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CASE AND COMMENT

MULTILATERAL DISPUTES IN BILATERAL SETTINGS: INTERNATIONAL PRACTICE LAGS BEHIND THEORY

ON 5 October 2016, the International Court of Justice handed down its decision in the three parallel proceedings involving the Marshall Islands (as applicant) and India, Pakistan and the UK (as respondents): *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*. The Marshall Islands claimed that the respondent states had failed to meet their obligation to negotiate the cessation of the nuclear arms race and nuclear disarmament in good faith, either under Article VI of the Non-Proliferation Treaty (claim against the UK) and/or customary law (against all three respondents). All three respondents formulated objections to jurisdiction and admissibility. In all three cases, they objected that a "dispute" did not exist between them and the applicant. The Court, by a narrow majority (extremely narrow in the case against the UK: by the casting vote of the President), declined to exercise jurisdiction on the basis that no dispute existed between the parties.

These judgments represent the first time that the Court has declined to exercise jurisdiction solely for this reason. The case law of the ICJ, and its predecessor the Permanent Court of International Justice, provided a variety of rather broad definitions of "dispute". These include "disagreements on points of law or fact" (*Mavrommatis Palestine Concessions* (1924) PCIJ Series A No. 2, at p. 11) as "positively opposed claims" (*South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, (1962) ICJ Rep. 319, at p. 328) and the holding of "clearly opposite views concerning the question of the performance or non-performance of certain" international obligations (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, (1950) I.C.J. Rep. 65, at p. 74). Moreover, as the Court stated on numerous occasions,

the existence of a dispute is a matter to be determined objectively (*Interpretation of Peace Treaties*, p. 74) and is a question "of substance, not of form" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, (2011) I.C.J. Rep. 70, at para. 30). Finally, the dispute must "in principle" have existed at the time of the institution of proceedings (*Georgia v Russia*, at [30]). Crucially, the Court used to treat the notion of dispute (regardless of matters of timing) as a threshold condition, which it interpreted flexibly and pragmatically.

The Marshall Islands had made their claim public and known in a number of diplomatic conferences, including at a High-level Meeting of the General Assembly on Nuclear Disarmament in 2013 and at the Second Conference on the Humanitarian Impact of Nuclear Weapons in 2014. For the Court, these statements were general in nature and, as such, insufficient to prove that a dispute existed between the parties. Indeed, not only had the Marshall Islands not raised the claim directly with the respondents, but in its statements it had failed to single out the respondents or specify the offending behaviour. Moreover, not all respondents were present in the forums where the Marshallese issued these statements. In these circumstances, the Court held that it was not possible to say that the respondents were "aware" (or that they "could not have been unaware", at [41]) of the existence of a dispute at the time of the filing of the applications. Therefore, the ICJ held that no dispute existed between the parties.

In a deviation from past practice, the Court's approach towards the notion of dispute in these judgments was narrow, subjective and formalistic. The Court began by narrowing the notion of dispute in two ways. Firstly, it stated that the dispute *must* have existed at the time of the filing of the application, whereas, in its past case law, it had stated that "in principle" the dispute ought to have existed at that time. Secondly, it introduced a requirement of "awareness", in the sense that the respondent state must have been aware of the existence of the dispute. The introduction of this requirement of awareness also led the Court to take a subjective and formalistic stance towards the notion of dispute. It is subjective insofar as the existence of the dispute is now determined on the basis of the knowledge of the respondent, rather than on the facts at the Court's disposal. It is also formalistic, as it could easily be fulfilled by the resubmission of a new application in the same terms.

It is unclear whether the Court's approach is part of a trend towards a stricter and more formalistic understanding of the notion of dispute, or if it simply responded to the peculiar circumstances of these cases. It seems likely that the deviation can be explained in purely contextual terms. Even so, the decision highlights an important difficulty for the Court: that of adapting the old institutions of the law of nations, an essentially bilateralist legal order, to a "brave new world" that recognises (some)

communitarian interests protected by (multilateral) obligations, owed collectively by every state towards all other states of the international community. The bulk of the Court's case law so far has concerned disputes arising under bilateral obligations between states, where one state claims to be injured by the other state's non-compliance with the obligation owed to it. In this context, a dispute will normally be the object of direct communication between the parties, so that the two parties will usually be "aware" of its existence. But the *Marshall Island* cases before the Court did not involve traditional bilateral obligations between the Marshall Islands and each of the respondents. Rather, they concerned a multilateral obligation, protecting a community interest, which is owed by every state (including each of the respondent states) to all other states of the international community (including the Marshall Islands).

Given the destructive potential of nuclear weapons, nuclear disarmament can indeed be seen as a collective interest of the states of the international community or, at the very least, as recognised by the ICJ in the judgments, a collective interest of the states members of the United Nations (as all states involved in the proceedings are, at [15]). Moreover, for the Marshall Islands, this collective interest was of special significance: from 1946 to 1958, it had been the site of repeated nuclear-weapon testing by its Administering Authority, the US. The Marshallese Government had made its views on nuclear disarmament known in several multilateral settings and had called upon nuclear-weapon states to comply with their obligations of disarmament in good faith under both conventional and customary law.

In the judgments, the Court recognised the collective character of the interest in nuclear disarmament (at [15]), but then failed to take the logical next step of treating the dispute between the Marshall Islands and the respondents as a multilateral instead of a bilateral dispute, to use Judge Crawford's words (at [2] of his dissenting opinion). To be sure, proceedings before the Court take an essentially bilateral character, in the sense that procedurally they usually involve two states: a claimant and a respondent. But this does not mean that the underlying obligation is also of a bilateral nature. The disjunction is patent: that of straitjacketing a multilateral dispute into a bilateral procedural setting. Nevertheless, the Court has recently embraced multilateralism in respect of questions of standing, as evidenced in its decisions in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, (2012) I.C.J. Rep. 422, and *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment (2014) I.C.J. Rep. 226. But to give meaning to community interests and to adopt multilateralism fully, the Court must move beyond just the issue of standing. While dispute settlement before the Court may remain essentially bilateral, it is important for the Court to take a more flexible approach towards its process where multilateral

disputes, such as these, are concerned so as to ensure the sound administration of justice.

The development of community interests and multilateralism has signified a paradigmatic shift for the international legal order. It is only to be expected that this development would have a thorough impact on the traditional institutions of this legal system. The *Marshall Island* judgments could denote a step back from the Court's endorsement of multilateralism in its previous decisions. But there is also a more optimistic possibility: that these decisions simply represent some teething problems in the adaptation by international institutions to the brave new multilateral world of international law.

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THE TAMING OF JOGEE?

WHEN the ambit of the criminal law is narrowed judicially, what impact should this have on convictions previously secured under the disavowed, broader rules? This question was considered by the Court of Appeal in *Johnson and Others* [2016] EWCA Crim 1613, [2017] 1 Cr. App. R. 12.

The Court was faced with several appeals based on the decision in *Jogee and Ruddock* [2016] UKSC 8; [2016] 2 W.L.R. 681 (*Jogee* – noted Dyson [2016] C.L.J. 196). Before *Jogee* was decided in February 2016, *D1* could be held liable as an accessory for a foreseen collateral crime B (e.g. murder) committed by *D2* in the course of committing an agreed crime A (e.g. burglary). In *Jogee*, it was decided that this "parasitic accessorial liability" (PAL) was mistakenly introduced in 1984 by *Chan Wing-Siu* [1985] A.C. 168 (discussed in Stark [2016] C.L.J. 550). The correct position, it was decided, was that *D1* could be liable for the murder committed by *D2* only if *D1* had *intentionally* assisted or encouraged *D2* intentionally to cause at least grievous bodily harm (GBH). *Foresight* that *D2* may intentionally cause GBH was no more than evidence of *D1*'s intention to encourage or assist *D2*'s offending.

In *Johnson*, the Court distinguished between two main categories of appellants (more complex circumstances will be ignored here for reasons of space). First, defendants who managed to appeal following the decision in *Jogee* within 28 days of their own convictions will succeed if those convictions are rendered "unsafe" by *Jogee* (Criminal Appeal Act 1968, ss. 2, 18(2)). *Johnson* confirms that safety will be compromised where a direction in accordance with *Jogee* could realistically have made a difference to the jury's decision.