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When a Dispute Exists: the Emerging Evidentiary Practice of the ICJ in Common Interests Proceedings

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Abstract

This contribution considers the practice of determining the existence of a dispute in proceedings before the International Court of Justice and explores the extent to which such assessment varies – or should vary – in relation to the legal interest protected. This question appears increasingly relevant in the context of common interests proceedings before the ICJ, that is, in cases in which the legal standing of the applicant(s) is based on a common interest in the compliance with *erga omnes* (*partes*) obligations. Zooming in on the requirements elaborated by the Court's case law to date, the article argues that diverging theoretical postures – termed *dialogic vs. systemic* – inform the evidentiary approaches that have so far emerged and that are essentially discretionary. This contribution aims to shed light on how the Court's evidentiary approach has adjusted to common interests proceedings to stand the test of time, while cautiously preserving the performance of the Court's judicial function.

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common interests – *erga omnes* obligations – dispute – legal interest – evidence – discretion – ICJ – judicial function

1 Introduction

Common interests proceedings are surging at the International Court of Justice (ICJ, "the Court"). By this, reference is made to contentious proceedings instituted on the basis of common interests in the compliance with *erga omnes* (*partes*) obligations. In fact, as these obligations are virtually owed to the international community as a whole,[1] every State is in principle entitled to invoke the responsibility of another State based on a common interest, without having to prove a special interest in the compliance with those obligations.

Common interests and *erga omnes* obligations are closely intertwined concepts in international law. In fact, one is often used as a corollary of the other, or to explain the rationale for distinguishing them from individual interests and reciprocal obligations, respectively. The Court itself, in the seminal *Barcelona Traction* case (*Belgium v. Spain*),[2] defined *erga omnes* obligations as those that "[b]y their very nature … are *the concern of all States*. In view of the importance of the rights involved, *all* States can be held to have a *legal interest* in their protection; they are obligations *erga omnes*."[3]

A great terminological and definitional variation affects scholarly accounts exploring the concept of common interest. For instance, the terms "community interests"[4] or "general interests"[5] are often used in lieu of "common

1 Notably, *erga omnes* obligations are owed to the international community as a whole, while *erga omnes partes* obligations are owed to all parties to a multilateral convention of universal or quasi-universal character, such as the 1948 Genocide Convention and the 1984 Convention against Torture. See *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *Judgment*, *I.C.J. Reports 2012* (*II*), p. 449, para. 68.

2 *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), *Second Phase*, *Judgment*, *I.C.J. Reports 1970*, p. 32, para. 33.

3 *Ibid.* (emphasis added).

4 Bruno Simma, "From Bilateralism to Community Interest in International Law" (1994), 250 *Recueil des Cours de l'Académie de Droit International*, 217; Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law", 21 *EJIL* (2010), 387; Yoshifumi Tanaka, "Protection of Community Interests in International Law: The Case of the Law of the Sea", 15 *Max Planck Yearbook of United Nations Law* (2011), 329; Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011); Eyal Benvenisti and Georg Nolte

interests".[6] By the same token, some scholars define community interests as moral and objective values and interests[7] that are shared across the international community, deserving the protection of all States through collective/coordinated action; others instead address them as correlative of obligations that are owed to the international community as a whole (i.e. *erga omnes* (*partes*) obligations),[8] as a concept offering a basis for the decentralised enforcement of those obligations.[9] Some others draw an association between common interests and the expression "common concern" used in several international legal instruments, particularly in the context of common spaces.[10] The present contribution focuses exclusively on proceedings *instituted on the basis of* common interests, leaving aside those instituted by directly injured

(eds.), *Community Interests across International Law* (Oxford University Press, 2018); Jutta Brunnée, "International Environmental Law and Community Interests: Procedural Aspects", in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (Oxford University Press, 2018), 151–175, https://doi.org/10.1093/oso/9780198825210.003.0010; Gentian Zyberi, *The Protection of Community Interests in International Law: Some Reflections on Potential Research Agendas* (Intersentia, 2021); Rüdiger Wolfrum, *Solidarity and Community Interests* (Brill, 2021).

5 Separate Opinion of Judge Jessup in *South West Africa Cases* (1962), at 432, referring to Article 7 of the South West Africa Mandate as "intended to recognize and to protect the *general interests* of the Members of the international community in the Mandates System"; Giorgio Gaja, "The Protection of General Interests in the International Community General Course on Public International Law" (2011), 364 *Recueil des Cours de l'Académie de Droit International*, 19; James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", 96 *AJIL* (2002), 874, 884 and 888; Massimo Iovane et al., *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press, 2021).

6 René Lefeber, "The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law: The International Community and Common Interests", 21 *Netherlands Yearbook of International Law* (1990), 81.

7 See e.g. Samantha Besson, "Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?", in Benvenisti and Nolte, *supra* note 4, 36–49, at 38.

8 Tanaka Yoshifumi, "Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the *Whaling in the Antarctic* and *South China Sea* Cases", 13 *The Law & Practice of International Courts and Tribunals* (2018), 527.

9 Christian Tams, "Individual States as Guardians of Community Interests", in Fastenrath et al., *supra* note 4, 379–405, at 381–382, https://doi.org/10.1093/acprof:oso/9780199588817.003.0026.

10 Wolfrum, *supra* note 4, 66: "(…) it is well established in recent international law instruments and confirmed in academic writings that certain community interests (or more vaguely concerning the beneficiary 'common interests') exist, while references are equally made to 'common concern'." See also Dinah Shelton, "Common Concern of Humanity", 39 *Environmental Policy and Law* (2009), 83.

parties, although they may still concern the compliance with *erga omnes* obligations. One such example is for instance offered by *Allegations of Genocide* (*Ukraine v. Russian Federation*).[11]

Yet, irrespective of the nature of interest at stake, the existence of a dispute between the parties still constitutes an essential precondition for the Court's exercise of jurisdiction.[12] This follows naturally from the Court being primarily – though not exclusively – an international dispute-settlement mechanism. In other words, in the absence of evidence as to the existence of a dispute, the Court could not exert its judicial function, even though the matter at stake calls into question the respect of fundamental, shared interests by the whole international community. It shall hence be no surprise that respondents in common interests proceedings have regularly advanced an argument objecting to the existence of a dispute to avert the Court's jurisdiction. In particular, respondents have stressed that the existence of a dispute could only be demonstrated by evidence of an exchange of disagreement between the parties, while public unilateral statements in multilateral fora would not suffice to this end.[13] This approach sets a quite high threshold for demonstrating the existence of a dispute and it is underpinned by a concept of dispute as a bilateral, dialogic opposition of views or interests, in a formal rather than substantive sense.

Conversely, an increasing practice of the Court in the context of common interests proceedings is paving the way towards an alternative evidentiary assessment as to the existence of a dispute, arguably more in line with the nature of the interests at stake. An example is offered by a most awaited order on provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*) issued by the Court on 26 January 2024.[14] Aside from the actual measures ordered by the Court to address the plausible violation by Israel of the

11 *Allegations of Genocide under the Convention on the Prevention and Punishment of Genocide* (*Ukraine v. Russian Federation: 32 States intervening*), Memorial submitted by Ukraine, 1 July 2022.

12 This point was recently reaffirmed in *Allegations of Genocide* (*Ukraine v. Russian Federation: 32 States intervening*), *Preliminary Objections, Judgment of 2 February 2024*, para. 44: "'[t]he existence of a dispute between the parties is a requirement for [its] jurisdiction under Article IX of the Genocide Convention'" (citations omitted). The power vested in the Court to decide "disputes" between States lies in Article 38 ICJ Statute.

13 See *infra* Section 3.2.

14 *Application of the Convention of the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*), *Provisional Measures, Order of 26 January 2024*, *I.C.J. Reports 2024*.

rights of the Palestinians as a protected group under the Genocide Convention, the order embraces and consolidates a somewhat novel approach in the Court's assessment of evidence of the existence of a dispute for the purposes of ascertaining prima facie jurisdiction. The Court has for instance accepted a wide range of documents and instruments from multilateral settings, including records of the UN General Assembly's plenary sessions, declarations at the UN Security Council, reports of UN fact-finding commissions, communications to UN treaty bodies as well as to the International Criminal Court, as evidence to prove the existence of a dispute between the parties.[15] I refer to this "systemic" approach, as distinguished from a "dialogic" approach, described above. Such a systemic approach arguably adds on previous analyses of the existence of a dispute in that, in the context of proceedings instituted on the basis of violations of *erga omnes* (*partes*) obligations, it admits evidence from multilateral settings and public fora as sufficient evidence to determine the existence of the dispute.[16]

This approach dismisses more stringent postures – typically advanced by respondent States – requiring the respondent to expressly reply to the applicant's accusations in a bilateral setting, for it to demonstrate "positive opposition". For instance, in *South Africa v. Israel*, the Court correctly noted that "Israel considers that South Africa's unilateral assertions against Israel, *in the absence of any bilateral interaction between the two States* prior to the filing of the Application, do not suffice to establish the existence of a dispute in accordance with Article IX of the Genocide Convention."[17] Notably, this approach would create an undue advantage for potential respondents from strategic silence or delayed response to diplomatic communications with the applicant, let alone from ignoring them – as, in South Africa's view, Israel has purportedly done in the case before the Court.[18] What is more, this would arguably be contrary to the principle *ex injuria jus non uritur*, according to which a legal subject shall not benefit from the consequences of wrongful conduct. Said differently, a purported breach of good faith cannot give the respondent State a legal ground to circumvent a finding about the existence of a dispute.

15 See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), *Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, paras. 64–77.

16 See e.g. *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Canada and The Netherlands v. Syrian Arab Republic*), *Provisional Measures, Order of 16 November 2023*, para. 31.

17 *Ibid.*, para. 23.

18 For *contra* views, see Separate Opinion of Judge *ad hoc* Barak in *South Africa v. Israel*, *Provisional Measures*, para. 15.

The distinction between these two approaches – dialogic *vs.* systemic – lies not only in the definition of a dispute for the purposes of ascertaining jurisdiction, but more fundamentally in the type of evidence deemed sufficient to prove the dispute. Notably, this evidentiary assessment is at the very heart of the Court's discretionary powers, which have been administered over the years through the formulation of tests and standards such as "it must be shown that the claim of one party is positively opposed by the other",[19] that a dispute is "a matter for objective determination",[20] or that "[t]he mere denial of the existence of a dispute does not prove its non-existence".[21] In subsequent cases, it has become common place for the Court to ritually rehearse these formulas by the letter, to the extent that the Court's pronouncements on this point present themselves as the accrued juxtaposition of previously formulated standards. Importantly, these tests and standards form a body of knowledge which confers upon the Court's crucial determination as to the existence of a dispute an aura of predictability and objectivity, somehow keeping at bay the risk of it appearing an arbitrary exercise of discretion. As I discussed elsewhere,[22] these tests and standards are nonetheless ambivalent devices, insofar as they, on the one hand, self-restrain the Court's discretion in subsequent cases while, on the other, they enable additional margins of manoeuvre. As such, they may be viewed as tools to navigate the spectrum that ranges from absolute flexibility to absolute rigidity.

Criticism has been levied against the assessment of the existence of a dispute becoming unduly rigid and cumbersome,[23] and with respect to tests and standards used as escape devices[24] to avoid jurisdiction in politically sensitive cases.[25] The present contribution builds on this literature and considers

19 *South West Africa Cases, Preliminary Objections*, p. 328.

20 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, 74.

21 *Ibid.*

22 See Letizia Lo Giacco, *Judicial Decisions in International Law Argumentation – Between Entrapment and Creativity* (Hart, 2022), 187–189.

23 Dissenting Opinion of Judge Bennouna, p. 901 and Dissenting Opinion of Judge Crawford, paras. 5–10, in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833.

24 Manuel Casas, "Functional Justiciability and the Existence of a Dispute: A Means of Jurisdictional Avoidance?", 10 *Journal of International Dispute Settlement* (2019), 599, 611.

25 *Ibid.*, 610; Ingo Venzke, "Public Interests in the International Court of Justice – A Comparison between *Nuclear Arms Race* (2015) and *South West Africa* (1966)", 111 *AJIL Unbound* (2017), 68, 68, referring to the Court's retreat to an "excessive formalism that protects great powers." See also John Dugard, "Nuclear Tests Cases and the South West

whether the nature of the legal interests involved, namely the common interests of the applicant, bears on the Court's evidentiary assessment as to the existence of a dispute. Notably, this angle has thus far remained unexplored in the literature, although it holds potential to explain and rationalize instances in which the Court declined jurisdiction because of the absence of a dispute.

As such, this contribution explores variations in the Court's determination of the existence of a dispute and considers to what extent the nature of the interests involved in the dispute informs the approach to the evidence considered adequate to prove it. The article proceeds as follows. Section 2 lays out some theoretical premises and offers an overview of the tests and standards on points of the existence of a dispute, uttered by the Court in its case law. Section 3 presents relevant arguments advanced by the parties in common interests proceedings, and sheds light on the practice of the Court to also admit evidence from multilateral, public settings for the purposes of determining the existence of a dispute. Section 4 critically reflects on the theory-loaded character of evidentiary approaches and its bearing on the Court's judicial function. Section 5 draws final conclusions.

2 Encoding the Existence of a Dispute: Definition, Method and Evidence

In international adjudication, the existence of a dispute is essentially dealt with as a factual determination: the Court is called to decide whether the facts presented in the courtroom lead to finding that a dispute exists between the parties. Nonetheless, facts do not simply exist in the real world as evidence of objective truths, but they are the construction of what the parties as well as the judges consider to correspond to reality.[26] Such a construction is not only law-dependent in that both the parties and the Court will select the relevant facts based on the law; it is also theory-loaded.[27] This means that the "objective determination" of the existence of a dispute is shaped by

Africa Cases: Some Realism about the International Judicial Decision", 16 *Virginia Journal of International Law* (1975), 463, 485, discussing procedural escape devices in cases which risk undermining the authority of the Court if its rulings are not abided by or have no power to influence conduct.

26 Ana Luísa Bernardino, "The Discursive Construction of Facts in International Adjudication", 11 *Journal of International Dispute Settlement* (2020), 175, 177–178.

27 *Ibid.*, 182, referring to Thomas Kuhn, Norwood Hanson, Paul Feyerabend, Karl Popper, Ludwik Fleck. See also Stanley Fish, *Is There a Text in the Class? The Authority of Interpretive Communities* (Harvard University Press, 1980), 338–339.

prior knowledge about what a dispute is as well as by the theory about it. Such knowledge results from the accumulation of standards and tests formulated by the Court on the point. It also emerges from theories about the existence of a dispute, e.g. as a dialogic manifestation of opposing views or rather as a systemic manifestation thereof.

Thus, far from being a dry matter of procedure, the question of the existence of a dispute has generated much controversy inside the Court. Suffice to recall the *South West Africa Cases*,[28] the *Marshall Islands Cases*[29] and *Georgia v. Russian Federation*,[30] in which the judges' divisions breathed through the pages of numerous dissenting and separate opinions.[31] To some, deciding on jurisdictional objections might even constitute "the most political aspect of all the Court's activities".[32]

The determination of the existence of a dispute falls squarely within the discretionary powers of the Court, particularly because the Statute of the ICJ does not provide for a legal definition of the term "dispute", nor does it set out any clear methodology that the Court shall follow to determine the existence of a dispute. Therefore, much of the tests and standards elaborated by the Court throughout its long activity (even longer if one considers the case law of its predecessor, the Permanent Court of International Justice) ought to be appreciated as a compass of sorts for its decision-making on jurisdiction. Yet further scrutiny shall apply to the emerging evidentiary approach of the Court in relation to proceedings instituted on the basis of common interests. To this end, the present section surveys the tests and standards formulated by the Court to guide its decision-making on the existence of a dispute for the purposes of ascertaining jurisdiction. Since it was only in *Belgium v. Senegal* (2012)[33] that

28 *South West Africa Cases*, *Preliminary Objections*: Dissenting Opinions of President Winiarski, Judge Besdevant, Judge Morelli, Judge van Wyk, and Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice.

29 Among the three cases brought by the Marshall Islands against the United Kingdom, Indian and Pakistan, see e.g. *Marshall Islands Cases*: Dissenting Opinions of Vice-President Yusuf, Judges Bennouna, Cançado Trindade, Robinson, Crawford and Judge *ad hoc* Bedjaoui, alongside four Separate Opinions and five Declarations.

30 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russia*), *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2011*, p. 70. Alongside six Separate Opinions and two Declarations, see in particular the Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja and the Dissenting Opinion of Judge Cançado Trindade. On the point, see generally James Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford University Press, 2012), 694–695.

31 *Ibid.*

32 Shabtai Rosenne, *Law and Practice of the International Court* (Brill, 2014), 236.

33 *Belgium v. Senegal*, *Judgment*, paras. 68–69.

the Court did recognise for the first time the applicant's legal standing on the basis of common interests in the compliance with *erga omnes* (*partes*) obligations, one shall be mindful that tests and standards pertaining to the existence of a dispute have been uttered first and foremost in proceedings *not* instituted on the basis of common interests.

The definition of a dispute was first put forward by the Permanent Court of International Justice (PCIJ) in the *Mavrommatis Palestine Concessions* case (1924).[34] This was not the first case adjudicated by the PCIJ. However, unlike *S.S. 'Wimbledon'*,[35] the question of the existence of a dispute – notably whether the "real dispute" was between two States as argued by the applicant, or rather between an individual and a State as argued by the respondent – was a contentious one in the proceedings between Greece – acting in protection of the acquired contractual rights of a Greek subject (Mavrommatis) operating in Palestine and Jerusalem – and Great Britain as the Mandatory Power for Palestine.[36] In determining its jurisdiction to hear the case, the PCIJ defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests".[37] The ICJ has reasserted this formulation by reference to *Mavrommatis* for just a century now.

Aside from ritually repeating the classic definition of a dispute, the ICJ has also encoded its reasoning in formulas directly bearing on the method and the evidence necessary to entertain the case. The terms "encoded" and "encoding" are here used to describe the approach of the Court in showing that previous formulations, sometimes even articulated in prescriptive terms, would orient the Court's discretion to ascertain jurisdiction. For instance, in its Advisory Opinion on *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (1950), the Court considered the existence of a dispute to be "a matter for objective determination by the Court",[38] that "[t]he mere denial

34 *Mavrommatis Palestine Concessions* (*Greece v. United Kingdom*) (*Jurisdiction*) (*30 August 1924*), *P.C.I.J. Reports, Series A, No. 2*, 11.

35 *S.S. 'Wimbledon'* (*United Kingdom and others v. Germany*) (*17 August 1923*), *P.C.I.J. Reports, Series A, No. 1*, 235.

36 The level of disagreement among the judges as to the existence of jurisdiction is evident from the five Dissenting Opinions appended to the Judgment of 30 August 2024. See https://www.icj-cij.org/pcij-series-a. See likewise *Northern Cameroons* (*Cameroon v. United Kingdom*), *Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 15, in particular p. 20 and p. 27; *East Timor* (*Portugal v. Australia*), *Judgment, I.C.J. Reports 1995*, p. 90, para. 22.

37 *Mavrommatis Palestine Concessions*, 11.

38 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 65, 74. See also *Georgia v. Russian Federation, Preliminary Objections*, para. 30; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), *Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 3, para. 50.

of the existence of a dispute does not prove its non-existence",[39] and that "the two sides [must] hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations."[40] In *South West Africa* (1962), the Court further elaborated that for a dispute to exist "it must be shown that the claim of one party is positively opposed by the other".[41] While the above criteria somehow preserve the wide discretion the Court has in appreciating the existence of a dispute, the latter provides an indication of the evidence that an applicant would need to adduce – to meet the Court's expectations and as a matter of customary practice before it – to show the existence of a dispute, or that respondents would need to use to instead object to it. Moreover, the existence of a dispute is a time-sensitive assessment for, in *Border and Transborder Armed Actions* (1988), the Court established that "[t]he critical date for determining the admissibility of an application is the date on which it is filed."[42]

Among evidentiary criteria, in *Land and Maritime Boundary between Cameroon and Nigeria* (1998), the Court also considered 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".[43] Moreover, as reiterated in the *Marshall Islands Cases* (2016),[44] "'although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition' for the existence of a dispute".[45] In the same vein, "notice of an intention to file a case is not required as a condition for the seisin of the Court".[46] Similarly, it is not necessary that a State expressly refers to a specific treaty in its exchanges with

39 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *ibid.*

40 *Ibid.* See also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), *Preliminary Objections, Judgment, I.C.J. Reports 2016* (*I*), p. 26, para. 50.

41 *South West Africa Cases, Preliminary Objections*, p. 328.

42 *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), *Jurisdiction and Admissibility*, *I.C.J. Reports 1988*, p. 69, para. 66. This criterion is also to be found in *Electricity Company of Sofia and Bulgaria* (*4 April 1939*), *P.C.I.J. Reports, Series A/B, No. 77*, p. 83.

43 *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

44 *Marshall Islands Cases.*

45 *Marshall Islands v. India, I.C.J. Reports 2016* (*I*), p. 271, para. 38, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), *Preliminary Objections, Judgment, I.C.J. Reports 2016* (*I*), p. 32, para. 72.

46 *Marshall Islands v. India*, *ibid.*, para. 38, citing *Cameroon v. Nigeria, Preliminary Objections*, para. 39.

the other State to enable it later to invoke that instrument before the Court.[47] Indeed, in *Georgia v. Russian Federation*,[48] the applicant invoked Article 22 of the 1965 Convention on the Elimination of Racial Discrimination (CERD) as a basis for the Court's jurisdiction. In determining the existence of a dispute, the Court considered that

> While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1984*, pp. 428–429, para. 83), *the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.* An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice.[49]

Notwithstanding, in reviewing the bulk of evidence ranging from diplomatic correspondence to official statements of the parties since the 1990s, the Court was in search of a clear reference to allegations against Russia based on CERD. This was notably a criterion that the Court had not expressly formulated before.[50] Although such reference could eventually be found in communications dating back to three days before the application was filed,[51] the Court still found that the procedural requirements to seise the Court under Article 22 CERD had not been met.[52] Such an assessment, defined "atomistic",[53] has been deemed as "a departure from previous practice by requiring formal notice and rejection of a claim, with express reference to the relevant treaty before the claimant can seise the Court."[54]

So far, the approach of the Court emerging from the formulation of these tests and standards does not offer much support to positions that insist on the need of a dialogic exchange of positively opposed statements. Rather,

47 *Georgia v. Russian Federation*, *Preliminary Objections*, para. 30.
48 *Ibid.*
49 *Ibid.*, para. 30.
50 On the point, see e.g. Crawford, *supra* note 30.
51 *Georgia v. Russian Federation*, paras. 31–114, in particular paras. 66–69.
52 *Ibid.*, 184.
53 Crawford, *supra* note 30, 695. See also James Crawford, "Jurisdiction and Applicable Law", 25 *Leiden Journal of International Law* (2012), 471, 478.
54 *Ibid.*

functional standards that reject formalism have preserved judicial discretion and "[granted] the Court freedom to determine that a dispute exists, regardless of the conduct of the parties (…), regardless of what the parties actually claim."[55]

Yet, in the *Marshall Islands Cases* (2016), the Court came up with a criterion of awareness that sparked extensive criticism in the literature,[56] as well as inside the bench.[57] In fact, the criterion played a major role in the reasoning of the Court which, unprecedentedly in its history, dismissed the whole case on the sole basis of the "absence of a dispute between the Parties".[58] The Court affirmed that "it must be demonstrated that, on that date, the respondent *was aware, or could not have been unaware*, that its views were positively opposed by the applicant."[59] Contrarily to what was argued by India and the United Kingdom, though, awareness does not require notice.[60] In the Court's

55 Casas, *supra* note 24, 608.

56 Beatrice Bonafé, "Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications", 45 *Questions of International Law: Zoom-out* (2017), 3; Vincent-Joël Proulx, "The World Court's Jurisdictional Formalism and Its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes", 30 *Leiden Journal of International Law* (2017), 925; Michael Becker, "The Dispute that Wasn't There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice", 6 *Cambridge International Law Journal* (2017), 4; Diane Marie Amann, "International Decisions: Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament", 111 *AJIL* (2017), 439; Juliette McIntyre, "Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court", 19 *Melbourne Journal of International Law* (2018), 546; George Barrie, "The Requirement of 'Awareness' as a Precondition for the Existence of a 'Legal Dispute' under Article 36(2) of the Statute of the ICJ", 43 *South African Yearbook of International Law* (2018), 121; Casas, *supra* note 24.

57 *Marshall Islands Cases*, Dissenting Opinion of Judge Crawford; Dissenting Opinion of Judge Bennouna; Dissenting Opinion of Judge Robinson; Dissenting Opinion of Judge Sebutinde.

58 *Marshall Islands v. United Kingdom*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2016*, p. 83, para. 59. On the point, see Juliette McIntyre, "Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court", 19 *Melbourne Journal of International Law* (2018), 546, 548; Federica Paddeu, "Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory", 76 *The Cambridge Law Journal* (2017), 1, 1, https://doi.org/10.1017/S0008197317000083.

59 *Marshall Islands v. India*, p. 271, para. 38; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2016* (*I*), p. 32, para. 73.

60 *Marshall Islands v. India*, para. 32; *Marshall Islands v. United Kingdom*, para. 27: India and the United Kingdom argued, among other things, that there was no dispute since, as a matter of customary international law, "an applicant must put a respondent on notice of its claims to establish a dispute."

view, awareness is simply rendered necessary to avoid that the respondent be otherwise "deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct."[61] Interestingly, this argument was recently bolstered by Israel in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*),[62] when claiming that "[w]here a State makes an assertion concerning the conduct of another State, it must thus give the latter a reasonable opportunity to respond before resorting to litigation."[63] South Africa, too, in its oral pleadings, made reference to the criterion of awareness as a general recollection of the tests formulated by the Court for determining the existence of a dispute,[64] thus somehow upholding a more rigid and formalistic approach to the existence of a dispute – perhaps solely in the attempt to pre-empt jurisdictional challenges based on the awareness test by the respondent.[65]

The *Marshall Islands Cases* are however *sui generis* in the Court's jurisprudence. The cases concerned the alleged failure of India, Pakistan and the United Kingdom to comply with their individual obligations to pursue negotiations in good faith with a view to achieve disarmament stemming from customary international law and, where applicable, the 1968 Nuclear Non-Proliferation Treaty (NPT). The applicant – a State made of a collective of islands in the Pacific – claimed that the respondents had instead modernized and maintained their nuclear arsenals.[66] As aptly observed by one

61 *Marshall Islands v. India*, para. 40.

62 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*).

63 *South Africa v. Israel*, Israel's oral pleadings, Verbatim Record, 12 January 2024, p. 25, para. 14. See also p. 26, para. 19 and p. 28, para. 26. See, likewise, Myanmar's position in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), *Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, para. 52: "(…) [the applicant argues that] the existence of a dispute at the time of the filing of the application requires 'mutual awareness' of the opposing views of the parties. For Myanmar, the applicant must have made a legal claim which the respondent was aware of or could not have been unaware of, and the respondent must have positively opposed that legal claim in a manner which the applicant was aware of or could not have been unaware of. However, Myanmar states that, in certain cases, the applicant may be aware of the respondent's position from its silence, after a reasonable time to respond has passed.".

64 *South Africa v. Israel*, South Africa's oral pleadings, Verbatim Record, 11 January 2024, pp. 45–46, paras. 14–16.

65 See, likewise, Gambia's reliance on the awareness test in *The Gambia v. Myanmar*, Written Observations of the Gambia on Preliminary Objections raised by Myanmar, 20 April 2021, p. 64, paras. 5.7–5.8.

66 Becker, *supra* note 56, 6.

commentator, although the Marshall Islands had been "the site of extensive nuclear testing by the United States during the 1950s, it did not present itself as an injured State. Instead, it sought to enforce the obligations *erga omnes* of the respondents"[67] vis-à-vis the international community. As such, this case presents itself as an instance of common interests proceedings, rather than one concerning the individual material interests of the applicant. In this context, it is thus germane to ask whether the test of awareness was not rendered necessary, in the view of the Court, by the multilateral or community-based character of the dispute and the nature of the interests involved.

The question of whether there is any correlation between, on the one hand, tests affording less flexibility to the Court's determination of the existence of a dispute and, on the other, the type of legal interest involved is particularly important for one reason. If more stringent standards were formulated in common interests proceedings as a way to preserve the Court's judicial function, their application should not *ipso facto* extend to all types of disputes before the Court. In other words, instituting contentious proceedings based on common interests may bear on the resort to additional standards to determine the existence of a dispute. From this perspective, the criterion of awareness may appear sound and justified, for it ensures that respondents in cases dealing with *erga omnes* (*partes*) obligations are at least cognizant of the party taking issues with their conduct. This may notably occur in situations in which an applicant's public statements address the respondent's conduct on a particular subject-matter. As we shall see, this test – based on elements such as the "author of the statement or document, their intended or actual addressee, and their content"[68] – has found application in *The Gambia v. Myanmar*[69] and *South Africa v. Israel*.[70] Likewise, more flexible evidentiary approaches, in the sense of admitting a wider range of evidence (i.e. not solely diplomatic

67 *Ibid.*

68 *Georgia v. Russian Federation*, para. 63.

69 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2022*, p. 477, para. 65: "The Court has also previously held that, in making such a determination, it takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *Judgment*, *I.C.J. Reports 2012* (*II*), pp. 443–445, paras. 50–55), as well as any exchanges made in multilateral settings (*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. 94–95, paras. 51 and 53). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*, p. 100, para. 63).

70 *South Africa v. Israel.*

communications but also statements in multilateral settings), may better harmonise with the common interest nature of the dispute. This would likely explain why the Court seems to largely rely on records of public statements in multilateral fora and a range of UN documents as compelling evidence to demonstrate the existence of a dispute in common interests proceedings.

3 The Court's Evidentiary Approach: Proceedings Involving a Breach of *erga omnes* (*partes*) Obligations Distinguished

The proceedings brought before the Court on the basis of common interests have so far been very few, and all concentrated in the last decade or so. Behind this recent ascent, there is a history of successful and failed attempts geared towards validating arguments from common interests before the Court. As recently recalled by Judge Xue, the first attempt to institute proceedings based on common interests dates back to over sixty years ago, "when Ethiopia and Liberia instituted proceedings against South Africa for breach of its obligations as the Mandatory Power of South West Africa, [and in which] the Court rejected the standing of those two applicants for lack of legal interest in the case."[71] The reference is of course to the *South West Africa Cases* (1966) which – to use the effective words of Judge Jessup[72] – concerned "the fundamental question whether the policy and practice of apartheid in the mandated territory of South West Africa [were] compatible with the discharge of the 'sacred trust' confided to the Republic of South Africa as Mandatory."[73] As known, the rejoined cases bought by Ethiopia and Liberia were quashed by the Court for lack of jurisdiction, raising "strong indignation of the Member States of the United Nations against the Court"[74] for a decision that still today is seen as a "denial of justice".[75]

Before such a failure, though, one successful attempt to judicially recognize the applicant's legal standing based on common interests should be traced back to the *South West Africa Cases* (1962). The question of the existence of a dispute was at the heart of the respondent's third preliminary objection. South Africa, contended that there was no dispute because the material interests of

71 Declaration of Judge Xue in *South Africa v. Israel, Order on Provisional Measures*, para. 4.
72 Dissenting Opinion of Judge Jessup to *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, p. 325.
73 *Ibid.*
74 Declaration of Judge Xue in *South Africa v. Israel, Order on Provisional Measures*, para. 4.
75 *Ibid.*

the applicants, Ethiopia and Liberia, or of their nationals were not affected by any disagreement or conflict of views.[76] In 1962, the Court considered that given the wording of Article 7 of the Mandate applicable over South West Africa and binding as a matter of law on South Africa as a Mandatory Power, "the Members of the League were understood to have a *legal right or interest in the observance* by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."[77] Although the Court did not elaborate on the aspect of legal rights in the terms of common interests, still it plainly asserted that "[p]rotection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are no less important."[78]

Of particular interest for the present analysis on the variation of evidentiary approaches is the Dissenting Opinion of Judge Morelli in the *South West Africa Cases* (1962).[79] In tackling the question as to how the applicants "*made known* their views concerning the exercise of the Mandate for South West Africa",[80] Morelli seemingly assumes a standard of awareness that would need to be met in order for a dispute to exist. Morelli takes issue with the evidence submitted to the Court, notably the direct participation of Ethiopia and Liberia in multilateral public fora, such as "in the debates, deliberations and proceedings of the General Assembly of the United Nations and of the Fourth Committee of the General Assembly, making clear their position on the matters in the dispute."[81] Also, "Ethiopia was a member of the Committee on South West Africa established by the General Assembly in 1953 to negotiate with South Africa with a view to the implementation of the Court's Advisory Opinion of 11 July 1950". In essence, such a direct participation cannot be equated to evidence exhibiting opposite views to those of the respondent for "[the applicants] acted solely in their capacity as members of a collegiate organ of the United Nations (…) [to express] statements of intention designed to be combined with corresponding statements by other members of the collegiate organ so as to shape the intention of that organ and, thereby, the intention of the United Nations."[82]

76 *South West Africa Cases, Preliminary Objections*, pp. 342–343.
77 *Ibid.*, 343.
78 *Ibid.*, 344.
79 Dissenting Opinion of Judge Morelli in *South West Africa Cases* (1962), p. 564, at 571.
80 *Ibid.* (emphasis added).
81 *Ibid.*
82 *Ibid.*

This way of interpreting the evidence as to the existence of a dispute appears unconvincing – at least looking at it with contemporary eyes – particularly in cases involving obligations owed to the international community as a whole. Why should one assume that bilateral communications would be better suited than multilateral fora to debate, disagree and express (opposing) views about community interests? On the contrary, it would be totally reasonable to expect opposing views about common interests to emerge first and foremost in multilateral settings, particularly at the UN.

Similarly to Morelli, in their Joint Dissenting Opinion to *South West Africa* (1962), Judges Spender and Fitzmaurice considered the "real dispute" to "[spring] directly from the activities of the United Nations Assembly relative to the Mandated territory and the Mandatory",[83] and highlight the distinction between legal interests derived from distinct legal personalities, namely, that of the individual States and that of the international organization.[84] In the words of the two judges:

> It is admitted that the Applicants have no direct material interests involved in this case. Neither their own national interests nor those of any of their nationals under the Mandate instrument or in the Mandated territory are affected. They are appearing … solely for the purpose of defending or upholding the Mandate, in the interest not of themselves, but of the inhabitants of the Mandated territory, and this they are doing at the instance of the Assembly.[85]

A diametrically opposite view was instead held by Judge Jessup, who showcases how "for over a century treaties specifically recognized the legal interests of States in general humanitarian causes and have frequently provided procedural means by which States could secure respect for these interests."[86] To Jessup, the Mandates System was "one of at least four great manifestations in 1919–1920 of the recognition of the interest of *all* States in matters happening in any quarter of the globe",[87] providing for "a 'legal' interest of States [in the observance of general treaty provisions] in questions which did not directly

83 Joint Dissenting Opinion of Judges Spender and Fitzmaurice, at 547–548.

84 *Ibid.*

85 *Ibid.*

86 Separate Opinion of Judge Jessup to *South West Africa Cases* (1962), at 425. See also pp. 424–429, referring, *inter alia*, to the 1948 Genocide Convention as an instrument in which the contracting parties have a common interest.

87 *Ibid.*, 429.

touch their 'material' interests or those of their nationals."[88] In particular, in Jessup's opinion, Article 7 of the South West Africa Mandate "was intended to recognize and to protect the *general interests* of the Members of the international community in the Mandates System".[89] In emphasizing observance of/compliance with the general interests of the international community rather than the injury of material interests, this position projects significant implications for the changing conception of the judicial function of the Court, from mere dispute-settlement mechanism – in its bilateralist connotation – towards a guardian of legality – in its systemic/community-oriented fashion.[90] The Court's approach to evidence in common interests proceedings may just offer some additional indication of such a changing understanding.

3.1 *Systemic Approach to the Existence of a Dispute in Common Interests Proceedings*

The practice of the Court with regard to common interests proceedings can only be appreciated with respect to a comparatively small sample of cases, namely *Belgium v. Senegal* (2012), *The Gambia v. Myanmar* (2019), *South Africa v. Israel* (2023), *Canada and the Netherlands v. Syria* (2023),[91] and, most recently, *Nicaragua v. Germany* (2024).[92] Except for *Belgium v. Senegal*, all cases are still pending before the Court, with only *The Gambia v. Myanmar* having to date reached the merits stage. However, the analysis is still relevant to undertake because of the similarity of arguments raised by the parties and the consistent approach exhibited by the Court in assessing the evidence proving the existence of a dispute.

South Africa v. Israel deserves particular attention for it is the last case in order in which the Court has assessed the parties' opposing arguments on the point of the existence of a dispute.[93] For the present inquiry, it is worth recall-

88 *Ibid.*

89 *Ibid.*, 432 (emphasis added).

90 On the point, see also Sarah Thin, "Guardians of Legality?: The International Judicial Function in an Era of Community Interest", 92 *Nordic Journal of International Law* (2023), 499, 511, https://doi.org/10.1163/15718107-bja10064.

91 *Canada and the Netherlands v. Syrian Arab Republic*, *Provisional Measures*.

92 *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory* (*Nicaragua v. Germany*), Application instituting proceedings, 1 March 2024, paras. 85–93. See also the ICJ's Order relating to the request for the indication of provisional measures, 30 April 2024.

93 Conversely, in *Nicaragua v. Germany*, the Court has not yet undertaken an analysis on the existence of a dispute between the parties, since it found that "the circumstances are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures." See *Nicaragua v. Germany*, *Order on Provisional Measures of*

ing a few salient arguments raised by the parties at the stage of provisional measures.

Following Hamas' attacks of 7 October 2023 in which 1,200 people were brutally killed, abused, mutilated, kidnapped and taken as hostages[94] (some 130 of whom are still held in captivity at the time of writing),[95] Israel launched a wide-scale military campaign against the Gaza Strip, which not only led to an extended loss of life (close to 40,000 civilians were reportedly killed in 285 days of conflict, 90,000 were injured, while a total of 1.9 million were displaced and almost 500,000 are "facing catastrophic levels of food insecurity"),[96] but to the destruction of sensitive civilian infrastructure necessary to the survival of the population, such as hospitals, and power and water supply plants.[97] Humanitarian corridors providing food and medical aid to the Palestinian population appear still very difficult to date, literally throwing the Palestinians in Gaza into a famine and hygiene catastrophe.[98] On 29 December 2023, after more than two months of escalating violence and indiscriminate attacks against the civilian population from air, sea and land, South Africa instituted proceedings against Israel before the ICJ. Based on the common interest to prevent and punish genocide enshrined in Article I of the Genocide Convention to which both Israel and South Africa are parties, South Africa claimed that Israel allegedly violated its *erga omnes partes* obligations and requested the issuance of provisional measures to halt the massacre of the Palestinians.

A key point addressed by the parties in their oral pleadings was the existence of a dispute that would confer jurisdiction to the ICJ on the basis of Article IX of the Genocide Convention. South Africa's arguments are worthy of closer scrutiny. As noted by Counsel John Dugard for South Africa, the applicant State has *jus standi* before the Court based on the alleged violations of *erga omnes*

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30 April 2024, para. 20. At the same time, the Court also noted that the case could not be removed from the List because the criterion of manifest lack of jurisdiction would not be met. *Ibid.*, para. 21.

94 *South Africa v. Israel*, *Order on Provisional Measures*, para. 13.

95 These data were reported by the media in early February, based on information from the Israeli government: Israel confirms deaths of 31 hostages as Hamas responds to truce proposals | Israel-Gaza war | The Guardian (accessed 20 February 2024).

96 United Nations Office for the Coordination of Humanitarian Affairs – occupied Palestinian territory | Home Page (ochaopt.org) (accessed 22 July 2024). See, in more detail, Reported impact snapshot | Gaza Strip (17 July 2024) | United Nations Office for the Coordination of Humanitarian Affairs – occupied Palestinian territory (ochaopt.org) (accessed 22 July 2024). See also *South Africa v. Israel*, *Order on Provisional Measures*, para. 46.

97 *South Africa v. Israel*, *ibid.*, paras. 47–50.

98 *Ibid.*, in particular para. 48.

partes obligations under the Convention, that is, obligations owed to the international community as a whole.[99] Most importantly, South Africa argues that

> Article IX of the Genocide Convention makes it clear that States parties are *guardians* of the Genocide Convention. Unlike other treaties designed to protect human rights [See, for instance, Convention on the Elimination of All Forms of Racial Discrimination, Article 22; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 30.], it does not oblige States to pursue negotiations as a prelude to approaching this Court. *It does not treat the ending of genocidal acts as a bilateral affair between States. Instead, it envisages a situation in which a State, acting on behalf of the international community as a whole, seises the jurisdiction of the Court as a matter of urgency to prevent genocide*.[100]

Three points are in order. First, as compared to other multilateral conventions set up for the protection of fundamental human rights, such as for instance the 1984 Convention Against Torture, the Genocide Convention is *sui generis* for it does not provide an obligation to negotiate as a procedural precondition before submitting a dispute to the ICJ.[101] This interpretation is also reiterated subsequently in the oral pleadings as follows:

> It is precisely because of a situation of this kind, affecting the international community as a whole, that Article IX of the Genocide Convention does not require negotiations as a precondition to seising the jurisdiction of the Court. Certainly a respondent State cannot prevent a referral to the Court by claiming that there is no dispute and that it wants discussions on this matter when the existence of a dispute is clear. For a State to insist on a time frame for negotiations would simply be a licence to commit genocide and would run counter to the object and purpose of the Genocide Convention.[102]

99 *South Africa v. Israel*, Verbatim Record, p. 42, para. 4.
100 *Ibid.*, p. 43, para. 5 (emphasis added).
101 *Belgium v. Senegal, Judgment*, pp. 445–448, paras. 56–63; *Canada and The Netherlands v. Syrian Arab Republic, Provisional Measures*, paras. 34–46.
102 *South Africa v. Israel*, Verbatim Record, p. 46, para. 13.

Plainly, negotiations may help demonstrate the existence of a dispute, as observed by the Court in *Georgia v. Russian Federation*.[103] However, "the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle."[104] The distinction lies in the fact that, on the one hand, negotiations may serve as evidence of the crystallization of opposing legal views or interests on a specific matter, one amid several elements that the Court may take into account while making its "objective determination"; on the other, negotiations may stem from a treaty-based obligation, envisaged as a pre-condition to the seisin of the Court. The obligation to negotiate as a propaedeutic step for the institution of contentious proceedings before the Court, as codified in several international conventions (including CAT and CERD), typically indicates a timeframe (usually six months) in which the parties shall try to resolve their disagreement by negotiation.

Second, the very institution of contentious proceedings before the Court shall be regarded as a means whereby a State *fulfils* its own obligation to prevent acts of genocide under the Genocide Convention (see formulation of Article IX in particular). South Africa's interpretation of its own obligations under the Genocide Convention appears innovative as, unlike other cases brought before the Court on the strength of alleged violations of *erga omnes partes* obligations under the Genocide Convention, the applicant is outspokenly declaring to seise the Court as a way to fulfil its own obligation to prevent genocide, among others.

Thirdly, disputes concerning the obligations to prevent, not to commit, and punish acts of genocide or other acts under Article III of the Convention shall not be regarded as a "bilateral affair between States" but as a matter of common interest. Thus, the applicant State suggests that its legal action shall be viewed as one on behalf of the international community as a whole rather than solely standing on its own rights. This position is bound to a specific way to see a dispute in common interests proceedings, which reflects on the selection of evidence considered relevant and thus brought before the Court to ascertain the existence of a dispute. In particular, to demonstrate the existence of a dispute concerning allegations of genocide against Israel for the purposes of the Court's jurisdiction over the case, South Africa indicated evidence in the form of:

– Concerns voiced by South Africa at the UN Security Council;
– Public statements by South Africa's State representatives, including President Ramaphosa;

103 *Georgia v. Russian Federation*, para. 30.
104 *Ibid.*

– A formal diplomatic démarche informing the Israeli Ambassador of South Africa's intentions to refer the situation of Palestine to the International Criminal Court, stressing alleged acts of genocide committed by Israeli officials;
– South Africa's opening remarks at a BRICS meeting;
– South Africa's official intervention at an Emergency Special Session of the UN General Assembly;
– South Africa's formal Note Verbale one week before submitting its application to the Court [to which Israel responded with a Note Verbale, although remaining silent on the accusations of genocide raised by South Africa].

An ample share of the evidence submitted by the applicant State draws from accusations about Israel's genocidal acts expressed in multilateral settings such as at the Security Council and at the General Assembly, as well as other public fora. This approach is premised on the idea that such evidence satisfies the existence of a dispute for the purposes of ascertaining the Court's prima facie jurisdiction over the case. In this sense, it seems that the concern of the entire community that is at stake in allegations of genocide could be reflected in the type of evidence adduced to demonstrate the existence of a dispute. Put differently, the multilateral character of the dispute bears on the multilateral loci of evidence attesting the existence of the dispute. There needs to be no *bilateral*(*ised*) dispute *stricto sensu* between the parties insofar as the dispute essentially concerns common interests and the applicant State is acting on behalf of the international community as a whole.

In *The Gambia v. Myanmar*, the applicant also relied on both bilateral and multilateral evidentiary records to demonstrate the existence of a dispute with Myanmar, in the form of exchanges at the UN and through a Note Verbale.[105] The Gambia pointed to a wealth of evidence to demonstrate Myanmar's awareness of The Gambia's views of its responsibility for acts of genocide against the Rohingya.[106] This evidence encompassed:

– The Dhaka declaration of the Organization of the Islamic Cooperation (OIC) expressing concerns for the "brutal acts perpetrated by [Myanmar] security forces against the Rohingya … which constitute a serious and blatant violation of international law.";[107]

105 *The Gambia v. Myanmar*, Written Observations of the Gambia on Preliminary Objections raised by Myanmar, 20 April 2021, p. 64, para. 5.7.
106 *Ibid.*, paras. 5.9–5.27.
107 *Ibid.*, para. 5.9.

- The Gambia's role as the chair of the ad hoc ministerial committee established to secure accountability for the violations against the Rohingya in Myanmar;[108]
- Myanmar Ministry of Foreign Affairs' declaration denying any responsibility for violating international law;[109]
- The Report of the UN Independent International Fact-Finding Mission on Myanmar alleging the perpetration of acts with genocidal intent, sent to Myanmar with a request for reply, to which Myanmar remained silent;[110]
- The Gambia's public reference to the UN report's findings and the necessity to secure accountability;[111]
- Myanmar's dismissal of those findings as "based on narrative and not on hard evidence";[112]
- Myanmar's rejection of resolutions adopted by the OIC Member States, including The Gambia, including one endorsing the recommendation of the ad hoc committee chaired by The Gambia to hold Myanmar accountable under the Genocide Convention;[113]
- The Gambia's statements at the 14th OIC Summit Conference;
- The UN Fact-Finding Mission second report, referring to the efforts of The Gambia to pursue the case against Myanmar before the ICJ under the Genocide Convention.[114] A copy was sent to Myanmar for corrections, with no response;
- Formal delivery of the Report of the UN Fact-Finding Mission to Myanmar, alleging the risk of genocide for the Rohingya in Myanmar;[115]
- Exchanges between the parties at the 74th session of the UN General Assembly, in particular The Gambia expressing the intention to bring the Rohingya issue to the ICJ and Myanmar dismissing the UN Fact-Finding reports;[116]
- A Note Verbale sent by The Gambia to Myanmar confirming the existence of a dispute concerning the latter's compliance with its obligations under

108 *Ibid.*
109 *Ibid.*
110 *Ibid.*, para. 5.10.
111 *Ibid.*, para. 5.11.
112 *Ibid.*
113 *Ibid.*, paras. 5.12–5.13.
114 *Ibid.*, para. 5.15.
115 *Ibid.*, para. 5.16.
116 *Ibid.*, para. 5.17.

the Genocide Convention in relation to its acts against the Rohingya, also based on the reports of the UN Fact-Finding Mission.[117]

Similarly, in *Application of the Convention against Torture* (*Canada and the Netherlands v. Syria*), the applicants contended that "in various multilateral settings, including the United Nations Security Council, General Assembly and Human Rights Council, they have specifically made known their disagreement and concern with regard to ongoing practices of torture and other cruel, inhuman or degrading punishment or treatment in Syria and that, each time, Syria has either remained silent or expressed disagreement."[118]

Lastly, in *Nicaragua v. Germany*, the applicant claimed the existence of a dispute based on a Note Verbale attaching a letter to Germany in which Nicaragua "specified the breaches of international law for which it considers that Germany is responsible", later rejected by Germany in a press conference.[119] In Nicaragua's view, the existence of a dispute between the parties was further corroborated by excerpts from a wide-ranging German governmental press conference, publicly reiterating Germany's support of Israel.[120]

It can therefore be concluded that, in the context of proving the existence of a dispute, applicants seising the Court on the basis of common interests have so far displayed both bilateral and multilateral evidence, though strongly leaning towards records of multilateral public fora to exhibit opposite views between the parties.

3.2 *Dialogic Approach to the Existence of a Dispute in Common Interests Proceedings*

Two intertwined arguments have been recurrently used by respondents in common interests proceedings to reject the existence of a dispute: first, that the test of awareness of the dispute is not met, particularly in the absence of notice of a dispute via diplomatic communications; second, that the (multilateral) evidence adduced is insufficient to demonstrate the existence of a dispute.

As recalled earlier the test of awareness was established by the Court – not without controversy and subsequent fierce criticism – in the *Marshall Islands Cases*. However, this test does not involve any "mutual awareness"[121] of the

117 *Ibid.*, para. 5.19.

118 *Canada and The Netherlands v. Syrian Arab Republic*, *Provisional Measures*, para. 26.

119 *Nicaragua v. Germany*, Verbatim Record 2024/15, Public hearing of 8 April 2024, p. 50, para. 7.

120 *Ibid.*

121 *The Gambia v. Myanmar*, *Preliminary Objections*, para. 52.

kind claimed by Myanmar in *The Gambia v. Myanmar*, which the Court has in fact retained "with no basis in law".[122]

Similarly, in *South Africa v. Israel*, the respondent insisted on the expression "*exchanges* in multilateral settings" used by the Court in previous cases concerned with alleged violations of the Genocide Convention.[123] In Israel's view, "[u]nilateral assertion does not suffice. There needs to be an element of engagement between the parties. *The element of interchange and bilateral interaction is required*. A dispute is a reciprocal phenomenon."[124] This position takes the cues from Myanmar's contentions in *The Gambia v. Myanmar*. As recalled by the Court:

> 53. (...) Myanmar considers that *neither the resolutions previously adopted by the OIC, nor the Final Communiqué of the 14th Islamic Summit Conference issued on 31 May 2019 may serve as evidence of the existence of a dispute between the Parties under the Genocide Convention*, as they did not emanate from the official organs of The Gambia, they were not addressed to Myanmar, and Myanmar could not have been aware, on the basis of these documents, of any particularized claims being made against it that it bears State responsibility for a breach of the Genocide Convention. Myanmar contends that these documents ... are formulated as political statements rather than legal claims with sufficient particularity to disclose the existence of a dispute within the meaning of Article IX of the Convention.
>
> 54. With respect to the reports of the United Nations Independent International Fact-Finding Mission on Myanmar (hereinafter the 'Fact-Finding Mission') issued in 2018 and 2019, *Myanmar considers that they too cannot serve as evidence of a dispute between the Parties under the Genocide Convention*, as they express the personal views of the three individual members addressed to the Human Rights Council rather than the legal views of The Gambia on Myanmar's responsibility under the Convention. (...)
>
> 55. (...) In Myanmar's view, the statement of the President of The Gambia before the United Nations General Assembly on 25 September 2018 contains nothing to suggest that the OIC or The Gambia were contemplating to make a claim that Myanmar was in breach of its obligations under the Genocide Convention. Myanmar also contends that the

122 *Ibid.*, para. 71.

123 *South Africa v. Israel*, Verbatim Record 2024/2, p. 25, para. 12 (emphasis added).

124 *Ibid.*

> statement of the Vice-President of The Gambia before the United Nations General Assembly on 26 September 2019 was not directly addressed to Myanmar, made no reference to genocide or the Genocide Convention, and was not sufficiently specific. For the same reasons, Myanmar considers that the statement of the Union Minister for the Office of the State Counsellor of Myanmar before the United Nations General Assembly on 29 September 2019 cannot be considered as establishing a positive opposition of views between the two Parties on a legal issue related to genocide, let alone the Genocide Convention.[125]

However, on closer scrutiny, Israel's claim does not correspond to the approach of the Court in *The Gambia v. Myanmar*, cited by Israel itself,[126] nor to the Court's case law on the point more generally. In fact, in considering "any exchanges made in multilateral settings", the Court regarded statements made by the parties in multilateral fora, such as the UN General Assembly, adequate to demonstrate the existence of a dispute between the parties, provided that a relevant opposition of views can be discerned (i.e. the alleged responsibility of Myanmar for genocidal acts against the Rohingya):

> The Court has also previously held that, in making such a determination [of the existence of a dispute], it takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *Judgment*, *I.C.J. Reports 2012* (*II*), pp. 443–445, paras. 50–55), as well as any exchanges made in multilateral settings (*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. 94–95, paras. 51 and 53). In so doing, it pays special attention to 'the author of the statement or document, their intended or actual addressee, and their content' (*ibid.*, p. 100, para. 63).[127]

What is more, in *The Gambia v. Myanmar* the Court confirmed the evidentiary approach adopted at the provisional measures stage in the same case,[128]

125 *The Gambia v. Myanmar*, *Preliminary Objections*, paras. 53–55.
126 *South Africa v. Israel*, Verbatim Record 2024/2, p. 25, para. 12, footnote 36.
127 *The Gambia v. Myanmar*, *Preliminary Objections*, para. 64.
128 *The Gambia v. Myanmar*, *Provisional Measures*, *Order of 23 January 2020*, *I.C.J. Reports 2020*, p. 3, paras. 27–28.

and considered evidence from multilateral settings such as the reports of the Fact-Finding Mission, or the statements by the representatives of the parties before the UN General Assembly as adequate to prove the existence of a dispute.[129]

An interesting position emerged from Germany's oral pleadings at the provisional measures stage in *Nicaragua v. Germany*.[130] In challenging the existence of a dispute, the respondent argued that the case at hand would not be one "where the parties had already locked horns before the UN or in some other fora"[131] as in *The Gambia v. Myanmar* where "there had already been a number of prior communications both outside and within the UN General Assembly that showed the mutual opposition of views [See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), *Preliminary Objections, Judgment, I.C.J. Reports 2022* (*II*), pp. 502–507, paras. 65–75]."[132] The respondent thus invited the Court to distinguish between the two cases and decline jurisdiction.

However, what is important to underscore is the fact that, for the first time in common interests proceedings, the respondent seems to open up to the possibility of evidence from multilateral fora to be admitted for the purposes of determining the existence of a dispute. In fact, Germany maintained that "for there to be a dispute as a matter of substance, there would have to be *some form of meaningful engagement with a claim*, pursuant to which Germany communicated its position either to Nicaragua *or in such a way that it could objectively be understood as crystallizing a dispute*."[133] As such, Germany does not preclude the possibility that a meaningful engagement with Nicaragua's claim might have occurred within multilateral settings. On the contrary, Germany exhibits an approach that may appear to depart from a purely dialogic approach so far embraced by respondents in common interests proceedings, acknowledging – and reasonably so – the relevance of evidence from multilateral fora, in particular the UN General Assembly, for the determination of a dispute.

129 *The Gambia v. Myanmar*, *Preliminary Objections*, paras. 76–77.
130 *Nicaragua v. Germany*, Verbatim Record 2024/16, 9 April 2024.
131 *Ibid.*, p. 31, para. 26.
132 *Ibid.*, pp. 32–33, para. 31.
133 *Ibid.*, p. 31, para. 27 (emphasis added).

4 Factual Determinations as Discretionary Choices: Some Reflections on the Court's Judicial Function

The recent proceedings in *South Africa v. Israel* have cast a renewed attention on the issue of the existence of a dispute as a condition for the exercise of the Court's jurisdiction. As illustrated by the evidence put forward by the parties in *South Africa v. Israel* and *The Gambia v. Myanmar*, applicants and respondents typically embody diametric stances: one more stringent, relying almost exclusively on bilateral communications *inter se* to prove the dispute, with the aim to disprove in fact the existence of a dispute; and the other, more systemic, oriented towards evidence from multilateral settings as appropriate to prove disputes that pertain to community interests. This divergence of evidentiary approaches simply marks the element of discretion playing out in the discursive construction of facts. Both approaches are plausible. The success of one over the other is a matter of choice by the Court.

Such exercise of discretion may be conditioned by meta-legal considerations. For instance, in the context of common interests proceedings, the Court could consider how appropriate it is to demand the applicant to show a *bilateral interaction* as a necessary element for the determination of the existence of an *erga-omnes*-obligation dispute (as e.g. argued by Israel); whether, in other words, it would not simply be an artificial operation to "bilateralise" a dispute which substantively relates to community interests rather than bilateral/reciprocal obligations. These questions have no easy answer and present several ramifications, not least for the understanding of the judicial function performed by the Court.

The Court's discretion in appraising the existence of a dispute is ample. As recalled by Judge Crawford in the *Marshall Islands Cases*, such broad discretion "allows it to overlook defects in the Application when to insist on them would lead to circularity of procedure."[134] In determining the existence of a dispute, the Court may thus be guided by considerations pertaining to the "'sound administration of justice' prioritizing substance over form".[135] As such, the Court's adjudication shall not be understood as a mechanical, formalistic, exercise of application of previous standards to find a dispute, but in a substantive appreciation that falls squarely in the powers vested in the Court. As different manifestations of the existence of a dispute may be "relevant", especially in case of matters concerning the international community as a whole,

134 Dissenting Opinion of Judge Crawford in the *Marshall Islands Cases*, para. 8, citing the Court in *Croatia v. Serbia*.

135 *Ibid.*, para. 9.

the selection of evidence deemed relevant by the Court will necessarily stem from an exercise of discretion consisting in discriminating between relevant and irrelevant facts.

As illustrated by the arguments put forward by applicants and respondents in common interests proceedings, the selection of "relevant" facts falls back on the lens adopted *to see* the dispute, which also bears on the evidence deemed appropriate to demonstrate the existence of such a dispute. Evidentiary approaches arguably mirror the knowledge and theory that led the parties, in the first place, to consider that evidence as "relevant" facts – what I refer to as a dialogic *vs.* systemic approach. As such, the construction of the existence of a dispute is knowledge- and theory-loaded. If the Court assumes a dialogic lens that sees a dispute arising from a violation of obligations *erga omnes* (*partes*) as no different from disputes arising from a purely bilateral/reciprocal context, the Court will primarily rely on bilateral communications between the parties to make its determination. This is the approach that the Court exhibited in the *Marshall Islands Cases* when rejecting the applicant's reference to *Certain Property* because that "dispute was clearly referenced by *bilateral exchanges* between the parties prior to the date of the application".[136] On the contrary, if the Court adopts a systemic lens in line with the community-oriented character of the allegations, it will accordingly rely on evidence from multilateral fora. As said, having one approach prevail over the other is a matter of discretionary choice of the Court.

In common interests proceedings the Court's approach has thus far admitted a combination of evidence from bilateral, private communications between the parties as well as statements drawn from multilateral, public settings as a reflection of both a dialogic and a systemic approach to evidence. More lenient practices towards the latter are just emerging from the analysis of ongoing proceedings before the Court, but it is far from settled since only a limited number of cases have been instituted based on common interests, many of which are still pending. This appears in line with the nature of the interests protected, insofar as they are interests of concern for the international community, they would most likely be debated in public fora and multilateral settings such as UN organs and international organizations, among others. However, accepting evidence from multilateral settings *in combination* with evidence from bilateral communications is one thing, and it is quite another to accept multilateral evidence *alone* as sufficient to prove the existence of a dispute.

136 *Marshall Islands Cases*, para. 54. See also *ibid.*, para. 10.

While variations in the assessment of evidence as to the existence of a dispute may well indicate a changed understanding of its judicial function by the Court, two caveats should induce some caution. First, irrespective of the interest protected, the existence of a dispute as a jurisdictional requirement ought to be wisely preserved in contentious proceedings to avoid "covert requests for advisory opinions."[137] This is particularly important because, by law, the power to request an advisory opinion is vested in the UN Security Council and the UN General Assembly,[138] or other organs of the UN and specialized agencies so authorized by the General Assembly.[139] Second, alternative evidentiary approaches should still accord with the dispute-settlement function entrusted in the Court, while at the same time making the institution of proceedings based on common interests an *effective* avenue to undertake in contentious cases. As such, the evidentiary approach of the Court, inclined to admit multilateral evidence, in addition to bilateral communications between the parties, shall be assessed against the potential risk of an overload of cases which might hinder the Court's function, as well as by virtue of it being "the primary judicial organ of the UN".[140] This is a balancing exercise that the Court ought to perform, remaining mindful of its mandate as well as of its far-reaching role.

In other words, the question as to how the Court should reconcile, on the one hand, viewing the existence of a dispute as a condition to exercise its judicial function and, on the other, with the increasing applications relating to common interests, has not only to do with the judicial function *stricto sensu* but, more broadly, with whether the Court perceives of itself as operating as part of the larger context of the UN system. To illustrate, in *The Gambia v. Myanmar* the Court has relied on evidence of statements between the parties at the UN General Assembly as well as on the reports of the UN Fact-Finding Commission. Similarly, in *South Africa v. Israel*, the Court considered reports and data of UN organs and agencies to assess the plausibility of the claim made by the applicant, as if it was fully cognizant of the community-relevance of the case. Similar considerations ensue from the increasing phenomenon of "mass-interventions" of third parties in proceedings involving

137 *South West Africa Cases* (1966), paras. 47–48; Casas, *supra* note 24, 600, 602: "… the Court's contentious jurisdiction is circumscribed to deciding *actual* disputes (as opposed to its advisory role, in which it can tackle abstract or theoretical issues)."

138 Art. 96(1) UN Charter.

139 Art. 96(2) UN Charter.

140 Art. 92 UN Charter.

violations of obligations *erga omnes*,[141] subjected to the Court's authorisation and therefore to its appreciation of the *legal* interests involved.[142]

The extent to which a systemic approach to the existence of a dispute might better accord with the nature of the interests/obligations at stake in the dispute is certainly not settled and shall attract further scrutiny. Importantly, if the Court is not merely approached as a dispute-settlement mechanism operating in a vacuum but as a judicial institution inserted into the broader international public order, what significance should be ultimately afforded to the question as to whether a dispute exists?

5 Conclusions

The arguments recently articulated by the parties in *South Africa v. Israel* as to the existence of the dispute quite clearly embody, respectively, a stringent and a more lenient position as to the evidence deemed sufficient to prove the dispute. These positions sit at the opposite ends of a spectrum, approaching the critical question of the existence of a dispute for the purposes of ascertaining jurisdiction in a public, multilateral, systemic context or as a dialogic, private issue. Embracing one rather than the other will necessarily bear on the type of evidence that the Court will consider sufficient to prove the dispute. While more lenient practices towards the latter are just emerging from the analysis of recent ICJ proceedings, this is far from settled since most of the common interests proceedings instituted so far are still ongoing. At present, the Court is likely caught in a struggle between these two plausible evidentiary positions from which a combination has thus far resulted. The more common interests proceedings will unfold in the future, the more clarity there will be in relation to the crystallization of the Court's evidentiary approach.

141 For a broader overview, see Brian McGarry, "Obligations *Erga Omnes* (*Partes*) and the Participation of Third States in Inter-State Litigation", 22 *The Law & Practice of International Courts and Tribunals* (2023), 273, https://doi.org/10.1163/15718034-bja10099.

142 The question is prominently increasing with 32 States appearing in *Allegations of Genocide* (*Ukraine v. Russian Federation*) (see Press Release No. 2023/49, 27 September 2023, p. 3) and 54 States appearing in the advisory proceedings in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (see Press Release No. 2024/15, 9 February 2024), and several others intervening in a number of cases (see e.g. *The Gambia v. Myanmar*, Joint Declaration of Intervention of Canada, Denmark, France, Germany, The Netherlands, and the United Kingdom, in addition to the Declaration of Intervention of the Republic of Maldives).

However, some elements can already be underscored in relation to the increased engagement with multilateral evidence by the Court. First, the evidence deemed sufficient to prove the existence of a dispute is a discretionary choice of the Court. If the Court engages with multilateral evidence, particularly in common interests proceedings, it does so by virtue of the discretionary powers vested in it. Second, the factual determination of the existence of a dispute is discursive and thus depends on the conception the Court adopts to determine a dispute in common interests proceedings. The evidence considered "relevant" for making such a determination is inherently bound to the conception of the dispute – dialogic *vs.* systemic – when common interests are at stake. Third, from a structural standpoint, the increased engagement with multilateral evidence to prove the existence of a dispute sits in the broader overarching transition from a bilateralist conception of international law, based on reciprocal norms, to a community-oriented conception of it, based on community norms.[143] Such transformation is arguably reflecting on international adjudication as well, marking a transition from a prominently "private" character of the international judicial system to a "public" character thereof.[144] Accordingly, discretionary choices of the Court likely reflect the changing understanding of international law and the needs to adapt the Court's practice to it, not through broad, grand strokes but through subtle, interstitial variations, which may well encompass the approach to evidence in common interests proceedings.

143 Anne Peters refers to "a paradigm shift namely international law's shift from a 'private' to a 'public' character." Anne Peters, "Towards Transparency as a Global Norm", in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge University Press, 2013), 534–607, 600; Bruno Simma, "Universality of International Law from the Perspective of a Practitioner", 20 *EJIL* (2009), 265, 268. See also Simma, *supra* note 4; Sarah Thin, "Community interest and the international public legal order", 68 *Netherlands International Law Review* (2021), 35.

144 Thin, "Guardians of Legality?", *supra* note 90, 527.