, the relevant rules of customary or treaty law may be invoked in the course of the pleadings,'[10] this is obviously no longer true nowadays. A dispute is established if the causes of action were referred to in the exchanges between the parties and if they expressed 'clearly opposite views' over the law and the facts. The Applicant has the burden of formulating its legal claims clearly, at the appropriate level, and to give them the required publicity.

[8] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, paras 54-55.

[9] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) Judgment [2016] ICJ Rep 3, paras 76-77.

[10] I Brownlie, 'Causes of Action in the Law of Nations' (1980-81) 50 British YB Intl L 37.

The Court may use the incantatory repetition that its 'determination must turn on an examination of the facts.'[11] Rather than analysing the facts, the Court has shown that it prefers to interpret words. It is what could be characterized as verbalism. The *Marshall Islands* cases are the ultimate representation of such a verbalistic approach. The Court has shown that it prefers to deduct the existence of a dispute, rather than infer it from facts and conduct.

On the other hand, under this latest approach, it is enough that one document refers to the relevant legal dispute and challenges the other party's appreciation. A dispute is born. I would not qualify this approach as necessarily more restrictive. But it is certainly excessively formalistic and hardly workable in terms of diplomacy (as Bonafé shows it in para 43).

The *Marshall Islands* decisions leave no doubt that the right evidence for establishing a dispute is the written one: 'the Court takes into account in particular any statements or documents exchanged between the parties as well as any exchanges made in multilateral settings.'[12] Under this approach, conduct and inference could only play a subsidiary role: 'the Court has previously held that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for."'[13] The relevant conduct is the one of the Respondent. Its acceptance does not liberate the Applicant from its obligation to previously state its claim. Béatrice Bonafé is certainly right to conclude that this line of reasoning amounts to requiring prior notification of claims (para 18), even though the Court persists in pretending the contrary.

2. *The new requirement(s): The objective awareness and the critical date*

Béatrice Bonafé analyses the Court's techniques of argumentation and evidence as crystallised by the *Marshall Islands* decisions as conditions set out for the establishment of a dispute. She identifies two: the

[11] *Marshall Islands v United Kingdom* para 39, quoting *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (n 9) para 50; see also *Georgia v Russian Federation* (n 4) para 30.

[12] *Marshall Islands v United Kingdom* para 39.

[13] *Marshall Islands v United Kingdom* para 40.

awareness requirement (para 8) and the critical date (para 10). While I would not describe the critical date as a new condition, I find it entirely appropriate and useful to describe the Court's approach as imposing an objective awareness requirement.[14] Paragraph 41 of the Judgment is the key one:

> 'As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, 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.'

The Court provides no reason for setting out this new requirement other than to give the Respondent a possibility to react prior to the filing of the application. If its rationale relates to the equality of the Parties (Bonafé, para 40), it is hardly convincing. Inter-state proceedings are very different from domestic cases, where formal equality protects the weaker party in the case. It may also be that the Court seeks to protect the Respondent from surprise proceedings (Bonafé, para 29). This would be even less convincing. The facultative clause mechanism under Article 36(2) of the Statute is different from the UNCLOS compulsory jurisdiction mechanism, where the Parties have to exchange views (Bonafé, paras 32-33). The surprise element is essential for the facultative clause mechanism to function. Since most of the declarations can be withdrawn at any moment, it is enough for the Respondent to get wind of a possible application to deprive the Court of its jurisdiction. As Bonafé herself stresses out, 'one must be careful in maintaining the distinction between the awareness of the existence of the dispute and the awareness of the intention of the applicant to bring the case before the Court' (para 60).

As far as the critical date is concerned, it is settled jurisprudence that 'in principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court.'[15] Bonafé considers this to be a new requirement (paras 10-11, 19, 21), on account that, in other cases, the Court showed temporal flexibility when as-

[14] This terminology was also used by Judge Crawford in his Dissenting Opinion in the *Marshall Islands* case.

[15] *Marshall Islands v United Kingdom* para 42.

sessing the conditions for jurisdiction and admissibility.[16] She insists on the phrase 'in principle', but precisely, the principle is that the date of the application is the critical date.

The critical date is important for two reasons. First, the Court may detect a procedural issue in the application, but decide to bypass it, provided that the conditions for jurisdiction are met when the decision on preliminary objections is reached. *Mavrommatis*[17] and *Croatia v Serbia*[18] are often quoted as an example (Bonafé, para 41). All the cases where the Court showed flexibility as to the critical date[19] can nonetheless be easily distinguished from the *Marshall Islands* decisions, since the potential default in the application concerned the entry into force of the convention providing for jurisdiction. Except in *Mavrommatis*, the Court did not actually decide that the conditions for jurisdiction were not met at the critical date. It simply noted that, in any case, the convention was in force at the date of its decision on the preliminary objections. The principle of judicial economy is thus a procedural tool for avoiding decisions on more difficult questions, like for instance the moment when two successor States were bound by the conventional obligations of their predecessors or the moment when they became members of the UN.

By contrast, the *Marshall Islands* decisions concern the very existence of a dispute, a requirement which was qualified by the Court not only as a condition for jurisdiction under Article 36(2),[20] but also as a condition of its judicial function under Article 38.[21] In the words of President Abraham (who had the casting vote in this case), 'the existence of a dispute between the parties to a case is not only a condition for the exercise of the Court's jurisdiction, but, more fundamentally, a

[16] Judge Crawford calls this the flexible approach (*Marshall Islands v United Kingdom*, Dissenting Opinion Crawford paras 7-19).

[17] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* [1924] PCIJ Rep Series A No 2, 34.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*) (Preliminary Objections) Judgment [2008] ICJ Rep 412, paras 80-82.

[19] See examples ibid para 82.

[20] *Marshall Islands v United Kingdom* para 36.

[21] ibid para 42.

condition for the very existence of that jurisdiction.'[22] This tautological characterization is a figure of speech meant to highlight the significance of the existence of a dispute requirement. It also serves the purpose of distinguishing this requirement from simple conditions for jurisdiction or admissibility, which may eventually be cured during the proceedings.

The second relevance of the critical date relates to the admissibility of evidence: the question arises as to whether the proceedings themselves, or acts and facts outside the Court and subsequent to the Application, could constitute evidence of the existence of a dispute. Relying on *Certain Property* and *Cameroon v Nigeria* decisions, Bonafé answers in the affirmative (paras 24-25). It could be said that if the parties have opposing views before the Court, this shows that in fact they disagree on points of law and fact, even though these opposing views have not been clearly articulated prior to the application. But if the institution of proceedings could automatically create a dispute, 'the distinct requirement that a dispute exists would be devoid of all justification and value.'[23]

3. *The distinction between the existence and the scope of a dispute or between dispute and claims*

Bonafé refutes the distinction between establishing the existence of a dispute and determining its scope and between dispute and claims (para 25). It is true that in *Belgium v Senegal* and *Alleged Violations of Sovereign Rights* the Court sought to establish whether the Parties had disagreed over specific claims. In *Burkina Faso/Niger* it also declared that all 'the requests that parties submit to the Court (…) must (…) relate to the function of deciding disputes'.[24] Even if their claims were in connection

[22] ibid Declaration Judge Abraham para 3. Even Judge Crawford dissenting noted that 'The rationale behind requiring a legal dispute is to ensure that the Court has something to determine: it protects the Court's judicial function which, in a contentious case, is to determine such disputes.' (ibid Dissenting Opinion Crawford para 3).

[23] R Kolb, *The International Court of Justice* (Hart 2013) 315.

[24] *Frontier Dispute (Burkina Faso/Niger)* Judgment [2013] ICJ Rep 44, para 48. The Court declared inadmissible the request of Burkina Faso to include in the operative part of the Judgment a reference to the sectors of boundary over which the Parties reached an agreement.

with the main dispute, they were rejected *in limine litis* on jurisdictional grounds.

In my opinion, this approach is highly debatable. A dispute should not be sliced up as a sum of specific claims. A claim (in French, *réclamation* or *demande*) has to be formulated in legal terms. Setting out a claim is setting out the precise facts and the legal foundations (cause of action). To require the Parties to establish their prior disagreement over each and every one of their claims is to create an undue burden, out of touch with the life of international relations. In diplomatic fora, States do not set out their positions in legal terms, as they would do in judicial fora.

Thus, it is all the more necessary to maintain the distinction between the existence of a dispute and its scope, between a dispute and a claim, in order to discourage this rise of formalism from spreading. This would also prevent the risk that the awareness requirement contaminates the conditions for admissibility of counter-claims and of intervention (Bonafé, paras 49-51).

4. *The existence of a dispute in highly political cases*

This formalistic approach in which the views of the Parties, clearly articulated before the Court's seisin, become controlling, confirms the subsidiary role played by judicial settlement in inter-State relations. It remains 'simply an alternative to the direct and friendly settlement of such disputes between the Parties.'[25] *Marshall Islands* cases show that this is far from being an outdated vision of the role of the ICJ.

It may be that the case submitted by the Marshall Islands was not yet ripe for adjudication. It may also be that the law on the ban of nuclear weapons was not yet ripe. The 1997 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* is indeed the only case where the Court implicitly found a *non liquet*. In *Marshall Islands*, the Court may have found it wise to avoid *in limine litis* a similar conundrum in contentious proceedings, or the risk of reaching a finding too moot for implementation. Either way, this is a form of abdication in face of difficult, political questions. In these situations, Bonafé considers arguments of judi-

[25] *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* [1929] PCIJ Rep Series A No 22, 13; see also Bonafé, para 59.

cial propriety and discretion to be more appropriate than a formalistic approach to the existence of a dispute (para 64). But is it not more disturbing to see a judge abdicating its role because there is too much at stake? As Thomas Franck concluded in his book on judicial deference to political questions, '[t]o make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament. It is a strategy urgently in need of judicial review.'[26]

[26] T Franck, *Political Questions/Judicial Answers. Does the Rule of Law Apply to Foreign Affairs?* (Princeton UP 1992) 159.