PUT ON NOTICE: THE ROLE OF THE DISPUTE REQUIREMENT IN ASSESSING JURISDICTION AND ADMISSIBILITY BEFORE THE INTERNATIONAL COURT

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Since the International Court of Justice handed down its 2016 judgments in the Marshall Islands *cases, much has been written about the cases and their consequences. This article takes a step back, to view the Court's most recent treatment of the dispute requirement in the context of the principles developed in the Court's previous case law. It will be argued that the 'new' awareness requirement is potentially no more than a manifestation of the requirement for positive opposition, but that it has been driven by the Court's conceiving of the dispute requirement as a jurisdictional precondition and serves to impose a de facto pre-action notice requirement on parties seeking access to the Court.*

CONTENTS

* Lecturer in Law, University of South Australia and PhD candidate, University of Melbourne. LLM (Cantab), LLB/LP (Hons), BA (Flin). Email: juliette.mcintyre@unisa.edu.au. I wish to express my sincere thanks to Ms Belinda McRae, without whom this article would never have happened. Belinda's exceptional LLM thesis (on file with author) and lucid conversation inspired this article. We had hoped to co-author a paper, but circumstances conspired against us. Her contribution cannot be underestimated and I thank her for allowing me to rely on some of her research. I also thank Professor Ivan Shearer, Professor Douglas Guilfoyle and Dr Jed Odermatt for their comments on an earlier draft, and the Editors for their particular assistance in preparing the article for publication. After all that help, any remaining errors are assuredly of my own making.

I INTRODUCTION

Once upon a time is the opening line in many a well-loved fairy tale. So may we begin this account of the International Court of Justice ('ICJ'): once upon a time, an international court was established under the auspices of the *Charter of the United Nations* ('*Charter*').[1] It was vested with the power to decide 'disputes' between states.[2] And for many years all was well. The Court promulgated a remarkably consistent jurisprudence, leading to a 'well established'[3] definition of what matters constituted a 'dispute' ripe for adjudication. No respondent state ever succeeded in establishing the non-existence of a dispute, save for in a handful of dissenting opinions.[4]

But that is not the end of our tale.

Since its 2011 decision in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* ('*Georgia v Russia*'),[5] the Court has demonstrated an increased willingness to dismiss claims for want of an extant dispute between the parties, culminating in the 2016 judgments in *Marshall Islands v India*, *Marshall Islands v Pakistan* and *Marshall Islands v United Kingdom* ('*Marshall Islands*').[6] There, for the first

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1 *Charter of the United Nations* art 92.

2 *Statute of the International Court of Justice* art 38; Manley O Hudson, 'The Twenty-Fourth Year of the World Court' (1946) 40 *American Journal of International Law* 1, 35; Alain Pellet, 'Article 38' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The* Statute of the International Court of Justice*: A Commentary* (Oxford University Press, 2006) 677, 696.

3 *Interhandel (Switzerland v United States of America) (Preliminary Objections)* [1959] ICJ Rep 6, 50 (Judge Wellington Koo) ('*Interhandel*').

4 See, eg, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275, 342–4 (Judge Vereshchetin) ('*Cameroon v Nigeria*'); *Application of the* Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v Serbia and Montenegro) (Preliminary Objections)* [1996] ICJ Rep 595, 625–30 (Judge Oda) ('*Application of the* Genocide Convention'); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 12, 42–56 (Judge Schwebel) ('*UN Headquarters Opinion*'); *Application of the* International Convention on the Elimination of All Forms of Racial Discrimination *(Georgia v Russia) (Provisional Measures)* [2008] ICJ Rep 353, 400–6 (Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov) ('*Georgia v Russia (Provisional Measures)*'); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures)* [2009] ICJ Rep 139, 161–4 (Judges Al-Khasawneh and Skotnikov) ('*Belgium v Senegal (Provisional Measures)*'); *Application of the* International Convention on the Elimination of All Forms of Racial Discrimination *(Georgia v Russia) (Preliminary Objections)* [2011] ICJ Rep 70, 181–2 (Vice-President Tomka), 235–8 (Judge Skotnikov) ('*Georgia v Russia (Preliminary Objections)*').

5 *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70.

6 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) (Jurisdiction and Admissibility)* [2016] ICJ Rep 255 ('*Marshall Islands v India*'); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) (Jurisdiction and Admissibility)* [2016] ICJ Rep 552 ('*Marshall Islands v Pakistan*'); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* [2016] ICJ Rep 833, 856–7 ('*Marshall Islands v United Kingdom*'). Given that the salient aspects of these judgments are identical, for ease of reading, reference will be made only to the decision in *Marshall Islands v United Kingdom* unless it is necessary to distinguish between the decisions.

time in its history, the Court rejected an entire case[7] on the basis of an 'absence of a dispute between the Parties'.[8] The decision in *Marshall Islands* radically divided the members of the Court, particularly with respect to whether it was consistent with the Court's previous jurisprudence in respect of the dispute requirement. The majority held that to establish the existence of a dispute:

> The evidence must show that the parties 'hold clearly opposite views' with respect to the issue brought before the Court … As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant.[9]

Much has since been written about this controversial decision; most of it critical. Béatrice Bonafé writes that the decision renders 'proof of the existence of a dispute unnecessarily difficult and uncertain when there were no prior diplomatic exchanges between the parties'.[10] Michael Becker says that the Court 'failed to explain why the absence of prior notice (or "awareness") is dispositive as a legal matter'.[11] Lorenzo Palestini and Diane Amann separately argue that the decision has unduly heightened the threshold for initiating cases and establishing the existence of a dispute,[12] and that 'it is hard to understand why potential respondents should generally be afforded the opportunity to react outside of the contentious proceedings and prior to their commencement'.[13] Vincent-Joël Proulx likewise considers that the judgments 'considerably' raise the bar to meet in establishing the existence of a dispute.[14] Ingo Venzke suggests that the Court has retreated into 'an excessive formalism',[15] creating 'a new hurdle'[16] that 'works to limit access to the Court',[17] while Nico Krisch blogs that

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7 Technically three cases.

8 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 856 [59].

9 Ibid 850 [41] (citations omitted).

10 Béatrice I Bonafé, 'Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications' (2017) 45 *Questions of International Law: Zoom-out* 3, 4.

11 Michael A Becker, 'The Dispute that Wasn't There: Judgments in the *Nuclear Disarmament* Cases at the International Court of Justice' (2017) 6 *Cambridge International Law Journal* 4, 17.

12 Lorenzo Palestini, 'Forget about *Mavrommatis* and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament' (2017) 8 *Journal of International Dispute Settlement* 557, 575; Diane Marie Amann, 'International Decisions: *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*' (2017) 111 *American Journal of International Law* 439, 444.

13 Palestini, above n 12, 570.

14 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' (2017) 30 *Leiden Journal of International Law* 925, 930–1.

15 Ingo Venzke, 'Public Interests in the International Court of Justice — A Comparison between *Nuclear Arms Race* (2016) and *South West Africa* (1966)' (2017) 111 *AJIL Unbound* 68, 68.

16 Ibid 70.

17 Ibid.

the Court has deliberately avoided reaching a decision on a contentious political issue and 'hides its evasion behind a façade of formalist legal reasoning'.[18]

While perhaps the Court was driven to find a procedural loophole sufficient to justify its avoidance of a difficult political issue,[19] the decision in the *Marshall Islands* cases can and should also be viewed as the ne plus ultra of a jurisprudential attitude to issues of jurisdiction and admissibility adopted by the Court some years earlier. As Alina Miron suggests, the cases are 'the culmination of a judicial trend, in which formalism and verbalism have replaced the objective assessment of facts by the Court'.[20]

This paper embeds the *Marshall Islands* judgments in the context of the Court's previous jurisprudence relating to the existence of a dispute. The first matter will therefore be to distil from the Court's case law the key principles that determine the existence of a dispute and the role of awareness as one of those principles. The second part of the analysis will be to consider why the Court has gone down its particular jurisprudential path. The criticism will be made that the Court's treatment of the dispute requirement as a jurisdictional condition is misconceived, and that the Court has elided the distinction between its jurisprudence regarding the interpretation of compromissory clauses and its optional clause jurisdiction. It will be argued that particularly in the latter context, the dispute requirement is more properly understood as relevant to admissibility and the protection of the Court's judicial function. For this reason, inquiries into the existence of a dispute should not be limited to matters arising prior to the seisin of the Court, and the Court should retreat from its most recent formalistic case law.

II 'DISPUTES' BEFORE THE INTERNATIONAL COURT OF JUSTICE AND THE PRINCIPLES THAT DETERMINE THE EXISTENCE OF A DISPUTE

The term 'dispute' features throughout the *Charter*.[21] Indeed, the *Charter* imposes a legally binding obligation on member states to consider 'judicial settlement'[22] at the ICJ as a peaceful means of resolving their 'legal disputes'.[23]

But the 'classic definition'[24] of the term 'dispute' in fact derives from the judgment of the Court's predecessor institution, the Permanent Court of

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18 Nico Krisch, 'Capitulation in The Hague: The *Marshall Islands Cases*' on *EJIL: Talk!* (10 October 2016) <https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/> archived at <https://perma.cc/KEA2-J6NW>.

19 Ibid. See also Jed Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14 *International Journal of Law in Context* 221, 231–2, discussing the case in the context of judicial avoidance techniques.

20 Alina Miron, '"Establishing the Existence of a Dispute before the International Court of Justice": Between Formalism and Verbalism' (2017) 45 *Questions of International Law: Zoom-in* 43, 43.

21 *Charter of the United Nations* arts 1(1), 2(3), 12(1), 27(3), 32–38, 52(2), (3).

22 Ibid arts 2(3), 33(1). See also Christian Tomuschat, 'Article 2(3)' in Bruno Simma et al (eds), *The* Charter of the United Nations*: A Commentary* (Oxford University Press, 2nd ed, 2002) vol 1, 101, 105–6; Christian Tomuschat, 'Article 33' in Bruno Simma et al (eds), *The* Charter of the United Nations*: A Commentary* (Oxford University Press, 2nd ed, 2002) vol 1, 583, 586.

23 *Charter of the United Nations* art 36(3).

24 Chittharanjan F Amerasinghe, *Jurisdiction of Specific International Tribunals* (Martinus Nijhoff, 2009) 45; Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (Martinus Nijhoff, 4th ed, 2006) vol 1, 507.

International Justice ('Permanent Court') in *Mavrommatis Palestine Concessions (Greece v United Kingdom)* ('*Mavrommatis*'). In that case, Greece brought a claim for diplomatic protection against the British Government and to found jurisdiction, relied on art 26 of the League of Nations *British Mandate for Palestine*,[25] which gave the Permanent Court jurisdiction over 'any dispute whatever … relating to the interpretation or the application of the provisions of the Mandate'.[26] The Permanent Court defined that central term as follows: '[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.[27] Although this 'unfortunate passage'[28] has been 'widely criticised',[29] Charles de Visscher for one praised the Permanent Court's succinct definition as follows:

> Avoiding too formal a position that would have led it into excessively complex definitions, calculated to foster a spirit of chicanery, the Court reduced the notion of dispute to its simplest elements. It took the same supple and liberal stand on the requirement of previous diplomatic negotiations as proof of the existence of a dispute and as an obligatory preliminary to recourse to international jurisdiction.[30]

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25 *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 10–11 ('*Mavrommatis*').

26 Ibid 11.

27 Ibid.

28 R Y Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1, 10.

29 Antonio Cassese, 'The Concept of "Legal Dispute" in the Jurisprudence of the International Court' (1975) 14 *Comunicazioni e Studi* 173, 179; Ruth Donner, *International Adjudication: Using the International Court of Justice with Special Reference to Finland* (Suomalainen Tiedeakatemia, 1988) 91.

30 Charles de Visscher, *Theory and Reality in Public International Law* (P E Corbett trans, Princeton University Press, revised ed, 1968) 380 (citations omitted).

The *Mavrommatis* definition of a dispute continues to be the first port of call for the Court in any case addressing the existence of a dispute,[31] 'unaffected by the passage of more than eight decades'.[32] As Sir Robert Jennings puts it, the definition provides a judgment drafter with 'an easy initial run in'.[33] But despite the deceptive simplicity of the *Mavrommatis* formula, it is not always 'easy in a given case to say whether a dispute exists or not', particularly where there may be 'all the appearance of one'.[34]

This difficulty has been made all the more acute by the Court's most recent case law. Since *Mavrommatis*, the Court had developed a well-understood

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[31] See, eg, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Jurisdiction)* [2002] ICJ Rep 3, 13 ('*Arrest Warrant*'); *Belgium v Senegal (Provisional Measures)* [2009] ICJ Rep 139, 163 [14] (Judges Al-Khasawneh and Skotnikov), 207 [14] (Judge ad hoc Sur); *Cameroon v Nigeria* [1998] ICJ Rep 275, 314 [87]; *Certain Property (Liechtenstein v Germany) (Preliminary Objections)* [2005] ICJ Rep 6, 18 [24] ('*Certain Property*'); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6, 40 [90] ('*DRC v Rwanda*'); *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 99 [22] ('*East Timor*'); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351, 555 [326] ('*El Salvador v Honduras*'); *Application of the* Genocide Convention [1996] ICJ Rep 595, 660 (Judge Kreća); *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 84 [30], 173 [10], 180 [27] (Judge Owada), 227 [11]–[12] (Judge Abraham), 325 [8] (Judge Greenwood); *Appeal relating to the Jurisdiction of the ICAO Council (India v Pakistan) (Judgment)* [1972] ICJ Rep 46, 167 (Judge Singh); *Interhandel* [1959] ICJ Rep 6, 61 (Judge Sir Spender); *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures)* [1999] ICJ Rep 124, 163 (Judge Higgins); *Questions of Interpretation and Application of the* 1971 Montreal Convention *arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Preliminary Objections)* [1998] ICJ Rep 115, 122 [21] ('*Lockerbie*'); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (Judgment)* [2007] ICJ Rep 659, 700 [128]; *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 44 [12] (Judge Wellington Koo) ('*Northern Cameroons*'); *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objections)* [1996] ICJ Rep 803, 868 (Judge ad hoc Rigaux) ('*Oil Platforms*'); *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6, 34; *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 328 ('*South West Africa (First Phase)*'); *UN Headquarters Opinion* [1988] ICJ Rep 12, 27; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) (Preliminary Objections)* [2016] ICJ Rep 3, 26 [50] ('*Alleged Violations*'); *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [37].

[32] Christian Tomuschat, 'Article 36' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The* Statute of the International Court of Justice*: A Commentary* (Oxford University Press, 2006) 589, 597.

[33] Jennings, above n 28, 10.

[34] *Northern Cameroons* [1963] ICJ Rep 15, 109 (Judge Sir Fitzmaurice).

jurisprudence constante[35] in which it relied on four key indicia: the irrelevance of political motive, the requirement of legal rights, the existence of 'positive opposition' as between the parties, and the rule that the final decision as to the existence of a dispute rests with the Court.

But to these uncontroversial elements we might now add the requirement of prior notice of the claim, inherently linked to the necessity of 'awareness'. We will see below that the requirement of awareness has evolved from merely an inherent aspect of the 'positive opposition' requirement, to a key indicium in its own right. This new addition has cemented a shift in the balance of the Court's inquiry from an objective and flexible approach to one based on formalism that effectively imposes an obligation of prior notice of claims.

A *Irrelevance of Political Motive*

First, the Court's early case law established a clear rule that political motives underlying a claim would not necessarily prevent the Court characterising it as a legal dispute,[36] and to date the Court has not explicitly declined to adjudicate upon a case for the reason that 'political results [would] flow from it'.[37] Indeed, at times the Court has presided over disputes touching on highly sensitive issues such as the use of force,[38] and disputes with which the United Nations Security

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35 Palestini, above n 12, 565. See also the dissenting opinions of Judges Cançado Trindade and Robinson in *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 913 [10], 920–1 [29] (Judge Cançado Trindade), 1063–4 [3]–[4] (Judge Robinson). The point is also implicitly acknowledged by President Abraham: at 858 [1]. The full list of earlier cases in which a dispute was challenged are as follows, in alphabetical order: *Aegean Sea Continental Shelf (Greece v Turkey) (Jurisdiction)* [1978] ICJ Rep 3 ('*Aegean Sea*'); *Alleged Violations* [2016] ICJ Rep 3; *Arrest Warrant* [2002] ICJ Rep 3; *Cameroon v Nigeria* [1998] ICJ Rep 275; *Certain Property* [2005] ICJ Rep 6, 18 [24]; *DRC v Rwanda* [2006] ICJ Rep 6; *East Timor* [1995] ICJ Rep 90; *El Salvador v Honduras* [1992] ICJ Rep 351; *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1998] ICJ Rep 432 ('*Spain v Canada*'); *Application of the* Genocide Convention [1996] ICJ Rep 595; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70; *Interhandel* [1959] ICJ Rep 6; *Lockerbie* [1998] ICJ Rep 115; *Mavrommatis* [1924] PCIJ (ser A) No 2; *Northern Cameroons* [1963] ICJ Rep 15; *Nuclear Tests (Australia v France) (Jurisdiction)* [1974] ICJ Rep 253 ('*Nuclear Tests*'); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)* [2012] ICJ Rep 422 ('*Belgium v Senegal (Merits)*'); *South-West Africa (First Phase)* [1962] ICJ Rep 319; *Territorial and Maritime Dispute (Nicaragua v Colombia) (Preliminary Objections)* [2007] ICJ Rep 832 ('*Territorial and Maritime Dispute (Nicaragua v Colombia)*'). The issue also arose in *UN Headquarters Opinion* [1998] ICJ Rep 12 and *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466 ('*LaGrand*').

36 *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Rep 69, 91–2 ('*Border and Transborder Armed Actions*'). See also *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 20 ('*Tehran Hostages*').

37 *East Timor* [1995] ICJ Rep 90, 220 (Judge Weeramantry). See also *Questions of Interpretation and Application of the* 1971 Montreal Convention *arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Provisional Measures)* [1992] ICJ Rep 114, 160 (Judge Weeramantry) ('*Lockerbie (Provisional Measures*').

38 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392, 435 [96] ('*Military and Paramilitary Activities*'). See also *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 31; *Oil Platforms* [1996] ICJ Rep 803, 812. *Contra Alleged Violations* [2016] ICJ Rep 3, 32–4.

Council was also occupied.[39] As expressed by the Court in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion),* albeit not in the context of the existence of a dispute, 'that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task'.[40] The fact that a question has political aspects 'does not suffice to deprive it of its character as a legal question'.[41]

Certainly, as a matter of theory, adopting a contrary approach would too severely restrict the Court's capacity to decide cases, because each case brought before it has an inherently political aspect.[42] But despite this point being sound in theory and established in the Court's early practice, in its more recent cases the Court has declined to hear — allegedly for want of the existence of a dispute — claims related to the use or threat of force,[43] the existence of a customary law obligation to prosecute or extradite for crimes of torture and genocide,[44] alleged ethnic cleansing in the context of an armed conflict,[45] and of course, the Court has declined to hear any contentious case dealing with nuclear disarmament or testing.[46] As Andrea Bianchi observes, 'the ICJ does not often have the opportunity to pass judgment on legal issues that touch the very nerves of the international legal system'[47] and its most recent case law would tend to suggest that the Court is disinclined to take up the opportunity to address highly politicised issues when it presents.[48] Indeed, the irrelevance of political motive in determining the existence of a dispute is not discussed in any of the Court's most recent cases, suggesting that the Court may be inclined at times to utilise the dispute requirement as a useful shield against highly political claims, which it

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39 *Lockerbie* [1998] ICJ Rep 115, 138, 144–5 (Judge Kooijmans).

40 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 162 [58].

41 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 415 [27] (citations omitted). Cf Odermatt, above n 19. See also *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep 166, 172 [14].

42 *Aegean Sea* [1978] ICJ Rep 3, 13 [31]; *Border and Transborder Armed Actions* [1988] ICJ Rep 69, 91–2 [52]; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 185 [7] (Judge Koroma); *Tehran Hostages* [1980] ICJ Rep 3, 20; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the* Charter*) (Advisory Opinion)* [1962] ICJ Rep 151, 155; Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4 *Melbourne Journal of International Law* 29, 31; Terry D Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v United States Dispute* (Martinus Nijhoff, 1989) 15; H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 1933) 153; Edward McWhinney, *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (Springer, 1991) 135; Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 1065; Tomuschat, 'Article 36', above n 32, 599.

43 See, eg, *Alleged Violations* [2016] ICJ Rep 3.

44 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422.

45 *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70.

46 See also Surabhi Ranganathan, 'Nuclear Weapons and the Court' (2017) 111 *AJIL Unbound* 88.

47 Andrea Bianchi, 'Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes Again in the *Marshall Islands* Case' (2017) 111 *AJIL Unbound* 81, 82.

48 See generally Venzke, above n 15.

considers unripe or unwise to pass judgment upon.[49] The propriety of using the dispute requirement in this manner is beyond the scope of this paper.[50]

B *Legal Rights*

A second requirement for the existence of a dispute has been that the case must relate to the parties' legal rights.[51] As stated by Judge Sir Spender in *Northern Cameroons (Cameroons v United Kingdom)* ('*Northern Cameroons*'), '[a] dispute … normally would relate to a legal right or interest in the State claiming to be aggrieved'.[52] Similarly, Judge Oda in *East Timor (Portugal v Australia)* ('*East Timor*') underlined the requirement that the parties assert the rights alleged to form the subject of the dispute,[53] and the Permanent Court in *Mavrommatis* placed emphasis on the fact that Greece was 'asserting its own rights' in characterising the case as a 'dispute'.[54]

On the one hand, the requirement that an applicant demonstrate 'the existence of a legal right or interest in the subject-matter of their claim', in order to be entitled to relief,[55] is logically sound.[56] But on the other hand, framing the dispute requirement as necessitating the existence of 'legal rights' can lead to particular difficulties when claims are brought in respect of obligations *erga omnes* or multilateral disputes. While the Court was 'confident enough' to find the existence of a dispute in Belgium's case against Senegal by relying on the *erga omnes* nature of the obligation to prosecute or extradite torture suspects,[57] in the *Marshall Islands* cases 'there were [not] any of the normal indicators of a bilateral dispute' due to the multilateral nature of the claims and the fora in which those claims had been initially put forward.[58] In particular, the cases concerned not the legal rights of the Marshallese, but the legal *duties* of the respondent states to negotiate (under the *Treaty on the Non-Proliferation of Nuclear Weapons*[59] or customary law) nuclear disarmament. The Court is empowered to render, at the least, a declaratory judgment addressing breach or

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49 See generally Bianchi, above n 47; Becker, above n 11; Krisch, above n 18; Palestini, above n 12.

50 However, Jed Odermatt considers this precise issue: Odermatt, above n 19. See also Bianchi, above n 47; Becker, above n 11; Krisch, above n 18; Ranganathan, above n 46.

51 In *Spain v Canada*, for example, the dispute was described as follows: '[t]he essence of the dispute between the Parties is whether [Canada's] acts violated Spain's rights under international law': *Spain v Canada* [1998] ICJ Rep 432, 450 [35].

52 *Northern Cameroons* [1963] ICJ Rep 15, 83. See also *Northern Cameroons*: at 33–4, 37, 111 (Judge Sir Fitzmaurice); *South West Africa (First Phase)* [1962] ICJ Rep 319, 659–60 (Judge van Wyk).

53 *East Timor* [1995] ICJ Rep 90, 108 [3].

54 *Mavrommatis* [1924] PCIJ (ser A) No 2, 12.

55 *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 34 [48] ('*South West Africa (Second Phase)*').

56 Dapo Akande, 'The Role of the International Court of Justice in the Maintenance of International Peace' (1996) 8 *African Journal of International and Comparative Law* 592, 606; Jonathan I Charney, 'Compromissory Clauses and the Jurisdiction of the International Court of Justice' (1987) 81 *American Journal of International Law* 855, 859; Ion Diaconu, 'Peaceful Settlement of Disputes between States: History and Prospects' in R St J Macdonald and Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff, 1983) 1095, 1100.

57 Venzke, above n 15, 70.

58 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1101 [20] (Judge Crawford).

59 Opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

affirming compliance with a particular obligation; and as such a simple denial of the breach or assertion of compliance with said obligation should be deemed sufficient for the purposes of establishing a dispute.[60]

For this reason, and despite the outcome of the *Marshall Islands* cases, broadly speaking the Court's recent case law tends to suggest a move away from requiring the establishment of 'legal rights' to found a dispute.[61] As Judge Crawford observed in *Marshall Islands*:

> It is now established — contrary to the inferences commonly drawn from the merits phase of *South West Africa* — that States can be parties to disputes about obligations in the performance of which they have no specific material interests.[62]

Instead, it is enough that the parties '"hold clearly opposite views concerning the question of the performance or non-performance of certain" international obligations'.[63]

C *Positive Opposition*

The third requirement — the 'holding of clearly opposite views' — marks the central criterion governing the existence of a dispute and unlike matters of political motive and legal rights, continues to serve as a key element in the Court's dispute analysis.

Famously articulated in the *South West Africa (Ethiopia v South Africa)* ('*South West Africa (First Phase)*') case, this key indicia requires that for a dispute to exist '[i]t must be shown that the claim of one party is positively opposed by the other'.[64] As such, neither a unilateral assertion, nor a denial, of the existence of a dispute is sufficient.[65] Rather it is the combination of these factors that gives rise to the dispute; it will be 'born at the very moment' at

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60 Juliette McIntyre, 'Declaratory Judgments of the International Court of Justice' (2012) 25 *Hague Yearbook of International Law* 107, 119, 127.

61 Although the question of the existence of a dispute was not raised, another recent case that proceeded to the merits notwithstanding that the applicant's legal rights were not directly infringed is *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Merits)* [2014] ICJ Rep 226.

62 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1102 [22] (Judge Crawford).

63 *Alleged Violations* [2016] ICJ Rep 3, 26 [50], quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (First Phase)* [1950] ICJ Rep 65, 74 ('*Interpretation of Peace Treaties*'). See also *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [37].

64 *South West Africa (First Phase)* [1962] ICJ Rep 319, 328. This indicia has been repeated in the following cases: *Arrest Warrant* [2002] ICJ Rep 3, 13 [27]; *Belgium v Senegal (Provisional Measures)* [2009] ICJ Rep 139, 162 [9] (Judges Al-Khasawneh and Skotnikov), 207 [14] (Judge ad hoc Sur); *Cameroon v Nigeria* [1998] ICJ Rep 275, 314 [87], 356 [7] (Judge Kooijmans); *DRC v Rwanda* [2006] ICJ Rep 6, 40 [90], 98 [13] (Judge ad hoc Mavungu); *East Timor* [1995] ICJ Rep 90, 100 [22]; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 84 [30], 173 [10] (President Owada), 325 [8] (Judge Greenwood), 332 [10] (Judge Donoghue); *Lockerbie* [1998] ICJ Rep 115, 122 [21]. See also *Interpretation of Peace Treaties* [1950] ICJ Rep 65, 74.

65 *Interpretation of Peace Treaties* [1950] ICJ Rep 65, 74; *Northern Cameroons* [1963] ICJ Rep 15, 27, 109 (Judge Sir Fitzmaurice); *Nuclear Tests* [1974] ICJ Rep 253, 277 [2] (Judge Gros); *Oil Platforms* [1996] ICJ Rep 803, 810 [16]; *South West Africa (First Phase)* [1962] ICJ Rep 319, 328, 547 (Judges Sir Spender and Sir Fitzmaurice), 565 [3] (Judge Morelli); *UN Headquarters Opinion* [1998] ICJ Rep 12, 27.

which denial of a claim is articulated, or where a claim is wilfully ignored.[66] As expressed by Judge Yusuf in *Marshall Islands*, '[w]hat matters is that there is a positive opposition of juridical viewpoints, a disagreement on a point of law or fact'.[67]

Historically, the Court was, as stated by Judge Bennouna, 'flexible in interpreting the definition of a dispute, merely noting the existence of the States' opposing arguments on a point of law'.[68] Or as explained by Judge Sebutinde in *Marshall Islands*:

> The Court's jurisprudence clearly demonstrates the Court's consistent preference for a flexible approach that steers clear of formality or procedural rigour, right from the days of the Permanent Court of International Justice, and until more recently in *Croatia v Serbia*.[69]

Even the majority in *South West Africa (First Phase)*, having established the principle, adopted a perfunctory approach to the evidence required to establish opposing views. The full extent of the majority's analysis was as follows: '[t]ested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes'.[70] Similarly, in *Northern Cameroons*, the Court found that it was 'sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute'.[71] Likewise, in *Aegean Sea Continental Shelf (Greece v Turkey)*, it was 'clear from the submissions … as well as in the observations in the various Turkish diplomatic communications to Greece, that Greece and Turkey are in conflict'.[72]

Despite a generally flexible approach to assessing the evidence required to establish positive opposition, some individual judges held it to be lacking in situations where the parties were considered to be in agreement in respect of the relevant issue.[73] And in the recent case of *Frontier Dispute (Burkina Faso v Niger)* ('*Burkina Faso v Niger*'), the Court refused to delimit a pre-agreed frontier, and also refused to place the agreement on record in the *dispositif*, on the basis that requests submitted by parties to the Court 'must not only be linked to a valid basis of jurisdiction, but must also always relate to the function of deciding disputes'.[74] There being no disagreement between the parties as to the

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66 Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill Nijhoff, 2015) 58.

67 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 867 [27].

68 *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 832, 932.

69 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1047 [18] (citations omitted). See also *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1078 [40] (Judge Robinson), 1095–101 (Judge Crawford).

70 *South West Africa (First Phase)* [1962] ICJ Rep 319, 328.

71 *Northern Cameroons* [1963] ICJ Rep 15, 27. Cf Judge Sir Fitzmaurice: at 109.

72 *Aegean Sea* [1978] ICJ Rep 3, 13 [31].

73 See, eg, *Cameroon v Nigeria* [1998] ICJ Rep 275, 343 (Judge Vereshchetin), 348–9 (Judge Higgins); *LaGrand* [2001] ICJ Rep 466, 546 (Judge Parra-Aranguren); *Lockerbie* [1998] ICJ Rep 115, 179 [21] (Judge Oda).

74 *Frontier Dispute (Burkina Faso v Niger) (Judgment)* [2013] ICJ Rep 44, 70 [48].

location of the boundary, there was nothing for the Court to adjudge and declare upon.[75]

Similarly, claims have been rejected on the basis that the conflict is too abstract, or hypothetical. Senegal argued in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ('*Belgium v Senegal*') that the Court should decline to render a judgment because to do so would be to deliver a 'purely declaratory [decision]'[76] of 'questionable utility'.[77] A similar argument was raised in the *Marshall Islands* cases by each of the respondent states.[78] Had the Court accepted these submissions in *Marshall Islands*, it would have been walking a more familiar (albeit not well-trodden) path. There have been several individual opinions rejecting a dispute on the basis that the conflict was too abstract.[79] For example, in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judge Oda found that there was no dispute for the reason that the Democratic Republic of the Congo's application merely indicated a 'different legal view'[80] and the claim lacked a connection to any wrong actually suffered.[81] This is similar to the conclusion reached by the majority in *Georgia v Russia* that the dispute threshold was not satisfied in respect of acts occurring between July 1999 and July 2008, because of the lack of a connection between Georgia's claims and Russia's specific obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*').[82] However, despite the language sometimes employed, such arguments are not directly concerned with the question of 'positive opposition' between parties, but rather go to the requirement that even a

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75 By contrast, in *Société Commerciale de Belgique (Belgium v Greece)*, the agreement in question only arose during the course of proceedings. In that context the Permanent Court of International Justice's decision to record such agreement by way of judgment was 'understandable' as it was 'bound to influence the settlement on the merits of the dispute originally brought before the Court': ibid 72 [57], citing *Société Commerciale de Belgique (Belgium v Greece) (Judgment)* [1939] PCIJ (ser A/B) No 78, 178.

76 'Counter-Memorial of Senegal', *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, International Court of Justice, General List No 144, 23 August 2011, 28.

77 Ibid 27.

78 'Preliminary Objections of the United Kingdom', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, International Court of Justice, General List No 160, 16 March 2015, 48–52; 'Counter-Memorial of the Republic of India', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, International Court of Justice, General List No 158, 16 September 2015, 38–40; 'Counter-Memorial of Pakistan (Jurisdiction and Admissibility)', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, International Court of Justice, General List No 159, 1 December 2015, 48–9, 65–6.

79 McIntyre, above n 60, 120–4.

80 *Arrest Warrant* [2002] ICJ Rep 3, 47 [4].

81 Ibid 48 [6] (Judge Oda). See also *South West Africa (First Phase)* [1962] ICJ Rep 319, 659 (Judge van Wyk).

82 *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 101–17. See also *Georgia v Russia (Provisional Measures)* [2008] ICJ Rep 353, 402 [11]–[12] (Vice-President Al-Khasawneh, Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

declaratory judgment must relate to, and resolve, a concrete controversy and cannot be concerned with hypothetical issues.[83]

A further factor that has affected the Court's flexible approach to establishing 'positive opposition' is the need, at times, to imply the existence of a dispute. The Court stated in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* ('*Cameroon v Nigeria*') that 'the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* … the position or the attitude of a party can be established by inference, whatever the professed view of that party'.[84] Thus, as summarised by Judge ad hoc Caron in *Alleged Violations Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* ('*Alleged Violations*'):

> The requirement that a dispute exist may thus be met where: (1) there is a claim of legal violation by a State and such a claim is positively opposed, that is, rejected, by another State; or (2) there is a claim of legal violation by a State where positive opposition may be inferred from the failure of another State to reply to the first State's claim of legal violation where such a response is called for.[85]

Taking an approach that permits the inference of a dispute allows an applicant to persist with their case where the respondent is 'wilfully deaf' to the claim or fails to appear,[86] as occurred in *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*. In that case, although Iran did not appear, the Court nevertheless found the existence of a dispute on the basis that Iran's failure to respond to the United States' protests was sufficient to imply 'opposing views'.[87]

Over time, however, the Court's jurisprudence has demonstrated two marked trends: first, towards a more careful examination of the evidence demonstrating positive opposition;[88] and secondly, away from a consideration of the parties' submissions as evidence of the existence of a dispute, instead requiring that the dispute be established by reference to pre-application conduct.

In respect of the first trend, examples arise in *East Timor* and the *Application of the Genocide Convention* case. In both cases, the Court outlined the specific allegations and the particulars of the respondent's denials before concluding in the former, that 'by virtue of [Australia's] denial, there is a legal dispute',[89] and in the latter that the evidence demonstrated that the 'two sides hold clearly

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83 McIntyre, above n 60, 120.

84 *Cameroon v Nigeria* [1998] ICJ Rep 275, 315 [89]. See also *UN Headquarters Opinion* [1988] ICJ Rep 12, 28; Christoph Schreuer, 'What is a Legal Dispute?' in Isabelle Buffard et al (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff, 2008) 959, 963–5.

85 *Alleged Violations* [2016] ICJ Rep 3, 79 [13].

86 'Verbatim Record', *Application of the* International Convention on the Elimination of All forms of Racial Discrimination *(Georgia v Russia)*, International Court of Justice, General List No 140, 13 September 2010, 34–5 (Samuel Wordsworth).

87 *Tehran Hostages* [1980] ICJ Rep 3, 25.

88 Although of course, not without exceptions: see *Belgium v Senegal (Provisional Measures)* [2009] ICJ Rep 139, 148–9 [46], 162–3 [9]–[12] (Judges Al-Khasawneh and Skotnikov); *Georgia v Russia (Provisional Measures)* [2008] ICJ Rep 353, 378, 402. However, the question of whether the Court enjoys prima facie jurisdiction is a less demanding inquiry.

89 *East Timor* [1995] ICJ Rep 90, 98–100.

opposite views' on the performance of *Convention* obligations.[90] The *Georgia v Russia* decision notoriously undertook '*un raisonnement long et laborieux*' that analysed in pedantic detail Georgia's evidence of positive opposition.[91]

The *Georgia v Russia* judgment also originates the second trend, in which the Court took a strict approach to the 'positive opposition' test,[92] and in doing so arguably mischaracterised the *South West Africa (First Phase)* dictum, which requires 'opposing *attitudes*' and uses present tense in the formulation of the test. In *Georgia v Russia*, the Court held that the requisite 'positive opposition' must be established at the date of the application to the Court, rather than the date of the judgment, and Russia must have had an opportunity to refute directly any claims made by Georgia prior to the application being filed.[93] In earlier case law the applicant state had merely been required to demonstrate that the dispute was nascent prior to the time the application was made,[94] not spell it out or define it 'with legal exactitude or particularity'.[95]

The methodology adopted by the majority in *Georgia v Russia* — of disregarding the parties' submissions and requiring the dispute to be established by the date of application to the Court — was, at the time of the decision, entirely at odds with the Court's regular references to submissions in assessing the existence of a dispute.[96] Certainly, the initial tool used by the Court in its analysis of the existence of a dispute must be the application to the Court, which in turn must necessarily set out a claim.[97] Article 40(1) of the *Statute of the International Court of Justice* ('*Statute*'),[98] coupled with arts 38(1), 39(2) and 87(2) of the *Rules of Court* ('*Rules*'),[99] demand that the 'subject of the dispute' be specified in the application,[100] and it is the responsibility of the applicant to present its characterisation of the dispute to the Court through such means.[101] But the dispute must also remain in existence until the Court's judgment is

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90 *Application of the* Genocide Convention [1996] ICJ Rep 595, 614–15, quoting *Interpretation of Peace Treaties (Advisory Opinion)* [1950] ICJ Rep 65, 74. See also *Certain Property* [2005] ICJ Rep 6, 17–19.

91 *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 225 [7] (Judge Abraham).

92 Ibid 174–5 [13] (President Owada), 332 [9] (Judge Donoghue).

93 Ibid 85 [30].

94 *El Salvador v Honduras* [1992] ICJ Rep 251, 658 [57] (Judge Torres-Bernárdez); *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 84–5, 334 (Judge Donoghue); *Northern Cameroons* [1963] ICJ Rep 15, 109 (Judge Sir Fitzmaurice); *South West Africa (First Phase)* [1962] ICJ Rep 319, 548 (Judges Sir Spender and Sir Fitzmaurice), 566 [4] (Judge Morelli); *Application of the* Convention on the Prevention and Punishment of the Crime of Genocide *(Croatia v Serbia) (Preliminary Objections)* [2008] ICJ Rep 412, 441 [85] ('*Croatia v Serbia*').

95 *Interhandel* [1959] ICJ Rep 6, 60 (Judge Sir Spender).

96 See, eg, *Aegean Sea* [1978] ICJ Rep 3, 12–13; *Application of the* Genocide Convention [1996] ICJ Rep 595, 614–15.

97 *Certain Property* [2005] ICJ Rep 6, 49–50 (Judge Owada); *Spain v Canada* [1998] ICJ Rep 432, 448–9; *Nuclear Tests* [1974] ICJ Rep 253, 260 [24]; *South West Africa (Second Phase)* [1996] ICJ Rep 6, 149 [16]–[17] (Judge van Wyk).

98 *Statute of the International Court of Justice* art 40(1).

99 International Court of Justice, *Rules of Court* (adopted 14 April 1978) arts 38(1), 39(2), 87(2) ('*Rules*').

100 *Interpretation of the Statute of the Memel Territory (Great Britain, France, Japan and Italy v Lithuania) (Judgment)* [1932] PCIJ (ser A/B) No 49, 350 (Judge Anzilotti) ('*Interpretation of the Statute of the Memel Territory*').

101 *Spain v Canada* [1998] ICJ Rep 432, 447 [29].

rendered, suggesting that it is proper to consider also the parties' submissions as evidence of the existence of a dispute.[102]

The Court's new approach could have been explained as being due to the particular requirements of the *CERD*'s compromissory clause, which requires prior negotiations ahead of referral of a dispute to the Court.[103] The case could easily have been confined and distinguished on that basis.[104] But the cases that have followed — *Belgium v Senegal*, *Alleged Violations* and *Marshall Islands* — have each likewise treated the date of filing of the application as the relevant date by which the dispute must have crystallised.[105] *Belgium v Senegal* provides a clear example of the Court's changing approach. The case concerned a complaint filed with a Belgian investigating judge, alleging torture and other crimes against humanity committed by the former President of Chad, Hissène Habré, during his presidential tenure.[106] The Belgian judge issued an international warrant in absentia for the arrest of Mr Habré, which was transmitted to Senegal (where Mr Habré had sought political asylum following the overthrow of his government in 1990).[107] Belgium claimed that Senegal had breached (and was continuing to breach) its obligation to prosecute Mr Habré or extradite him to Belgium,[108] under both the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*Convention against Torture*')[109] and customary international law.

One of the asserted grounds of jurisdiction — art 30 of the *Convention against Torture* — reads in the same terms as the *CERD*'s compromissory clause and requires prior negotiations;[110] but the Court's decision to require the existence of a dispute at the date of filing the application cannot be explained away on this basis. The claims in respect of the *Convention against Torture* were permitted to proceed; only the claims asserting a breach of customary law on the basis of jurisdiction under the optional clause were denied.[111] On this point, Judge Abraham was in dissent, arguing that the parties had demonstrated a strong divergence of legal views on the date of the Court's judgment and in the proceedings before the Court,[112] which would ordinarily have been sufficient to

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102 *Arrest Warrant* [2002] ICJ Rep 3, 12; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 228–9 [15] (Judge Abraham); *Nuclear Tests* [1974] ICJ Rep 253, 270–1 [55].

103 *CERD* art 22:

> Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

104 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1056 [33] (Judge Sebutinde).

105 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 444 [54]; *Alleged Violations* [2016] ICJ Rep 3, 18 [33]; *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1056 [33] (Judge Sebutinde).

106 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 432 [19].

107 Ibid 431–2.

108 Ibid 428–9, 461.

109 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 7(1) ('*Convention against Torture*').

110 Ibid art 30; *CERD* art 22.

111 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 444–5.

112 Ibid 475 [18].

establish an opposition of views in conformity with the *South West Africa (First Phase)* formulation.

In *Marshall Islands*, President Abraham performed a somewhat unenthusiastic about-turn, aligning his views with the majority.[113] While expressly observing that '[p]rior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its *Statute*, unless one of the relevant declarations so provides',[114] the Court nevertheless declined to find the existence of a dispute on the basis that the respondent states needed to be 'aware, or … not … unaware, that its views were "positively opposed" by the applicant',[115] at a date prior to the filing of the application.[116] Reference to submissions could only be to 'confirm the existence of a dispute'[117] or 'clarify its subject-matter'[118] — the latter reference an attempt to confine the Court's 2012 decision in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* where the Court held that '[t]o identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties'.[119]

As has only subsequently become apparent, the most significant feature of the *Georgia v Russia* judgment was the Court's implicit addition of a notice requirement through its rejection of documents evidencing the dispute due to Russia's lack of awareness of them.[120] As noted in the joint dissent:

> under the reasoning adopted by the Court, a dispute does not exist unless the applicant has given notice of its claims to the respondent before the application is filed and the respondent 'has opposed' those claims.[121]

Insistence that a claim be directly opposed by the respondent prior to seisin — a position adopted by the majority notwithstanding that some of the Judges acknowledged the theoretical possibility of a dispute being inferred[122] — marks a reversion to a position where a respondent's 'wilful deafness' may prevail[123] and moreover, delimits the Court's shift from a flexible focus on 'opposing

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113 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 30–1 [9].

114 Ibid 849 [38] (citations omitted).

115 Ibid 850 [41] (citations omitted).

116 Ibid 851 [43].

117 Ibid (citations omitted).

118 Ibid (citations omitted).

119 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile) (Preliminary Objections)* [2015] ICJ Rep 592, 602 [26]. See also *Cameroon v Nigeria* [1998] ICJ Rep 275, 317. Béatrice Bonafé considers the distinction 'not convincing': Bonafé, above n 10, 14. The Court reiterated this formulation in *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Preliminary Objections)* (International Court of Justice, General List No 163, 6 June 2018) 17 [48] ('*Equatorial Guinea v France*').

120 *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 99 [61], 116–17 [104].

121 Ibid 143 [3].

122 Ibid 84–5 [30], 87 [37]. See also Vice President Tomka: at 181–2; Judge Skotnikov: at 238 [11]–[12].

123 Ibid 174 (President Owada), 331 (Judge Donoghue).

attitudes'[124] or 'opposing arguments on a point of law'[125] to a new emphasis on the rigid application of a standard of 'awareness'.[126]

D *Awareness*

1 *As the Foundation to Infer Positive Opposition*

It is nigh on impossible to truly disentangle the new requirement of 'awareness' from the old (but still extant) requirement of 'positive opposition'. Hugh Thirlway suggests wryly that 'it is difficult to see how it is possible to "positively oppose" a claim of the other party of which one is not yet aware'.[127] Certainly for some, such as Judge Donoghue in *Marshall Islands*, awareness is a necessary precondition that creates a 'reason to expect a response from the Respondent, and thus, even in the absence of an explicit statement of the Respondent's opposition to the claim' provides the 'basis for the Court to infer opposition'.[128] For others, such as Judge Robinson in the same case,

> [t]o establish whether the parties hold clearly opposite views, it is sufficient to examine the positions of the parties on the issue as objectively revealed by the evidence before the Court, without regard to their awareness of the other party's position.[129]

The judgment in *Belgium v Senegal* demonstrates the Court's shifting emphasis from positive opposition to awareness of claim as a necessary requirement to establish the existence of a dispute. It marked the first time in the Court's history that it had declined to hear part of a case on the basis of the lack of a dispute. Notwithstanding that Belgium claimed jurisdictional title under both the *Convention against Torture* and the parties' optional clause declaration,[130] the Court denied that it had jurisdiction in respect of the customary international law claims on the basis that:

> The only obligations referred to in the diplomatic correspondence between the Parties are those under the *Convention against Torture* … Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr Habré under customary international law.[131]

In the final judgment, as in *Georgia v Russia*, the Court carefully reviewed the pre-application correspondence between the parties and emphasised not whether the parties held opposing views on the legal consequences of a certain factual matrix, but whether the respondent state was aware of the claims being made

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124 *South West Africa (First Phase)* [1962] ICJ Rep 319, 328.

125 *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 832, 932 (Judge Bennouna).

126 Bonafé, above n 10, 14.

127 Hugh Thirlway, 'Establishing the Existence of a Dispute before the International Court of Justice: A Response to Professor Bonafé's Criticisms of the ICJ' (2017) 45 *Questions of International Law: Zoom-out* 53, 55.

128 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1036 [8] (Judge Donoghue).

129 Ibid 1072 [25] (Judge Robinson).

130 *Convention against Torture* art 30.

131 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 444–5 [54].

against it.[132] Or to put it another way, had received notice of those claims, prior to the filing of the application.

Despite its taking on a fresh impetus in the years since *Georgia v Russia*, it must be noted that referring to the respondent state's awareness of claims in determining the existence of a dispute is not an entirely new phenomenon. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, the Court regarded the United States as 'well aware' of Nicaragua's allegations that its conduct was a breach of international obligations before the case was instituted; and as such considered that

> it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty.[133]

Similarly, although related to arguments about undue delay in bringing the claim rather than the existence of a dispute, in *Certain Phosphate Lands in Nauru (Nauru v Australia)* the Court emphasised that it was sufficient that Australia had been made aware of the claim, 'even if the communications between the parties took the form of press reports of speeches or meetings, rather than formal diplomatic correspondence'.[134] And in *Nuclear Tests (Australia v France)* ('*Nuclear Tests*'), the Court accepted as evidence a series of unilateral statements that the tests were to cease. The Court considered that the dispute had thus 'disappeared',[135] and highlighted that although its conclusion was based on public statements made by the French president after the conclusion of the hearings (in which France did not participate) they were 'known to the Australian Government'[136] and could therefore serve as the basis of the Court's decision.

The Court also relied on unilateral public statements to demonstrate awareness of the dispute in the 2016 *Alleged Violations* decision. The case concerned alleged violations of Nicaragua's sovereign rights and maritime zones declared by the Court's judgment of 19 November 2012 and the threat of the use of force by Colombia.[137] Colombia argued that 'at no time' up to the date on which Nicaragua filed its Application did Nicaragua 'ever indicate to Colombia, by any modality', the claims alleged by Nicaragua. It further argued that Nicaragua had not raised any complaints with Colombia, either in writing or orally, until almost 10 months after it filed the Application and three weeks before it submitted its Memorial.[138] The Court reviewed a number of public statements made by the presidents of each state, and concluded that in respect of alleged violations of Nicaragua's sovereign rights and maritime zones, despite

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132 Ibid.

133 *Military and Paramilitary Activities* [1984] ICJ Rep 392, 428–9 [83].

134 Jacqueline Peel, 'Notice of Claim by an Injured State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 1029, 1031.

135 *Nuclear Tests* [1974] ICJ Rep 253, 271 [55].

136 Ibid 264 [32].

137 *Alleged Violations* [2016] ICJ Rep 3, 27 [53].

138 Ibid 28 [55].

the lack of formal communication between the parties prior to the filing of the case:

> in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of *Decree 1946* and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of the Parties, such as those referred to in paragraph 69, Colombia could not have misunderstood the position of Nicaragua over such differences.[139]

The Court reached the opposite conclusion in respect of the claims of threat or use of force, stating that 'nothing in the evidence suggests that Nicaragua had indicated that Colombia had violated its obligations'.[140] Rejecting — consistently with earlier jurisprudence — the need to lodge a formal diplomatic protest prior to the seisin of the Court,[141] the Court's reasoning on its face utilises the requirement of awareness as the evidence upon which it could base an inference of positive opposition.[142] But it may also be suggested that the reference to awareness was driven at least in part by the Court's wish to refute Colombia's submission that it had been taken entirely by surprise by the institution of proceedings.[143]

2 *Objective Awareness as a Discrete Criterion*

The above analysis demonstrates that even prior to the delivery of the *Marshall Islands* judgments, the 'positive opposition' threshold required a definite claim against the respondent, the veracity of which was denied by the latter, or at least the launch of a protest against the respondent's course of conduct.[144] But now the requirement that a respondent be aware of the allegations against it appears to have become central to the dispute inquiry; emerging as a discrete criterion and not merely as a factual foundation for drawing an inference of positive opposition, or 'compelling evidence of the existence of a dispute'.[145] On this point, the *Marshall Islands* Court was strongly divided. Judge Robinson in the minority said that 'awareness may be confirmatory of positive opposition of views, but it is not … a pre-requisite for, nor decisive in determining the existence of a dispute'.[146] Judge Donoghue, in the majority, likewise treats the criterion of awareness as an element demonstrating that 'there was no opposition of views, and thus no dispute'.[147] Others, such as Judge Owada, contend that the 'it is the awareness of the respondent which demonstrates the transformation of a mere disagreement into a

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139 Ibid 32–3 [73].

140 Ibid 33 [76].

141 Ibid 32 [72]; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 84 [30].

142 *Contra Alleged Violations* [2016] ICJ Rep 3, 78–9 (Judge ad hoc Caron).

143 Cf Judge Xue's assertion in *Marshall Islands* that '"surprise" litigation should … be discouraged': *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1031 [6].

144 *El Salvador v Honduras* [1992] ICJ Rep 351, 555 [326]; *Mavrommatis* [1924] PCIJ (ser A) No 2, 61 (Judge Moore); *Northern Cameroons* [1963] ICJ Rep 15, 109 (Judge Sir Fitzmaurice), 136–7 [6] (Judge Morelli); *UN Headquarters Opinion* [1998] ICJ Rep 12, 30.

145 Becker, above n 11, 11.

146 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1079 [40].

147 Ibid 1037 [8].

true legal dispute'.[148] President Abraham, in a reversal of his previous position on this issue, held that it is necessary that the dispute have been 'revealed by exchanges between the parties — in whatever form' prior to the institution of proceedings.[149] The respondent, says President Abraham, 'has to have been informed' of the claim beforehand.[150]

The precise contours of a separate 'awareness' requirement are not clear from the Court's reasoning. The key passage in the judgment followed an assessment of the evidence submitted by the Marshall Islands to demonstrate the dispute; particularly statements made by the Marshall Islands in various multilateral fora.[151] Thus one can confidently say that in applying the criterion of awareness, 'generic or vague' allegations are unlikely to be adequate;[152] the Court emphasised in *Marshall Islands* that the statements made by the applicant had failed to set out sufficient particulars.[153]

But precisely what will be considered by the Court as sufficient particulars for the purposes of awareness remains uncertain.[154] The Court continues to reject any need for a formal diplomatic protest,[155] although they hint to future applicants that it 'may be an important step to bring a claim of one party to the attention of the other'.[156] As noted above, there is no need for prior negotiations in respect of cases brought under the optional clause,[157] and notice of intention to file a case (a 'letter before action', as it is often known in domestic systems) is likewise unnecessary.[158] Likewise, the case law demonstrates an array of conduct that may be accepted as creating the requisite 'awareness', without any clear justification: unilateral statements made about the subject matter of the dispute but not the claim itself are in;[159] so too are press reports of speeches or meetings.[160] But not statements in multilateral fora at which the parties were present, unless there was a clear articulation of an alleged breach by the respondent state of a particular legal obligation, which demanded a response.[161] Similarly, awareness of the acts constituting the alleged breach is not sufficient,

148 Ibid 881 [13].
149 Ibid 858 [3].
150 Ibid.
151 Ibid 23–5 [48]–[51].
152 Becker, above n 11, 10.
153 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 856 [57].
154 The Court makes some limited suggestions by way of attempting to distinguish its approach in the *Certain Property*, *Cameroon v Nigeria* and *Application of the* Genocide Convention cases: see ibid 854–5 [54].
155 Ibid 849 [38].
156 *Alleged Violations* [2016] ICJ Rep 3, 32 [72].
157 Whether or not this is a requirement of jurisdiction under a particular compromissory clause is a separate issue: *Georgia v Russia (Preliminary Objections)* [2011] 70, 84 [29]; *Interpretation of Judgments Nos 7 and 8 concerning the Case of the Factory at Chorzow (Germany v Poland)* [1927] PCIJ (ser A) No 13, 10–11; *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [38].
158 *Cameroon v Nigeria* [1998] ICJ Rep 275, 297 [39].
159 *Nuclear Tests* [1974] ICJ Rep 253, 264 [32].
160 *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 254 ('*Nauru v Australia*'); *Alleged Violations* [2016] ICJ Rep 3, 31–2. See also Peel, above n 133, 1031.
161 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 853–4 [50]–[51]; *Alleged Violations* [2016] ICJ Rep 3, 31 [69].

even where the parties are engaged in direct correspondence about the issue; the respondent must have had the opportunity to address the particular claim.[162] Whether the awareness requirement is a hurdle of 'modest height',[163] or an obligation to undertake extensive negotiations, or something else entirely, is not at all clear from the Court's case law.

E *Primacy of the Court*

But evidential problems to one side, the fundamental problem with relying on awareness as a standalone criterion, as distinct from an element of the positive opposition test, is that it is inherently and inescapably subjective.[164] It requires the Court to ascertain an 'entirely subjective psychical criterion',[165] using what Jean d'Aspremont refers to as 'anthropomorphic constructions'.[166] In the words of Judge Crawford, it demands 'an analysis of that indefinite object, the state of mind of a State'.[167] It does not sit at all well with the Court's previously well-established obligation to determine the existence of a dispute objectively.[168] As expressed in *Fisheries Jurisdiction (Spain v Canada)* ('*Spain v Canada*'), it had been clear that it was the duty of the Court 'to determine on an objective basis the dispute dividing the parties',[169] and in the process 'to isolate the real issue in the case and to identify the object of the claim'.[170]

That the Court is the primary arbiter of the existence of a dispute is persistently replicated in the introductory paragraphs of judgments, without any consideration of its real meaning; its unreflective recitation in *Marshall Islands* is particularly jarring.[171] So it may be that the Court's seminal pronouncement in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* ('*Interpretation of Peace Treaties*') opinion that '[w]hether there exists an international dispute is a matter for objective determination'[172] is

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162 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 444–5 [54]. Although this arguably conflicts with the Court's approach in the much earlier *Military and Paramilitary Activities* case: *Military and Paramilitary Activities* [1984] ICJ Rep 392, 428–9.

163 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Arbitral Tribunal Constituted under Annex VII of the *United Nations Convention on the Law of the Sea*, 18 March 2015) 143 [363]. The language is that of the Tribunal discussing the need to 'exchange views' pursuant to art 283 of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994): at 71 [160].

164 Federica I Paddeu, 'Multilateral Disputes in Bilateral Settings: International Practice Lags behind Theory' (2017) 76 *Cambridge Law Journal* 1, 2; *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 866 [23] (Judge Yusuf), 904–6 (Judge Bennouna), 1024 [314] (Judge Cançado Trindade).

165 Bianchi, above n 47, 81–7.

166 Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 *Cambridge Journal of International and Comparative Law* 501, 504.

167 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1093 [1].

168 *Interpretation of Peace Treaties* [1950] ICJ Rep 65, 74. See Adronico O Adede, 'Judicial Settlement in Perspective' in A S Muller, D Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff, 1997) 47, 50; McWhinney, above n 42, 44.

169 *Spain v Canada* [1998] ICJ Rep 432, 448 [30].

170 *Nuclear Tests* [1974] ICJ Rep 253, 262 [29].

171 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [38]–[39].

172 *Interpretation of Peace Treaties* [1950] ICJ Rep 65, 74.

no more than a 'platitude'.[173] But in fact, it underlines that a dispute cannot be established by mere assertion or mere denial, and indicates that the Court is the guardian of the dispute requirement and the primary actor in the inquiry, able to consider the issue *proprio motu*. This is appropriate,[174] given that the Court's power may be derived from its inherent jurisdiction, its *compétence de la compétence*, to ensure the orderly settlement of disputes.[175] The exercise of such a power is apparent in *Belgium v Senegal* where — as pointed out by Judge Abraham in his separate opinion — the Court 'raised ex officio the ground that the dispute relating to compliance with customary obligations did not exist on the date when the Application was filed'.[176] Senegal had in fact argued that there was no dispute between the parties because they fundamentally agreed on the existence and scope of Senegal's obligations.[177]

It may be that the primacy of the Court simply suggests a responsibility to identify and delineate the dispute's subject matter,[178] even where proceedings are instituted by special agreement, as demonstrated in *Burkina Faso v Niger*.[179] As noted by Judge Yusuf in *Marshall Islands*, '[i]t is for the Court itself to determine on an objective basis the subject matter of the dispute between the parties'.[180] However, it is important not to conflate decision-making power with the reasons for the decision. The issue of whether or not the 'existence of a dispute has to stand objectively by itself',[181] by reference to a purely objective standard, is not the same as whether the determination of the existence of a

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173 Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Grotius, 1958) 331.

174 *Cameroon v Nigeria* [1998] ICJ Rep 275, 343 (Judge Vereshchetin), 347 (Judge Higgins); *Northern Cameroons* [1963] ICJ Rep 15, 132 (Judge Morelli); *South West Africa (First Phase)* [1962] ICJ Rep 319, 565 [1] (Judge Morelli).

175 *Nuclear Tests* [1974] ICJ Rep 253, 259 [23]; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (Pt 11) (2000) 71 *British Yearbook of International Law* 71, 78–9.

176 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 476.

177 Ibid 476 [19] (Judge Abraham). See also 'Counter-Memorial of Senegal', *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, International Court of Justice, General List No 144, 23 August 2011, 21–31 [120]–[184].

178 *Equatorial Guinea v France* (International Court of Justice, General List No 163, 6 June 2018) 17 [48]; *Belgium v Senegal (Provisional Measures)* [2009] ICJ Rep 139, 163–4 (Judges Al-Khasawneh and Skotnikov); *Cameroon v Nigeria* [1998] ICJ Rep 275, 317, 343 (Judge Vereshchetin), 347 (Judge Higgins); *Certain Property* [2005] ICJ Rep 6, 19 [26], 49 [8] (Judge Owada); *El Salvador v Honduras* [1992] ICJ Rep 351, 658 [57] (Judge Torres-Bernárdez); *Spain v Canada* [1998] ICJ Rep 432, 448; *Lockerbie* [1998] ICJ Rep 115, 147 [9] (Judge Kooijmans); *Military and Paramilitary Activities* [1986] ICJ Rep 14, 26–7 [33]; *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 832, 848 [38], 931 (Judge Bennouna); *Nuclear Tests* [1974] ICJ Rep 253, 262 [29], 277 [2] (Judge Gros). See also *South West Africa (First Phase)* [1962] ICJ Rep 319, 547 (Judges Sir Spender and Sir Fitzmaurice); Rosenne, above n 24, 508.

179 *Burkina Faso v Niger* [2013] ICJ Rep 44. See also *Spain v Canada* [1998] ICJ Rep 432, 448 [29]–[30]; *El Salvador v Honduras* [1992] ICJ Rep 351, 554–5.

180 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 871 [42] (Vice-President Yusuf). The Court's role as ultimate arbiter on the existence of a dispute is particularly apparent when the subject matter of the dispute is also a source of disagreement between the parties, as was the case in the *East Timor*, *Fisheries Jurisdiction* and *Certain Property* cases: *East Timor* [1995] ICJ Rep 90, 98–100. Cf Judge Oda: at 108 [3]. See also *Spain v Canada* [1998] ICJ Rep 432, 446–50; *Certain Property* [2005] ICJ Rep 6, 18–19 [24]–[26], 47 [2] (Judge Owada). Cf Bonafé, above n 10, 7.

181 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 867 [27] (Judge Yusuf).

dispute must be made by an objective third party. The Court's assertion in the *Interpretation of Peace Treaties* opinion that a 'mere denial of the existence of a dispute does not prove its non-existence',[182] is an assertion of the primacy of the Court's own authority to decide on the a priori existence of a dispute.

But the distinction is a fine one, particularly following on from the *Marshall Islands* cases; the Court, after holding that a dispute must be ascertained objectively as a matter of substance and not of form,[183] utilised the subjective criterion of awareness as the dispositive test for the existence of a dispute. As observed by Judge Sebutinde in her dissenting opinion:

> On every occasion that the Court has had to examine the issue of whether or not a dispute exists, it has emphasized that this is a role reserved for its objective determination (not that of the parties) and that that determination must involve an examination in substance and not form, of the facts or evidence before the Court.[184]

Similarly, Judge Cançado Trindade posited that the Court has, 'in its *jurisprudence constante*, upheld its own *objective determination* of the existence of a dispute, rather than relying — as it does in the present case — on the subjective criterion of "awareness" of the respondent States'.[185] Bianchi argues that on this point in particular the majority judgment is 'a bit odd, and not terribly persuasive'.[186] The strength of such criticism lies in the fact that the existence of the dispute is now determined 'on the basis of the knowledge of the respondent'.[187] The Court has thus, quite effectively, undermined its own central role in the determination of the existence of a dispute.[188]

F *Notice of the Claim*

Finally, it is particularly curious that in establishing 'awareness' as a standalone criterion in the establishment of the existence of a dispute, the majority in *Marshall Islands* gave short shrift to the argument — put forward by the United Kingdom and India in each of their proceedings[189] — that there is a 'customary law principle that the State intending to institute proceedings must give notice to the other State'[190] pursuant to art 43 of the International Law Commission's *Articles on the Responsibility of States for Internationally*

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182 *Interpretation of Peace Treaties* [1950] ICJ Rep 65, 74.

183 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [38].

184 Ibid 1054 [30] (citations omitted).

185 Ibid 1024 [314] (emphasis in original).

186 Bianchi, above n 50, 83. See also at 81–7.

187 Paddeu, above n 164, 2.

188 See Bonafé, above n 10, 9.

189 'Preliminary Objections of the United Kingdom', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, International Court of Justice, General List No 160, 15 June 2015, 14 [29]; 'Verbatim Record', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, International Court of Justice, General List No 158, 10 March 2016, 37 [5] (Alain Pellet). See also Amann, above n 12, 441.

190 'Preliminary Objections of the United Kingdom', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, International Court of Justice, General List No 160, 15 June 2015, 14 [29].

Wrongful Acts ('*ARSIWA*').[191] The Court held that the '[a]rticles are not addressed to questions of jurisdiction or the admissibility of cases before international courts and tribunals',[192] and the inquiry to be made by the Court is one of substance, not procedure.[193] Article 43 states as follows:

> 1 An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
> 2 The injured State may specify in particular:
> (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
> (b) what form reparation should take in accordance with the provisions of Part Two.

At the time of its adoption, art 43 was generally considered to codify customary international law and be one of the more 'relatively straightforward' rules;[194] a simple proposition that to invoke responsibility an injured state 'must draw the attention of the responsible state to the situation and call upon it to take appropriate steps to cease the breach and provide redress'.[195] Judge Crawford, the Special Rapporteur who delivered the completed draft *ARSIWA*, noted in his dissenting judgment that art 43 does not import a requirement of notification ahead of the filing of an application with the Court:

> there is nothing in the Commentary that prevents such notice being given by filing an application. Article 43 is not a pre-notification requirement, it is a notification requirement … I share the Court's view that a dispute cannot be created simply by the filing of an application … the question is whether enough of the dispute was in existence prior to the Application here and whether the Court has enough flexibility to recognize it as a dispute.[196]

And certainly, Judge Crawford is (of course) correct in so far as art 43 governs invocation of responsibility, which may be by application to a Court or other means. But as Becker observes, 'the Court's approach to what it means for claims to be "positively opposed" has become intertwined over time with assumptions about the need for prior notice and evidence of a reaction'.[197] And while prior to *Georgia v Russia* such a requirement is 'nowhere' to be found in the Court's '*jurisprudence constante* as to the existence of a dispute',[198]

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191 *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 83rd plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*') art 43(1) ('*Articles on the Responsibility of States for Internationally Wrongful Acts*'). Article 43(1) states: 'An injured State which invokes the responsibility of another State shall give notice of its claim to that State'.

192 Becker, above n 11, 8 (citations omitted).

193 Amann, above n 12, 441.

194 Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 *American Journal of International Law* 798, 800.

195 James Crawford, Pierre Bodeau and Jacqueline Peel, 'The ILC's *Draft Articles on State Responsibility*: Toward Completion of a Second Reading' (2000) 94 *American Journal of International Law* 660, 669.

196 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1102–3 [23]–[25].

197 Becker, above n 11, 14.

198 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 913–14 [10] (Judge Cançado Trindade).

conceptually it is coherent. The existence of a dispute 'presuppose[s] a claim';[199] and as expressed by Judge Anzilotti in *Interpretation of the Statute of the Memel Territory (Great Britain, France, Japan and Italy v Lithuania)*, '[a] properly constituted action at law is only possible if … there is a person who makes against some other person a claim upon which it is for the judge to pass according to law'.[200]

It is the existence of a legal claim and the response (whether that response be express or by way of 'wilful deafness')[201] that constitutes the foundation of the 'positive opposition' resulting in a dispute. And as Philippe Couvreur notes 'some form of negotiations will often prove to be necessary as evidence of the existence of a dispute and as a matter of practical and political expediency'.[202] Likewise, Christoph Schreuer notes that in so far as a claim must be 'positively opposed' for a dispute to exist, '[t]he existence of a dispute presupposes a certain degree of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant's position if only indirectly'.[203] There will be 'a certain amount of communication demonstrating opposing demands and denials'.[204] These views reflect the approach adopted by Judge ad hoc Caron in his dissenting opinion in *Alleged Violations*. Judge ad hoc Caron disagreed that a dispute had arisen between the parties in that case even in respect of the claims relating to violation by Colombia of Nicaragua's rights in the maritime zones declared by the Court in 2012, because mere awareness was insufficient. Rather,

> it is my view that a dispute cannot be taken to have arisen between the Parties unless Nicaragua made a 'claim' capable of rejection by Colombia and communicated it to Colombia in some way. That is, Nicaragua must have — prior to filing its Application — asserted against Colombia its views on those points of law or fact forming the subject of the claims now before the Court.[205]

> It is appropriate for the Court to infer positive opposition to a claim. It is not in my view appropriate to infer the assertion of the claim. First, such an inference eviscerates the requirement that there be a dispute … It is not asking much of the applicant that they have formulated and communicated in some fashion a claim.[206]

Despite assertions that 'notice of an intention to file a case' is not necessary,[207] the result in *Marshall Islands* perhaps indicates that the Court has adopted art 43 — and the views of Judge ad hoc Caron — on the sly.[208] It is

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199 *UN Headquarters Opinion* [1988] ICJ Rep 12, 30 [42].

200 *Interpretation of the Statute of the Memel Territory* [1932] PCIJ (ser A/B) No 49, 350 [2]. See also Thirlway, above n 127, 58.

201 Cf Schreuer, above n 84, 963, making reference to the *UN Headquarters Opinion* noting that absence of opposition but failure to provide a remedy 'will not negate the existence of a dispute'.

202 Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law* (Brill, 2017) 106.

203 Schreuer, above n 84, 961.

204 Ibid 965.

205 *Alleged Violations* [2016] ICJ Rep 3, 82 [23].

206 Ibid 80 [17].

207 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [38].

208 See also Peel, above n 134, 1029–30:

difficult for an applicant state to be certain that anything short of outright notice and prior negotiation, even where such is not mandated by the relevant jurisdictional instrument, will be accepted by the Court as sufficient to establish awareness of the existence of a dispute, and as such the Court has in the same breath rejected a de jure requirement of notice and yet imposed the same net result de facto.[209] Miron goes so far as to claim that following *Marshall Islands*, nothing less than 'evidence of an *expressis verbis* disagreement over the subject-matter of the case submitted'[210] will suffice — a scenario quite at odds with the approach previously proposed by the Court in *Cameroon v Nigeria*.[211] State practice supports such a contention. Costa Rica's January 2017 application regarding the land boundary with Nicaragua in the region of Isla Portillos is illustrative. Although proceedings are instituted under the optional clause and art XXXI of the *Pact of Bogota*,[212] neither of which requires evidence of prior negotiations as a condition of jurisdiction, Costa Rica emphasises its diplomatic contacts with Nicaragua over the relevant issues, Nicaragua's response (or lack thereof) and that '[g]iven the factual and legal positions adopted by Nicaragua, the futility of further negotiations is apparent'.[213] Perhaps even more telling, Iran has made two recent applications to the Court pursuant to art XXI(2) of the *Treaty of Amity, Economic Relations and Consular Rights*,[214] one in June 2016 and the other in 2018. The former application simply asserts that the dispute 'has not been satisfactorily adjusted by diplomacy, and there has been no agreement to settle the dispute by some pacific means'.[215] The latter, by contrast, draws attention to a *note verbale* in which Iran expressly 'notified the USA of the existence of a dispute'.[216]

It is suggested that the Court has been driven to adopt a de facto notice requirement — couched as 'awareness' — due to the Court's perception of the

> Notice under article 43 is not a pre-condition for the operation of the obligation to provide reparation for the injury, since that obligation arises immediately upon the commission of the breach of an international obligation by the responsible State. As a practical matter, however, it is important to establish the precise scope and nature of the particular dispute between the parties. An injured State should therefore indicate its complaint with reasonable clarity and communicate any demands for cessation of the wrongful conduct and reparation, so that the responsible State is aware of the allegation and is in a position to respond to it … There is no requirement for the notice to be in a particular form, such as in writing, nor is there any specification of the level of government of the responsible State to which the notice should be submitted.

209 Miron, above n 20, 46; Bonafé, above n 10, 10–11.

210 Miron, above n 20, 45.

211 *Cameroon v Nigeria* [1998] ICJ Rep 275, 315 [89].

212 *American Treaty on Pacific Settlement of Disputes (Pact of Bogota)*, opened for signature 30 April 1948, 30 UNTS 84 (entered into force 6 May 1949) art XXXI.

213 'Application Instituting Proceedings', *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, International Court of Justice, General List Nos 157 and 165, 14 [19].

214 Signed 15 August 1955, 284 UNTS 93 (entered into force 16 June 1957) art XXI(2).

215 'Application Instituting Proceedings', *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, International Court of Justice, General List No 164, 14 June 2016, 4 [5].

216 'Application Instituting Proceedings', *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)*, International Court of Justice, General List No 175, 16 July 2018, 2 [7].

role and purpose of the dispute requirement as strictly relevant to the Court's jurisdiction; a perception which has only clearly become apparent since the *Georgia v Russia* decision. As will be discussed below, this has in turn driven the Court's emphasis on the need to establish the existence of the dispute — the claim and the response — prior to filing the application. In effect, a pre-action notice requirement.

Such a view of the role and purpose of the dispute requirement is controversial. The minority Judges in *Marshall Islands* concurrently argue that because there is 'a continuum between the pre-application and post-application state of the dispute',[217] and because there is no de jure requirement of notice, the institution of proceedings may serve as the requisite notice and result in 'the subsequent crystallization of the nascent dispute if the juridical viewpoints of the parties in relation to the subject matter of the dispute continue to be positively opposed'.[218] As will be seen, the conclusions of the *Marshall Islands* Court rest on insecure conceptual foundations.

III THE ROLE AND PURPOSE OF THE DISPUTE REQUIREMENT

A *Strike Out*

To begin with, *Marshall Islands* raises the question of whether the function of the dispute requirement should be conceived as offering a means for the Court to filter objectionable claims, in a manner equivalent to 'strike out' or 'abuse of process' mechanisms in domestic jurisdictions. A failure to state a cause of action is a ground for striking out in most common law jurisdictions.[219] Likewise, where the claim is 'frivolous or manifestly groundless'[220] a court will decline to hear the case. But such a procedure is not to be found in the Court's *Statute* or *Rules*,[221] leading to a suggestion that the dispute requirement 'serves to protect States against having to answer frivolous claims brought against them'.[222]

Certainly Judges Sir Spender and Sir Fitzmaurice in *South West Africa (First Phase)* described the dispute requirement as one appearing 'in virtually every adjudication clause that has ever been drafted' because the role of the requirement is to 'protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious'.[223] Individual members of the Court have highlighted that while 'obviously absurd and frivolous' cases 'would be rare',[224] there nevertheless

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217 See, eg, *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 871 [39] (Judge Yusuf).

218 Ibid 868 [28] (Judge Yusuf).

219 It discloses no reasonable grounds for bringing or defending the claim: *Civil Procedure Rules 1998* (UK) r 3.4(2)(a).

220 Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191, 202.

221 Article 29 of the *Statute* does provide for the annual constitution of a 'Chamber of Summary Procedure' which sits '[w]ith a view to the speedy dispatch of business', but to date no party has ever submitted a case to the Chamber: *Statute of the International Court of Justice* art 29. On this point, see also Rosenne, above n 24, 1077–9.

222 Tomuschat, 'Article 36', above n 32, 598.

223 *South West Africa (First Phase)* [1962] ICJ Rep 319, 563.

224 Ibid 424 (Judge Jessup).

exists a general proposition that 'international justice should not be impeded by frivolous arguments of a delaying kind'.[225] Jed Odermatt suggests that the requirement that a 'dispute' exist could be a means to 'prevent vexatious or unfounded cases being brought before the ICJ'.[226]

But as pointed out by Christian Tams, while the Court 'could have adopted a more demanding approach and have "used" the notion of a "legal dispute" as a relevant "filter mechanism"',[227] it has not in fact done so to date, and even the 'new formalist cases'[228] do not tend to suggest a change of approach.

By way of example, in *Marshall Islands* both India and Pakistan, while not expressly referring to a doctrine of strike out, put forward arguments in this vein. Both states argued that a judgment on the merits would serve no legitimate purpose, and that the Marshall Islands' claim was essentially hypothetical.[229] Even a declaratory judgment must resolve a concrete controversy,[230] and without the presence of a recognised dispute the Court should decline to hear the case on the basis that to do otherwise would 'compromise the administration of justice and the Court's judicial propriety and integrity'.[231] Indeed Pakistan went further, stating that 'the Court must consider whether the case advanced by the RMI [Republic of the Marshall Islands], in the absence of any argument or evidence to support the RMI's claims as formulated in the Application, is capable of sustaining the allegations levelled against Pakistan'.[232] This is, in essence, an argument that the claim is hopeless, and a strike out is a defence on the merits; the claim has no prospect of succeeding.[233]

Yet while Judge Xue remonstrated against '"surprise" litigation',[234] none of the Judges in *Marshall Islands* took the view that the case was unmeritorious or vexatious. Judge Robinson hinted that a party 'embarrassed by hearing for the first time, through the commencement of Court proceedings, a claim against it',

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225 *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 832, 927 (Judge Bennouna). See also *Northern Cameroons* [1963] ICJ Rep 15, 106–7 (Judge Sir Fitzmaurice); *Oil Platforms* [1996] ICJ Rep 803, 844–5 (Judge Ranjeva); *South West Africa (First Phase)* [1962] ICJ Rep 319, 424 (Judge Jessup).

226 Odermatt, above n 19, 231.

227 Christian J Tams, 'The Contentious Jurisdiction of the Permanent Court' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff, 2013) 9, 34.

228 Daniel West, 'Formalism versus Realism: The International Court of Justice and the Critical Date for Assessing Jurisdiction' (2016) 5 *UCL Journal of Law and Jurisprudence* 31, 50.

229 'Counter-Memorial of the Republic of India', *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, International Court of Justice, General List No 158, 16 September 2015, 38–40; 'Counter-Memorial of Pakistan (Jurisdiction and Admissibility)', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarament (Marshall Islands v Pakistan)*, International Court of Justice, General List No 159, 1 December 2015, 48–9, 65–6.

230 McIntyre, above n 60, 120–1.

231 'Counter-Memorial of Pakistan', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Disarmament (Marshall Islands v Pakistan)*, International Court of Justice, General List No 159, 1 December 2015, 65.

232 Ibid 66.

233 See Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and Robert Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution:* Liber Amicorum *in Honour of Robert Briner* (International Chamber of Commerce, 2005) 601, 607.

234 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1031 [6].

had the option of addressing that matter 'by recourse to the rules of procedure'[235] but which rules of procedure in particular is left to speculation.[236] Certainly there is no indication that the Court conceives of the dispute requirement as operating as a strike out mechanism.

Moreover, conceiving of the dispute requirement as a strike out mechanism is both problematic and unnecessary. First, arguments that a claim is hopeless or doomed to failure are defences on the merits and not issues related to jurisdiction or admissibility.[237] While present in any inquiry as to the existence of a dispute,[238] the risk of transgression into the merits is particularly acute if the Court must, in deciding whether a dispute exists, also resolve whether a claim is adequately substantiated.[239]

But perhaps even more persuasively, the Court already has an inherent power to dismiss proceedings summarily, at least in the case of a manifest lack of jurisdiction,[240] and arguably under general principles of international law.[241] As such, conceiving of the dispute requirement as a strike out mechanism would be superfluous. Judge Sir Fitzmaurice in *Northern Cameroons* recognised that the absence of 'filter' procedures in the Court's *Statute* 'makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal'.[242] And as Vaughan Lowe indicates, doctrines such as strike out and abuse of process relate to 'the good order of judicial proceedings'[243] and there is nothing so inherently different in the nature of the international legal system that precludes 'the tribunal's competence to regulate its own proceedings'[244] in such a manner.

That the Court retains an inherent power, as 'master of its own procedure',[245] to decline to proceed to the merits of a case on the grounds of abuse of process

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235 Ibid 1082 [51].

236 Bonafé suggests arts 44–69 of the *Rules* and arts 50, 62, 63 and 69 of the *Statute*: Bonafé, above n 10, 20–1.

237 Paulsson, above n 233, 607–8.

238 See, eg, *Mavrommatis* [1924] PCIJ (ser A) No 2, 35.

239 Tomuschat, 'Article 36', above n 32, 598.

240 *Legality of Use of Force (Yugoslavia v Spain) (Provisional Measures)* [1999] ICJ Rep 761, 773; *Legality of Use of Force (Yugoslavia v United States of America) (Provisional Measures)* [1999] ICJ Rep 916, 925; *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279, 294–6, 338 (Judge Higgins), 349–50 (Judge Kooijmans) ('*Serbia and Montenegro v Belgium*'); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Provisional Measures)* [2002] ICJ Rep 219, 249, 267–8 (Judge Dugard); *Northern Cameroons* [1963] ICJ Rep 15, 106–7 (Judge Sir Fitzmaurice). See also Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) 243; Michele Potestà and Marija Sobat, 'Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily' (2012) 3 *Journal of International Dispute Settlement* 137, 142.

241 Edward Gordon, '"Legal Disputes" under Article 36(2) of the *Statute*' in Lori Fisler Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers, 1987) 184, 200.

242 *Northern Cameroons* [1963] ICJ Rep 15, 97, 106–7.

243 Lowe, above n 220, 203.

244 Ibid.

245 *Serbia and Montenegro v Belgium* [2004] ICJ Rep 279, 349–50 [22] (Judge Kooijmans). Judge Higgins also notes that the 'very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has, or in connection with the conduct or the merits of a case': at 339 [11].

was recently confirmed by the Court in *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, where the Court stated that 'abuse of process goes to the procedure before a court' and can be considered at the preliminary phase of proceedings as a question of admissibility even where a valid basis of jurisdiction is established.[246]

B *Jurisdiction, or Admissibility*

So if the role of the dispute requirement is not to operate as an *in limine litis* filter to unmeritorious claims, it nevertheless clearly operates as 'a pass-key for the case to proceed to the merits'.[247] Whether or not the keyhole is shaped jurisdiction or admissibility may initially seem unimportant. The Court has wavered between them,[248] and authors such as Robert Kolb appear content to accept that the dispute requirement 'may be considered either as a ground of want of jurisdiction or a ground of inadmissibility'.[249] Kolb continues:

> It is thus possible to say that in the absence of a dispute the Court will have no subject-matter jurisdiction, its duty (in contentious cases) being to decide between opposing positions on the basis of law. Thus, if there is no dispute, there is nothing for a court of justice to do in terms of its particular task of deciding disputes. The fault lies not simply in the claim, but in the material scope of the Court's jurisdiction. Equally, however, it is possible to say that the absence of a dispute indicates a defect in the claim as a formulated application as, in those circumstances, it is not based on a genuine 'claim'. This perspective leads quite naturally to a decision that the claim is inadmissible.[250]

Certainly, the arguments put by the parties in *Marshall Islands* make clear that states are not themselves entirely clear on whether the dispute requirement is a jurisdictional condition or a requirement of an admissible claim. Pakistan argued the matter as going to admissibility.[251] India treated it as a point of jurisdiction.[252] The UK hedged its bets and submitted that for the want of a

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246 *Equatorial Guinea v France* (International Court of Justice, General List No 163, 6 June 2018) 41 [145], 42 [150]. The Court considered that 'evidence has not been presented to the Court' which could suggest an abuse of process, and thus said no more about it: at 42 [150]. *Contra* the dissenting opinion of Judge Donoghue: at 1–6.

247 *Oil Platforms* [1996] ICJ Rep 803, 855 (Judge Higgins). See also *Northern Cameroons* [1963] ICJ Rep 15, 132 [1]–[2] (Judge Morelli).

248 For example, the matter was treated by the majority as going to jurisdiction in: *Mavrommatis* [1924] PCIJ (ser A) No 2; *Interpretation of the Statute of the Memel Territory* [1932] PCIJ (ser A/B) No 49; *South West Africa (First Phase)* [1962] ICJ Rep 319; *Lockerbie* [1998] ICJ Rep 115; *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 832; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70; *Alleged Violations* [2016] ICJ Rep 3; *Belgium v Senegal (Merits)* [2012] ICJ Rep 422. But as going to admissibility in: *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Preliminary Objections)* [1939] PCIJ (ser A/B) No 77; *Northern Cameroons* [1963] ICJ Rep 15. And seemingly in *Burkina Faso v Niger* [2013] ICJ Rep 44.

249 Robert Kolb, *The Elgar Companion to the International Court of Justice* (Elgar, 2014) 169.

250 Ibid 169–70.

251 'Counter-Memorial of Pakistan', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, International Court of Justice, General List No 159, 1 December 2015, 42.

252 'Counter-Memorial of the Republic of India', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, International Court of Justice, General List 158, 16 September 2015, 43.

dispute 'the Court lacks jurisdiction to address all of the Marshall Islands' claims and/or those claims are inadmissible in their entirety'.[253]

But there is a distinction between matters of jurisdiction and questions of admissibility. Jan Paulsson once famously said that they are:

> as different as night and day. It may be difficult to establish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that day and night do not exist.[254]

The key difference is that between the *existence* of power and the *exercise* of power. Jurisdiction is non-discretionary, it entails not only the power to adjudicate but an obligation to do so once jurisdictional conditions have been met.[255] Admissibility, on the other hand, has a 'discretionary character'[256] and is determined on a 'case-by-case basis, unlike rules of jurisdiction that entail category-based case selection'.[257] That is, a Court may be properly seised of a matter (the jurisdictional conditions have been met) and yet exercise its discretion not to proceed to the merits, such as in the case of an abuse of process described above.[258]

While some suggest that the distinction between the two concepts has 'no practical consequences',[259] this is only true in so far as a failure on either account prevents a case from proceeding to the merits. The distinction matters. The terms are used separately in the Court's *Rules,*[260] and as observed by Sir Gerald Fitzmaurice, an objection to the jurisdiction of the Court is a plea 'that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim'.[261] Admissibility is by contrast a substantive question, but one based on considerations other that the ultimate merits of the case.[262]

The dispute requirement has existed in the twilight zone between jurisdiction and admissibility for some time. But the Court's jurisprudence since 2011 has attempted to firmly embed the dispute requirement as a jurisdictional condition, which explains (but does not justify) the Court's new formalist approach.[263] But

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253 'Preliminary Objections of the United Kingdom', *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, International Court of Justice, General List No 160, 15 June 2015, 13.

254 Paulsson, above n 233, 603.

255 Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014) 84.

256 Saar A Pauker, 'Admissibility of Claims in Investment Treaty Arbitration' (2018) 34 *Arbitration Intlernationa1* 1, 78.

257 Shany, above n 255, 84.

258 *Equatorial Guinea v France* (International Court of Justice, General List No 163, 6 June 2018) 41 [145], 42 [150].

259 Pauker, above n 256, 7. See also *Northern Cameroons* [1963] ICJ Rep 15, 27.

260 International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 79(1): '[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits'.

261 Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius, 1986) vol 2, 438–9.

262 Ibid 438–9 n 5.

263 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 859 [5] (President Abraham).

the Court has taken a wrong turn by attempting to confine the role of the dispute requirement to a jurisdictional hurdle. Rather, the dispute requirement should be conceived of as concerned with ensuring the proper performance of the judicial function, and as such, treated as a question of admissibility.

1 *The Dispute Requirement and Jurisdiction*

For many, the dispute requirement is 'the nucleus around which the very notion of jurisdiction is constructed'.[264] Members of the Court have regularly referred to the dispute requirement as a 'condition *sine qua non* … for the compulsory jurisdiction of the Court'.[265] As expressed by President Abraham in *Marshall Islands*, the existence of a dispute is 'not only a condition for the exercise of the Court's jurisdiction, but, more fundamentally, a condition for the very existence of that jurisdiction'.[266] Likewise, scholars have commonly treated the issue of the existence of a dispute as going to jurisdiction.[267] Thirlway observes:

> Texts conferring jurisdiction on the Court normally provide for the reference to it of 'any dispute' between the parties, and the question therefore arises from time to time whether there exists a dispute, and if so whether it is of the kind contemplated. A dispute may in fact arise as to whether or not there is a dispute; and this 'dispute-dispute' of course cannot itself be a dispute of the kind contemplated by the text. The definition of the dispute alleged, what it is about, may be vital, both for it to fall into whatever category of disputes is defined by the jurisdictional instrument, and because, even though it is such a dispute, it may then be excluded by some other provision of that instrument.[268]

Certainly, one can recite a number of cases in which the dispute requirement was treated as going to the Court's jurisdiction,[269] and since 2011 it has been considered exclusively so. In *Georgia v Russia* the determination of the existence of a dispute was treated as 'in relation to the jurisdiction of the Court'.[270] Likewise in *Belgium v Senegal*, the Court considered that due to the want of a dispute in respect of obligations under customary law, the Court 'has no jurisdiction to decide on Belgium's claims related thereto'.[271] In *Alleged Violations*, the Court simply asserted that '[t]he existence of a dispute between the parties is a condition of the Court's jurisdiction'.[272] The point is made expressly by President Abraham when he states that the Court's previously 'more flexible approach could be understood as being based on the idea that the existence of a dispute was … a condition for the Court's exercising of its

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264 Rosenne, above n 24, 505. Cf Gordon, above n 241, 198.

265 *LaGrand* [2001] ICJ Rep 466, 544 [4] (Judge Parra-Aranguren). See also *Nuclear Tests* [1974] ICJ Rep 253, 260 [24].

266 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 858 [3].

267 See Tams, above n 227. Cf Hugh Thirlway, 'The International Court of Justice: Cruising Ahead at 70' (2016) 29 *Leiden Journal of International Law* 1103, 1112.

268 Thirlway, above n 267, 1113 (citations omitted).

269 See *Oil Platforms* [1996] ICJ Rep 803, 855 (Judge Higgins); *Northern Cameroons* [1963] ICJ Rep 15, 132 (Judge Morelli). See also above n 247 and accompanying text.

270 *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 84 [29].

271 *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 445.

272 *Alleged Violations* [2016] ICJ Rep 3, 26 [50].

jurisdiction',[273] but since *Georgia v Russia* the Court has shifted to viewing the dispute requirement as a jurisdictional hurdle.[274]

But understanding the dispute requirement as strictly relevant to jurisdiction is not truly representative of its role. As expressed by Judge Tomka in *Marshall Islands*: 'it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it'.[275] Indeed, the dissenting judgments in *Marshall Islands* reveal the disagreement on the Court regarding the purpose of the dispute requirement. A number of the minority judges argued strongly that the purpose of the need to determine of the existence of a dispute is the protection of the Court's judicial function. Judge Cançado Trindade argued that the dispute requirement enables the Court 'to *exercise* jurisdiction properly … to safeguard the proper exercise of the Court's judicial function'.[276] Likewise, Judge Crawford emphasised that the 'rationale behind requiring a legal dispute is to ensure that the Court has something to determine: it protects the Court's judicial function which, in a contentious case, is to determine such disputes'.[277] Particularly convincing is the argument put forward by Judge Robinson:

> The requirement that there be a 'dispute' is designed to ensure that what the Court is being asked to decide is susceptible to its authority and competence, or, as Judge Fitzmaurice in his separate opinion in *Northern Cameroons* said, the dispute must be 'capable of engaging the judicial function of the Court'. It is a question of the *nature* and *character*, determined objectively, of the claim presented to the Court. It is not about mandating that an applicant State jump through various hoops suggesting a formal approach before it can appear in the Great Hall of Justice.[278]

There are a number of reasons why conceiving of the dispute requirement as limited to a jurisdictional hurdle is unsatisfactory. To begin with, the existence of the dispute requirement can be sourced in the reference to disputes in both arts 36(2) and 38(1) of the Court's *Statute*.[279] In the *Marshall Islands* judgments, the Court stated that:

> Under Article 38 of the *Statute*, the function of the Court is to decide in accordance with international law disputes that States submit to it. Under Article 36, paragraph 2, of the *Statute*, the Court has jurisdiction in all 'legal disputes' that may arise between States parties to the *Statute* having made a declaration in accordance with that provision. The existence of a dispute between the Parties is thus a condition of the Court's jurisdiction.[280]

Certainly art 36 is expressly concerned with establishing the Court's jurisdiction and the limits thereof. The Court would find it equally as impossible, relying on art 36(2), to avoid the requirement of the existence of a dispute as it would the ability to decide cases by application of purely domestic law. But art

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273 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 859 [5].
274 Ibid 859 [5]–[7].
275 Ibid 889 [15].
276 Ibid 915 [13] (emphasis added).
277 Ibid 1094 [3].
278 Ibid 1064 [5] (emphasis in original) (citations omitted).
279 *Statute of the International Court of Justice* arts 36(2), 38(1); *Cameroon v Nigeria* [1998] ICJ Rep 275, 356 (Judge Kooijmans).
280 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 849 [36].

36(2) is only concerned with one (of multiple) methods of granting jurisdiction. There is no requirement of the existence of a 'legal dispute' in respect of art 36(1), which requires only consent expressed by special agreement or compromissory clause — the terms of those instruments will in turn set out the jurisdictional hoops an applicant is required to jump through, one of which may (or may not) be the existence of a dispute.[281] Yet the Court will inquire into the existence of a dispute in any case, not merely those brought under the optional clause; a fact which may be explained by the reference to disputes in art 38(1) of the Court's *Statute*, which states that the Court's 'function is to decide in accordance with international law such disputes'.[282] This is our first hint that the dispute requirement serves a more complex function than simply as a jurisdictional check box.

Secondly, it is axiomatic that the consent of the parties founds the Court's jurisdiction.[283] Objections to jurisdiction take aim at the tribunal;[284] the argument is that the claim should not be brought to the particular forum because the parties have not consented that the matter be heard in that forum.[285] Sir Gerald Fitzmaurice suggests that 'consent is the one essential, but also, normally all sufficient basis of jurisdiction',[286] and the Court in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* likewise observed that the conditions under which parties express their consent 'are a matter of jurisdiction' and not of admissibility.[287]

Yet it is clear that consent to jurisdiction cannot cure the non-existence of a dispute.[288] In *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, the parties submitted their case to a Chamber of the Court by special agreement. The Chamber was asked to, inter alia, determine the legal situation of the islands in the Gulf of Fonseca. But the Chamber held that while the special agreement 'confers upon the Chamber jurisdiction in respect of all the islands of

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281 *Statute of the International Court of Justice* art 36(1): 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the *Charter of the United Nations* or in treaties and conventions in force'.

282 Ibid arts 36(2), 38(1).

283 *Ambatielos (Greece v United Kingdom) (Merits)* [1953] ICJ Rep 10, 28–9 (President Sir McNair and Judges Basdevant, Klaestad and Read); *Arrest Warrant* [2002] ICJ Rep 3, 48–9 (Judge Oda); *Corfu Channel (United Kingdom v Albania) (Preliminary Objections)* [1948] ICJ Rep 15, 27; *DRC v Rwanda* [2006] ICJ Rep 6, 39 [88]; *East Timor* [1995] ICJ Rep 90, 101; *Georgia v Russia (Provisional Measures)* [2008] ICJ Rep 353, 377 [84]; *Interpretation of Peace Treaties* [1950] ICJ Rep 65, 71; *Mavrommatis* [1924] PCIJ (ser A) No 2, 16; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177, 200 [48] ('*Djibouti v France*'); *Nauru v Australia* [1992] ICJ Rep 240, 260 [53]; *Oil Platforms* [1996] ICJ Rep 803, 891–2 (Judge Oda); *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 177–8; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the* Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya) *(Judgment)* [1985] ICJ Rep 192, 216 [43]; Amerasinghe, *Jurisdiction*, above n 24, 20. Cf *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 317–18 (Judge Cançado Trindade).

284 Paulsson, above n 233, 616.

285 Ibid 617.

286 Fitzmaurice, above n 261, 492.

287 *Djibouti v France* [2008] ICJ Rep 177, 201 [49].

288 Amerasinghe, *Jurisdiction*, above n 24, 21–2. See also C F Amerasinghe, 'Reflections on the Judicial Function in International Law' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes:* Liber Amicorum *Judge Thomas A Mensah* (Martinus Nijhoff, 2007) 121, 126–7.

the Gulf',[289] the Chamber 'should not exercise its jurisdiction so as to make a finding in relation to any islands which are not in dispute'.[290] Likewise in *Burkina Faso v Niger*, the Court refused to delimit a pre-agreed frontier despite being requested to do so by the parties' special agreement.[291] The Court said:

> A special agreement allows the parties to define freely the limits of the jurisdiction, *stricto sensu*, which they intend to confer upon the Court. It cannot allow them to alter the limits of the Court's judicial function: those limits, because they are defined by the Statute, are not at the disposal of the parties, even by agreement between them, and are mandatory for the parties just as for the Court itself.[292]

So too the disappearance of the dispute renders a decision on the merits moot, but does not deprive the Court of its jurisdiction.[293] If the parties cannot, by the expression of their consent, induce the Court to determine a particular issue because the Court considers the matter not in dispute, this again suggests that the role of the dispute requirement is not merely protective of the Court's jurisdiction.

Thirdly, the vast majority cases in which the dispute requirement was treated as going to jurisdiction were brought to the Court pursuant to a compromissory clause yet the Court, particularly in its most recent case law, has not adequately distinguished these cases and has conflated the particular jurisdictional requirements of certain compromissory clauses with the objective dispute inquiry. Compromissory clauses may incorporate particular requirements such as prior negotiations,[294] but as seen above the dispute requirement is a separate inquiry, demanded by the terms of the Court's *Statute* regardless of the jurisdictional instrument.[295] The clearest example lies in the Court's extensive reliance in *Marshall Islands* on its judgments in *Georgia v Russia* and *Alleged Violations* to establish that 'a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant'.[296] Arguably, there were rational reasons to direct the inquiry towards the existence of prior exchanges in both of these cases;[297] certainly given the 'peculiarities' of the compromissory clause in the former.[298] In respect of the latter, as Judge Robinson points out, the references to 'awareness' were merely 'factual

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289 *El Salvador v Honduras* [1992] ICJ Rep 351, 554 [326].

290 Ibid 555 [326].

291 *Burkina Faso v Niger* [2013] ICJ Rep 44, 70 [46].

292 Ibid.

293 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 889 [15] (Judge Tomka). See *Northern Cameroons* [1963] ICJ Rep 15; *Nuclear Tests* [1974] ICJ Rep 253.

294 As was the case in: *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70; *Belgium v Senegal (Merits)* [2012] ICJ Rep 422, 445–6. It was also the case in respect of the claims arising out of the *Palermo Convention* in: *Equatorial Guinea v France* (International Court of Justice, General List No 163, 6 June 2018) 25 [75]–[76].

295 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 890 [19] (Judge Tomka).

296 Ibid 850 [41], citing *Alleged Violations* [2016] ICJ Rep 3, 26 [73]; *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 99 [61], 109–10 [87], 117 [104].

297 Palestini, above n 12, 571–3.

298 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1077–8 [38] (Judge Robinson).

statements made in the specific circumstances of the case'.[299] Neither case demands that the Court embed 'awareness' of a dispute as legal test barring jurisdiction in all cases where it is lacking prior to the seisin of the Court; or to put it another way, where the fact of the dispute and its precise contours are evident only after the parties have drafted their submissions.

Fourthly, the Court takes a strict approach to the determination of its jurisdiction,[300] which as it has been demonstrated, was not the approach taken to ascertaining the existence of a dispute in the pre-2011 case law. At the same time, however, it is clear that since *Georgia v Russia*, the Court has pivoted to a new formalism, requiring that a dispute cannot exist 'unless the applicant has given notice of its claims to the respondent before the application is filed'.[301] The implicit requirement of notice, and the vital question of the timing of that notice, is derived from and driven by comprehending of the dispute requirement as a jurisdictional threshold. Jurisdictional conditions, going to the permission of the Court to hear the case, must be satisfied at the time the Court is seised.

Perhaps ironically, the practical effect of the Court's adoption of 'awareness' as an element of its dispute analysis, despite its being conceived of as a requirement to be satisfied ahead of the filing of proceedings, actually supports the conceptual argument that the dispute requirement is more than a jurisdictional hurdle. As pointed out by Vice-President Yusuf and Judges Bennouna, Robinson and Crawford, where there is a lack of 'awareness' in respect of a claim, an applicant state 'may be able to fulfil such a condition at any time by instituting fresh proceedings'.[302] But mere awareness of a claim does not indicate that the parties consent to hearing the matter in a particular forum. A true condition of jurisdiction could not be satisfied by the mere reinstitution of fresh proceedings — for example, the reinstitution of proceedings would not satisfy the condition of prior negotiations, or a requirement to exhaust local remedies, or permit the Court to hear a case in respect of parties that have not consented to the Court's jurisdiction. The only exception to this general proposition might be the passing of a particular time limit, such as can be found in the UK's optional clause declaration,[303] or as was the case in respect of the

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299 Ibid 1073 [27] (Judge Robinson).

300 *Application of the* Genocide Convention [1996] ICJ Rep 595, 629 [10] (Judge Oda).

301 The wording is that of the dissenters: *Georgia v Russia (Preliminary Objections)* [2011] ICJ Rep 70, 143 [3] (President Owada, Judges Simma, Abraham, Donoghue and Judge ad hoc Gaja).

302 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 867 [24] (Vice-President Yusuf). See also at 901 (Judge Bennouna), 1084 [55] (Judge Robinson), 1096 [8] (Judge Crawford). See also West, above n 228, 33–4.

303 Paragraph 1(iii) states that

> all disputes arising after 1 January 1987, with regard to situations or facts subsequent to the same date, other than: … (iii) any dispute in respect of which … the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court …

Declaration by the United Kingdom Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court (signed and entered into force 22 February 2017) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#EndDec> archived at <https://perma.cc/5M2S-3S3R>.

applicable compromissory clause in *Croatia v Serbia*.[304] By contrast, when the circumstances resulting in the inadmissibility of the claim have changed, it can be submitted anew and the Court may exercise jurisdiction over the new claim.[305]

2 *The Dispute Requirement and the Judicial Function*

For the above reasons, the better view is that the dispute requirement exists to protect the Court's judicial function, which in turn suggests that the question to be asked is one of admissibility — the appropriateness of the Court proceeding to the merits, given the inherent limits of the nature of a court of justice.[306]

It has been said that '[t]he primary duty of the Court is to discharge its judicial function'.[307] Although to an extent the 'judicial function' is an inherently broad and variable concept,[308] Aharon Barak defines the role of the judiciary in general terms as 'to adjudicate disputes according to law. Adjudication involves three functions: fact determination … law application and law determination'.[309]

For the Court, support for the relationship between the dispute requirement and the judicial function is drawn from the Court's edict in the *Nuclear Tests* case that 'the existence of a dispute is the primary condition for the Court to exercise its judicial function'.[310] But such a view of the Court's function is also encapsulated in art 38(1) of the Court's *Statute*, in which the Court's central function is defined as concerning the adjudication of existing disputes.[311] Thus, '[t]he function of the Court is to state the law' and pronounce judgment in a given case.[312] The Court's raison d'être in interstate cases is 'the peaceful settlement of disputes' through adjudication,[313] pursuant to the objectives of the

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304 *Croatia v Serbia* [2008] ICJ Rep 412, 438–41.

305 Although the Court is sui generis in respect of matters of procedure, this point was made by the Tribunal in *RREEF Infrastructure (G P) Limited v Kingdom of Spain (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/13/30, 6 June 2016) [225].

306 *Northern Cameroons* [1963] ICJ Rep 15, 29; Shany, above n 255, 86–92; *Equatorial Guinea v France* (International Court of Justice, General List No 163, 6 June 2018) 2 [7] (Judge Donoghue).

307 *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3, 18–19 [38].

308 Stephan Wittich, 'The Judicial Functions of the International Court of Justice' in Isabelle Buffard et al (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill, 2008) 981, 985, 987.

309 Aharon Barak, 'The Role of a Supreme Court in a Democracy' (2002) 53 *Hastings Law Journal* 1205, 1205. In a similar vein, Louis Jaffe defines the judicial function as simply the 'unqualified application of the known law to facts fairly found': Louis L Jaffe, *English and American Judges as Lawmakers* (Clarendon Press, 1969) 12.

310 *Nuclear Tests* [1974] ICJ Rep 253, 270–1 [55].

311 *Statute of the International Court of Justice* art 38(1). See also *East Timor* [1995] ICJ Rep 90, 219 (Judge Weeramantry); *Northern Cameroons* [1963] ICJ Rep 15, 98–9 (Judge Sir Fitzmaurice); *Nuclear Tests* [1974] ICJ Rep 253, 270 [55]; *Serbian Loans (France v Serbia) (Judgment)* [1929] PCIJ (ser A) No 20, 19; Lauterpacht, above n 173, 142; Malcolm N Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function' in A S Muller, D Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff, 1997) 219, 246.

312 *Northern Cameroons* [1963] ICJ Rep 15, 33–4, 180 [10] (Judge Bustamante). For characterisation as 'principal judicial organ', see *Charter of the United Nations* arts 7, 92; *Statute of the International Court of Justice* art 1.

313 *Border and Transborder Armed Actions* [1988] ICJ Rep 69, 91 [52].

Charter.[314] Indeed, this dispute settlement function is central to the Court's existence as part of the UN framework for maintaining peace.[315]

Although identifying dispute settlement as the function of the Court may be something of a 'truism',[316] it is also necessary because without such an inherent limitation, the Court's pronouncements would 'serve no purpose falling within or engaging the proper function of courts of law as a judicial institution'.[317] It can be contrasted with the Court's advisory function, in which the Court acts not as a court per se, but as a panel of experts offering legal advice to UN political organs.[318]

The Court must therefore exercise, in its contentious jurisdiction, 'purely judicial functions';[319] the Court is limited to activities that fall within the ambit of the 'judicial'.[320] And while art 38(1) implies that the Court *must* decide the disputes submitted to it, the necessary proviso is that the dispute is capable of being adjudicated upon in a manner consistent with the Court's judicial function.[321] The Court is therefore also empowered with an inherent jurisdiction to maintain its judicial character.[322] Particularly illustrative is the Court's ability to inquire as to the existence of a dispute *proprio motu*; it is the Court, rather

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314 *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Merits)* [1974] ICJ Rep 175, 213 (Judge Nagendra Singh).

315 Shany, above n 255, 166.

316 Wittich, above n 308, 985, 990.

317 *Northern Cameroons* [1963] ICJ Rep 15, 99 (Judge Sir Fitzmaurice). See also at 33–4, 133 (Judge Morelli); *Nuclear Tests* [1974] ICJ Rep 253, 270 [54]–[55], 322 [22]–[23] (Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Waldock); *Cameroon v Nigeria* [1998] ICJ Rep 275, 347 (Judge Higgins); *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 832, 874 [138]; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment on 20 December 1974 in the* Nuclear Tests (New Zealand v France) *Case (Order of 22 September 1995)* [1995] ICJ Rep 288, 316 (Judge Shahabuddeen); *South West Africa (First Phase)* [1962] ICJ Rep 319, 565 [2]–[3] (Judge Morelli).

318 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 236; Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (Clarendon Press, 1994) 202.

319 *Military and Paramilitary Activities* [1984] ICJ Rep 392, 435 [95].

320 See *Haya de la Torre (Colombia v Peru) (Merits)* [1951] ICJ Rep 71, 78–9 ('*Haya de la Torre*'); *Serbia and Montenegro v Belgium* [2004] ICJ Rep 279, 294–5 [34]; *Namibia Opinion* [1971] ICJ Rep 16, 303 [11] (Judge Fitzmaurice); *Territorial and Maritime (Nicaragua v Colombia)* [2007] ICJ Rep 832, 921 (Judge Keith); *Northern Cameroons* [1963] ICJ Rep 15, 150 (Judge Badawi), 179 (Judge Bustamante); *Nuclear Tests* [1974] ICJ Rep 253, 314 [7] (Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Waldock); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 237; Robert Y Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 1, 41; R St J MacDonald, 'Changing Relations between the International Court of Justice and the Security Council of the United Nations' (1993) 31 *Canadian Yearbook of International Law* 3, 6; Takane Sugihara, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in A S Muller, D Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff, 1997) 117, 130, 136.

321 *East Timor* [1995] ICJ Rep 90, 159 (Judge Weeramantry), 258 (Judge ad hoc Skubiszewski); *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment)* [1985] ICJ Rep 13, 25 [21]; *Nicaragua v Colombia* [2007] ICJ Rep 832, 921 (Judge Keith); *Nuclear Tests* [1974] ICJ Rep 253, 322 [22] (Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Waldock). Cf *Northern Cameroons* [1963] ICJ Rep 15, 37; *Nuclear Tests* [1974] ICJ Rep 253, 270 [54].

322 *Northern Cameroons* [1963] ICJ Rep 15, 29; *Nuclear Tests* [1974] ICJ Rep 253, 259–60 [23].

than the parties, that must safeguard its judicial role.[323] As expressed by Aaron Etra, 'as the guardian of its own judicial integrity, the Court is not compelled to go forward in every case wherein it is seised'.[324] And while there is some inconsistency in the jurisprudence,[325] in several judgments the Court has, in analysing the dispute requirement, excluded a case due to its incompatibility with the judicial function.[326] Likewise, the parties' inability to waive the dispute requirement is further evidence of its integral connection to art 38 rather than the jurisdictional requirements of art 36.[327]

But since the Court used the dispute requirement to guard the jurisdictional limitations of *CERD*'s art 22 in *Georgia v Russia*, the Court's focus has moved away from viewing the dispute requirement as necessary for the preservation of the judicial function, partly driven, it would seem, by a desire to ensure consistency in its case law.[328] While the Court does not generally observe a doctrine of precedent, the exception lies in respect of matters of procedure.[329] Yet this prioritises consistency of outcome over consistency of reasoning. While a dispute analysis prompted by a compromissory clause will always relate to the preservation of the parties' consent, the better view is that the Court's fundamental aim — in all cases — should be to ensure that its adjudication of the dispute would involve a proper exercise of its judicial function. As aptly expressed by Judge Sir Fitzmaurice in *Northern Cameroons*, the parry and thrust of adjudication and the existence of a dispute is demanded by the judicial nature of the forum tasked with resolving the argument. It is the inherent nature of *the* Court as *a* court that demands the existence of a dispute, and sets out its inherent requirements:

> there is a minimum required in order to establish the existence of a legal dispute, properly so called — that is (to come very close to the language of the present Judgment itself) a dispute capable of engaging the judicial function of the Court. This minimum is that the one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded.[330]

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323 *Equatorial Guinea v France* (International Court of Justice, General List No 163, 6 June 2018) 2 [7] (Judge Donoghue); *Interhandel* [1959] ICJ Rep 6, 104 (Judge Sir Lauterpacht); *Northern Cameroons* [1963] ICJ Rep 15, 29, 38; Georges Abi-Saab, 'The International Court as a World Court' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 3, 7.

324 Aaron Etra, 'Justiciable Disputes: A Jurisdictional and Jurisprudential Issue' (1965) 4 *Columbia Journal of Transnational Law* 86, 94.

325 Palestini, above n 12, 571.

326 See, eg, *Haya de la Torre* [1951] ICJ Rep 71, 78–9; *Northern Cameroons* [1963] ICJ Rep 15, 33–4, 64 [59] (Judge Wellington Koo); *Nuclear Tests* [1974] ICJ Rep 253, 270–1 [55].

327 Amerasinghe, 'Reflections on the Judicial Function in International Law', above n 288, 126–7; Amerasinghe, *Jurisdiction*, above n 24, 21–2; *Cameroon v Nigeria* [1998] ICJ Rep 275, 347 (Judge Higgins).

328 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 859–60 [9] (Judge Abraham).

329 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 38.

330 *Northern Cameroons* [1963] ICJ Rep 15, 109 (Judge Sir Fitzmaurice).

IV CONCLUSIONS

For a Court whose 'power base depends primarily on persuasion',[331] it is absolutely essential that its jurisprudence addressing fundamental questions such as the right of access to the Court and the role of the Court as the UN's principal judicial organ be both coherent and convincing. Currently, there are discernible trends that suggest the Court has elected to treat the dispute requirement as a jurisdictional hurdle but without truly considering the conceptual soundness or practical ramifications of that choice.

To be clear, it is not the case that the requirement of the existence of a dispute, or the requirement of awareness, or notice, cannot be a necessary element to establish the Court's jurisdiction. But that will be determined by the terms of the instrument of the parties' consent. Rather, the Court's *Statute* demands an inquiry into the existence of a dispute in all cases, and always as a matter of admissibility. The Court has rejected such a view and instead promulgated a general rule — the requirement of notice, or prior awareness — as a prerequisite of the existence of the Court's jurisdiction.

The implications are potentially serious. Not only, as Bonafé points out, will the determination of the existence of a dispute be rendered more difficult, thus leading to less predictability and a likelihood of the Court declining to hear cases that may otherwise have proceeded,[332] but states party cannot be certain what conduct will satisfy the Court's unacknowledged, unspoken but nevertheless now very real notice requirement.[333]

The situation is perhaps not so grave as suggested by Judge Robinson, who opined in *Marshall Islands* that 'the Court has written the Foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive issues'.[334] But the Court should take the first opportunity to restore to clarity the formerly 'well established'[335] purpose of the dispute requirement. If the Court wishes, for reasons of efficiency or in order to reduce the number of preliminary arguments about the existence of a dispute, to impose a requirement of notice — a letter before action or similar — the better approach would be to look to reform the Court's *Rules* and establish a clear procedure; not to mutate the dispute requirement to satisfy the same end.

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331 Bart M J Szewczyk, 'International Decisions: *Application of the* International Convention on the Elimination of All Forms of Racial Discrimination *(Georgia v Russian Federation)*' (2011) 105 *American Journal of International Law* 747, 751.

332 Bonafé, above n 10, 31.

333 Miron, above n 20, 45.

334 *Marshall Islands v United Kingdom* [2016] ICJ Rep 833, 1092 [70].

335 *Interhandel* [1959] ICJ Rep 6, 50 (Judge Wellington Koo).