'Establishing the existence of a dispute before the International Court of Justice': Glimpses of flexibility within formalism?

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1. *Introduction*

Besides marking the celebrated 70th anniversary of the International Court of Justice (ICJ or the Court), 2016 will stand out as the year in which the requirements for the determination of the most basic condition for the exercise of the Court's contentious jurisdiction – the existence of a dispute – have been called into question by the same Court, with the consequence of provoking a sharp division among judges and a great deal of criticism by commentators. By a very narrow majority (in one case carried by the casting vote of the President) the Court dismissed the *Marshall Islands* cases on the ground that there were no disputes between the applicant and the three respondents.[1] For the very first time in the Court's history, entire cases were struck down for lack of any dispute.

As the paper by Beatrice Bonafé persuasively shows, the Court's approach towards the existence-of-a-dispute condition presents a number of drawbacks.[2] The requirements that, in order for a dispute to exist, the respondent must be 'aware' of its existence and the dispute itself must exist at the time of the filing of the application lack any convincing and consistent reason. They also signal a remarkable shift in the Court's perception of the real rationale behind the existence-of-a-dispute condition. From a condition aimed at protecting the judicial function of the Court, it is apparently now being used as a means to

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[1] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom, Marshall Islands v India, Marshall Islands v Pakistan)* (Preliminary Objections) ICJ Judgment 5 October 2016 (hereafter *Marshall Islands v United Kingdom*).

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

protect respondent States against a 'surprise' application or to encourage diplomatic settlement prior to seising the Court.

In this comment I will elaborate further on some of the questions left open by the Court, which basically relate to the 'standard of proof' of the awareness requirement and to the potential for a more flexible approach to its employment. By drawing from the case law subsequent to the judgments handed down in the *Marshall Islands* cases, I will then provide a first account of the spillover effects of the *Marshall Islands* precedent. In this latter part, specific factors of flexibility that might emerge in the context of incidental proceedings and influence the Court in the determination of the existence of a dispute will be considered.

2. *The standard(s) of 'awareness'*

It can hardly be denied that a formalistic stance towards the existence-of-dispute condition has been 'in the air' since the most recent case law prior to the *Marshall Islands* cases.[3] The judgments at hand, however, no doubt provide the first precedent which, in general and abstract terms, sets out the 'awareness' requirement by making it clear 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'.[4]

As Beatrice Bonafé rightly observes, the *Marshall Islands* decisions do not offer any clarification of the 'precise content' of the awareness requirement which, in the end, 'remains extremely vague'.[5] While the Court clearly ruled out the requirements of prior negotiations, prior formal protest and notice of the intention to file a case in order for a

[3] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment [2012] ICJ Rep (II) 422; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) Judgment of 17 March 2016 [2016] ICJ Rep 3.

[4] *Marshall Islands v United Kingdom* (n 1) para 41; see also paras 52 and 57.

[5] Bonafé (n 2) para 18.

dispute to exist,[6] it nonetheless failed to elucidate exactly what distinguishes the awareness requirement from these other forms of direct exchanges between the parties. As Judge *ad hoc* Bedjaoui tellingly put it, '[l]e couple «*pas de notification préalable (par le demandeur) — mais connaissance préalable (par le défendeur)*» ne peut ... vivre qu'une cohabitation difficile et ambiguë'.[7]

It seems safe to assume that the *Marshall Islands* decisions will induce potential applicants to notify potential respondents of their claims before the filing of an application in order to safeguard themselves from such ambiguities. However, it is submitted that, at least in general terms, there is still some room to reconcile the assertion that while the respondent's awareness – like it or not – is required, prior notification is not. In other words, even if the evidence of the dispute submitted by the Marshall Islands did not pass the awareness test in that case, the Court is still left with some margin with which to modulate such a test in a more flexible way depending, as we shall see, on a series of factors and circumstances. The same Court referred also to a 'not unaware' standard. As obscure as its scope may be, this latter standard might suggest a less rigid approach and allow some flexibility to operate even within the formalistic framework traced by the Court for determining the existence of a dispute.

A dispute has two components, a 'static' and a 'dynamic' one. The static component of a dispute essentially concerns the content of the claim of the complaining party and, in particular, the way in which the claim identifies its subject-matter and the party to which it is addressed. The dynamic one consists in the fact that the legal viewpoints are 'positively opposed', namely that there is a reaction by the potential respondent or a failure to react when the opportunity to react is afforded. It is on the basis of these three elements that the respondent's awareness is assessed. In *Marshall Islands* the Court confirmed that exchanges made in multilateral settings can show that the parties held 'clearly opposite view' by giving particular attention to their content, to the identity of the actual or intended addressees and to any reaction thereto.[8] These three elements were all found to be insufficiently present by the Court in the

[6] *Marshall Islands v United Kingdom* (n 1) para 38.
[7] Dissenting Opinion Judge *ad hoc* Bedjaoui, para 26.
[8] *Marshall Islands v United Kingdom* (n 1) para 48.

case at hand. What the Court did not require, however, is the same degree of presence of these three elements. As a general matter, it seems that the Court did not discard the possibility that the standard of proof of each element could be balanced on account of several factors.

As to the content of the statements invoked *in casu* by the applicant, the Court found that, in order to give rise to a dispute, a statement should refer to the subject-matter of a claim 'with *sufficient clarity* to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter'.[9] It then found that the statements invoked by Marshall Islands were too general in scope as they 'did not specify the conduct of [the respondents] that gave rise to the alleged breach'.[10] The Court went on to state that 'such specification would have been *particularly necessary*'[11] given that the international responsibility which the applicant was supposedly invoking originated from 'a course of conduct which had remained unchanged for many years'.[12] 'Sufficient clarity' is a flexible standard that the Court first employed in *Georgia v. Russia* when dealing with the requirements of a dispute in general. In that case the Court employed a rather high standard of 'sufficient clarity'. The reason is probably to be found in the circumstances of that specific case, and in particular in the fact that 1) its jurisdiction was based on a compromissory clause (Article 22 of the CERD) 2) requiring prior negotiations and 3) it was particularly debated whether the dispute related to the interpretation and application of the Convention or whether the compromissory clause was in fact used to force unrelated issues before the Court.[13] None of these circumstances were present in the *Marshall Islands* cases. The Court however preferred to interpret the 'sufficient clarity' standard as it did in *Georgia v Russia*. This approach can be criticised, especially if one considers that the Court conceded that the Application or subsequent materials can be used to clarify the scope of the dispute.[14] One may hope that in the future the Court will refrain from using as a basic standard for 'sufficient clarity' the standard applied in *Georgia v Russia*. More broadly, it can be assumed

[9] ibid para 49 (emphasis added).
[10] ibid para 50.
[11] ibid para 50 (emphasis added).
[12] ibid para 50.
[13] See Dissenting opinion of Judge Crawford para 19.
[14] *Marshall Islands v United Kingdom* (n 1) para 54.

that the nature of the alleged wrongful act will have a considerable impact in determining the standard of clarity and will provide an ample degree of flexibility in its assessment.

With respect to the subjective element of the dispute, the Court apparently did not draw decisive consequences from the lack of identification by name of the potential respondents in the relevant statement. In principle, however, the Court would give particular attention to the 'identity of the actual or intended addresses'. This could turn out to be a promising avenue for flexibility with respect to the standard of 'sufficient clarity'. One may wonder whether the fact that a statement made in a multilateral forum singles out the potential respondent(s) could constitute a further factor likely to lower the standard of clarity.

As far as the dynamic element of the reaction is concerned, the Court excluded the possibility that the conduct of the United Kingdom, essentially characterized by the absence of reaction to the claim of the Marshall Islands, could provide a basis for finding a dispute between the two parties.[15] But aside from the *Marshall Islands* cases, and in light of the possibility left open by the Court to mutually balance the standards for the three elements of a dispute, it seems certainly possible that a positive opposition could be inferred by the silence or failure to react, or a consistent pattern of conduct, of the potential respondent(s) party. In principle, despite its subjective connotation, 'awareness' can (and should) still be proved on the basis of the appreciation of the 'clarity' of the claim, particularly by the fact that the claim clearly identifies the subject-matter of the dispute and the party to which it is addressed.[16] While put in the background by the Court, the 'not unaware' standard apparently suggests this reading. It is only to be hoped that the Court will enhance the importance of the 'objective' elements that can be deduced from the claim and refrain from placing too much emphasis on the

[15] ibid para 57.

[16] For a recent example of how failure to react can play a crucial role in establishing the existence of a dispute even when the clarity of the subject-matter of a claim is debated, see the *M/V 'Norstar' Case (Panama v Italy)* (Preliminary Objections) ITLOS Judgment 4 November 2016 paras 99 ff. Note that the Tribunal expressly resorted to the *Marshall Islands* judgments in support of its finding that the existence of the dispute could be 'inferred from Italy's failure to respond to the questions raised by Panama regarding the detention of the *M/V 'Norstar*'' (para 101 and paras 99-100).

'subjective' dimension relating to the 'status of mind' of the respondent party.

The possibility to adjust the standard of 'awareness' according to the 'degree of presence' of the three elements of a dispute might allow the Court to retrace its flexible steps as to the existence-of-a-dispute condition in future cases. However, as we shall see below, the judicial practice immediately following the *Marshall Islands* decisions does not look very promising in this respect.

3. *Spillover effects*

Beatrice Bonafé made some suppositions as to the 'spillover effects' of the *Marshall Islands* precedent on incidental proceedings. According to her '[t]he new awareness and critical date requirements should in principle apply to the other situations in which new claims, ie new disputes, are advanced by the parties or third states'.[17] She expressly referred to incidental proceedings, such as counter-claims, intervention and provisional measures, as well as to other proceedings such as the interpretation of previous judgments. While after the *Marshall Islands* judgments no requests for intervention or interpretation have been submitted, the Court has had occasion to pronounce upon the admissibility of counterclaims and on requests for provisional measures. This recent practice not only allows an assessment as to whether traces of the standard set out in the *Marshall Islands* cases can really be found – such that Bonafé's concerns relating to the 'spillover' effects could be considered well-founded – but also constitutes the first testing ground of the Court's inclination to consider the possibility of flexibility arising from external or contextual factors of a case.

The Order of 15 November 2017 on counter-claims handed down in the *Nicaragua v Colombia* case is the most recent expression of this practice.[18] The Court had been called upon to decide on the admissibility of four counter-claims submitted by Colombia and accordingly applied the test set forth in Article 80 of its Rules. Pursuant to this provision, two

[17] Bonafé (n 2) para 47.

[18] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Counter-claims) Order of 15 November 2017 (nyr).

requirements must be cumulatively met for the Court to be able to entertain a counter-claim. The counter-claim must come within the jurisdiction of the Court and must be directly connected with the subject-matter of the claim of the other party. In the case at hand the big issue at stake related to the application of the requirement of jurisdiction. The jurisdictional title invoked by the Applicant when instituting proceedings (the Pact of Bogotá) had elapsed before the respondent's counter-claims were filed under the same jurisdictional title. The Court, however, found that '[o]nce the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases; the subsequent lapse of the title cannot deprive the Court of its jurisdiction'.[19] This finding prompted quite sharp criticisms by several judges.[20]

However, it is submitted that the most controversial – and most significant for our purposes – aspect of the Court's Order is the way in which the test of jurisdiction was carried out. Indeed, the Court proceeded in examining whether the conditions set out in the Pact of Bogotá had been met in order to establish if it had jurisdiction over the third and fourth counter-claim, which were previously found to be directly connected with the subject-matter of the claim of the other party. Among these conditions was the existence of a dispute 'with regard to the subject-matter of counter-claims'.[21] At this point the Court expressly relied on the *Marshall Islands* precedent for the definition of the concept of dispute.[22] It then applied the awareness and the critical date test by looking at the exchanges between the parties in order to establish whether disputes on those counter-claims existed at the time of the filing of Nicaragua's application.[23]

This approach undoubtedly confirms Beatrice Bonafé's concerns about the spillover effects on counter-claims proceedings. It also signals the Court's reluctance to modify the assessment of the existence-of-a-dispute condition in light of the external factors provided by the nature of counter-claims proceedings. These factors consist of the fact that, firstly, counter-claims can be submitted, as in the case at hand, under the

[19] ibid para 67.

[20] Joint Opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet.

[21] *Alleged Violations* (n 18) para 70.

[22] ibid para 71.

[23] ibid paras 72-73.

same jurisdictional title upon which the Court already entertains the applicant's claim. Secondly, the 'direct connection' between the counter-claim and the principal claim can be particularly close. If taken together, these two factors could indeed affect the scope of the 'awareness' test and make it more flexible in counter-claims proceedings. As Judge Greenwood critically observed in his separate opinion appended to the Order, 'where the direct connection [...] is as close as it is with the third counter-claim in this case, the analysis of the jurisdictional requirements in the context of the principal claim may make it unnecessary to engage in a separate analysis of the same requirements with regard to that counter-claim. Whether that is so will depend upon the *specific requirement in the relevant jurisdictional instrument* and the *nature of the connection* enjoyed by the counter-claim with the subject-matter of the principal claim'.[24]

It is worth clarifying that the factors of flexibility afforded by counter-claims proceedings are strictly connected with the nature of such proceedings, whose underlying rationale is 'to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently'.[25] A rigid approach as to the existence-of-a-dispute underlying a counter-claim appears to be unable to fulfil such procedural needs.[26]

[24] ibid Separate opinion of Judge Greenwood, para 12 (emphasis added). See also the Declaration of Vice-President Yusuf, paras 9 ff.

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Counter-Claims) Order of 17 December 1997 [1997] ICJ Rep 257 para 30.

[26] By contrast, one could observe that within principal proceedings 'additional issues' raised by the Applicant might instead justify the adoption of a more rigid approach by the Court when it comes to the determination of the existence of a dispute on that additional issue. This point was made clear by Judge Crawford in his dissenting opinion appended to the *Marshall Islands* judgments (paras 14-16). According to him, the fact that the Court did not employ a flexible approach as to the critical date (according to the so-called *Mavrommatis* principle) in cases such as *Belgium v Senegal* (n 3) and *Nicaragua v Colombia* (n 3) was due to the fact that the Court had already determined that it had jurisdiction over the 'main' disputes. Issues such as the alleged violation of customary law obligations to prosecute Mr Habré, or the alleged violation of treaty and customary law obligation prohibiting the use of force were 'additional' issues that simply did not call the Court to necessarily apply a flexible approach with regard to the existence of a dispute at the time of the filing of the application. In counter-claims proceedings are still 'additional

Even more than counter-claims proceedings, proceedings for the adoption of provisional measures might also provide considerable possibility for flexibility in the determination of the existence of a dispute. In this respect, it should be recalled that during the hearings in the *Marshall Islands* case, the United Kingdom itself acknowledged that '[i]t is possible to conceive of cases in which the acute urgency of the matter, the nature and severity of the conduct that is the subject-matter of the claim, the character of the breach that is alleged, and a manifest appreciation of notice derived from the circumstances in issue of the opposing views of the parties, may suffice to crystallize a dispute. Such a case, for example, may be a death penalty case in which the application is accompanied by a request for provisional measures'.[27] It should be incidentally observed that one cannot exclude the possibility that cases of extreme urgency or 'egregious conduct'[28] may not be accompanied by a request for provisional measures. These factors might affect the standard of 'awareness' also in principal proceedings, even if they are most likely to emerge in provisional measures proceedings.

Since the *Marshall Islands* judgments, there have been three requests for provisional measures. Unlike the Order on counter-claims in *Nicaragua v Colombia*, however, it is less easy to detect traces of the *Marshall Islands*'s approach in the three corresponding orders on provisional measures.[29] Indeed, the jurisdictional bases invoked were all compromissory clauses and apparently the Court was much more concerned about whether the disputes fell within the scope of the *ratione*

issues' but these are raised by the respondent and relate to peculiar procedural needs as seen above.

[27] CR 2016/03, 28 para 47 (Bethelem). The above passage followed another interesting passage whereby 'the United Kingdom does not come before you to contend that there is an immutable, inflexible rule of international law applicable in any and all cases that requires the prior written notification of a claim as a precondition for the crystallization of a dispute and the jurisdiction of the Court, at the point at which the application seising the Court is filed'.

[28] See Dissenting opinion of Judge Crawford, para 17.

[29] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Request for the Indication of Provisional Measures) Order of 7 December 2016 [2016] Rep 1148; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russia)* Order of 19 April 2017 (nyr); *Jadhav Case (India v Pakistan)* Order of 18 May 2017 (nyr).

materiae jurisdiction of the relevant title of jurisdiction and whether the respective procedural preconditions were met. Moreover, in all three cases the very 'existence' of a dispute was not really at stake, since a sufficient amount of bilateral exchanges had occurred between the parties. It remains, however, the fact that in all these cases the Court singled out the existence of a dispute as a requirement that has to be assessed in the context of provisional measures proceedings. Admittedly, the special emphasis put on the existence-of-a-dispute requirement in provisional measures proceedings can be traced back to the order handed down in *Belgium v Senegal* where the Court first held that 'at this stage of the proceedings, the Court must begin by establishing whether, prima facie, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the Court's jurisprudence, that its jurisdiction must be considered'.[30] Since then, most of the decisions on provisional measures rendered on the basis of compromissory clauses have been adopted through a more or less detailed evaluation of a *prima facie* existence of a dispute. This condition is increasingly treated as an 'autonomous' or 'isolated' condition within the assessment of the *prima facie* jurisdiction.[31] The *Marshall Islands* precedent undoubtedly fuels this trend.

The most recent order on provisional measures in the *Jadhav* case represents a prominent example of such a trend. Despite being rendered in the context of a 'death penalty' case, thus potentially allowing great margins of flexibility to the Court, in the Order of 18 May 2017 the Court held that it had to 'ascertain whether, on the date the Application was filed, ... a dispute [arising out the interpretation or application of the Vienna Convention on Consular Relations] appeared to exist between the Parties'.[32] The Court then scrutinised several notes verbales

[30] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, (Provisional Measures) Order of 28 May 2009 [2009] ICJ Rep 139 para 46.

[31] This approach starkly contrasts with the approach adopted in those cases where the *prima facie* jurisdiction was grounded upon optional declarations under art 36(2) of the Court's Statute and the existence-of-a-dispute condition was not even contemplated. See eg *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Provisional Measures, Order of 3 March 2014 [2014] ICJ Rep 147 paras 18-21.

[32] *Jadhav Case* (n 29) para 28.

exchanged between the Parties and found that '[t]hese elements are sufficient at this stage to establish that, on the date the Application was filed, a dispute existed between the Parties'.[33] Again, though less blatantly than in the recent Order on counter-claims, this approach appears at least to support the formalistic stance as to the existence-of-a-dispute condition. Aside from the *prima facie* character of the enquiry, which is indeed regularly made in the context of provisional measures proceedings (even though it still calls for clarification as far as the existence-of-a-dispute is concerned), it does not seem to exploit the potential for more flexibility afforded by the nature of provisional measures proceedings and, particularly, by the circumstances of extreme urgency in a death penalty case.

4. *Conclusions*

The approach taken by the Court in the *Marshall Islands* cases completes and intensifies the formalistic path traced in previous case law addressing the existence-of-a-dispute condition. Yet it does not seem to completely get rid of those factors of flexibility which, in future cases, could temper the rigidity of the standards of presence of the three elements of a dispute. As I have tried to suggest in the present comment to Beatrice Bonafé's paper, a sensible degree of flexibility can indeed be afforded either by the possibility of mutually balancing such standards of presence and by other external or contextual factors likely to come into play within incidental proceedings.

It is true that most recent practice on incidental proceedings subsequent to *Marshall Islands* still appears to follow the formalistic line,

[33] ibid para 29. As 'proudly' observed by Judge Bhandari in his Declaration appended to the Order at hand 'India's case could be regarded as being even stronger than *LaGrand* (*Germany v United States of America)* (Provisional Measures) Order of 3 March 1999 [1999] ICJ Rep (I) 14, from the perspective of the prima facie existence of a dispute, owing to India's thirteen requests to have consular access to Mr Jadhav since his arrest'. It should be recalled that in the Order delivered in *LaGrand* the Court did not assess the existence-of-a-dispute requirement but simply held that 'in the light of the requests submitted by Germany in its Application and of the submissions made therein, there exists prima facie a dispute with regard to the application of the Convention within the meaning of art 1 of the Optional Protocol' (para 17).

perhaps because the influence of the *Marshall Islands* decisions is still too fresh. It can still be hoped, however, that the Court will resume a flexible approach in assessing the 'awareness' requirement. All in all, *Marshall Islands* itself left the door half-open for such possibility.