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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Inferring a 'dispute' from state silence

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Abstract

A dispute's existence can be a requirement for establishing the jurisdiction of numerous international courts and tribunals. It requires that a state opposes the claim of another state. Yet, when a state is silent in response to a claim directed at it, there is ambiguity about the silent state's view. This article argues that opposition and a dispute can be inferred from state silence under specific cumulative conditions: when a claim has been made in circumstances that call for the silent state's reaction; when the silent state is aware of the claim; and when reasonable time of silence passed. Because it prevents tactical silences from undermining international justice, the inference must be encouraged. The conditions, under which the inference can be made, should also be retained in international adjudication, because they perform primarily an evidentiary function, as well as a cautionary and a channelling function.

Keywords: dispute; international courts and tribunals; international dispute settlement; jurisdiction; state silence

1. Introduction

The existence of a 'dispute' can be a requirement for the jurisdiction of numerous international courts and tribunals (ICTs).[1] This requirement's objective is to protect the judicial function and the parties from moot cases;[2] to distinguish the ICTs' contentious from advisory functions; and, as

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[1]The existence of a court's jurisdiction differs from the exercise of jurisdiction. For the International Court of Justice (ICJ), the dispute's existence has shifted to a requirement for jurisdiction under Art. 36(2) of the ICJ Statute. *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*), Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 833, para. 36. It can be also a requirement of jurisdiction in particular optional clause declarations under the ICJ Statute, compromissory clauses or treaties that establish the jurisdiction of the ICJ or other ICTs, such as ITLOS or Ann. VII arbitrations under Art. 286 of the Law of the Sea Convention (LOSC). *Contra*, earlier: *Nuclear Tests (Australia v. France)*, Jurisdiction and Admissibility, Judgment of 20 December 1974, [1974] ICJ Rep. 253, at 271, para. 55, and at 476, para. 58; S. Rosenne, *Law and Practice of the International Court 1920-2005* (2006), vol. II, at 506. The dispute's existence may also be legally significant elsewhere, e.g., abuse of rights: *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015, paras. 536–537. The latter issues fall outside this study's scope.

[2]*Case Concerning the Northern Cameroons* (*Cameroon v. United Kingdom*), Preliminary Objections, Judgment of 2 December 1963, [1963] ICJ Rep. 15, at 38; *South West Africa Cases (Ethiopia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Rep. 465, at 563 (Judges Spender and Fitzmaurice, Joint Dissenting Opinion).

far as permanent courts are concerned, to promote their efficiency in delivering justice.[3] For the jurisdiction of numerous ICTs, a dispute must exist *prior* to filing the application,[4] irrespective of whether prior recourse to other settlement is required.[5] Thus, only facts that took place prior to the date of application can be relied on as evidence that a dispute existed.

A dispute may be generated over time by state actions, statements, inactions and silences – at times, in direct exchange with each other, and on other occasions, *independently* from each other. But, for a dispute to exist, it must be shown that the claim of one party is *positively opposed* by the other.[6]

Yet, when a state directs a claim at another state, and the latter state fails to respond, it is far from evident that the silent state opposes, let alone positively opposes, the claim.[7] Behind silence, there can be a whole array of possible reasons; not a binary choice of motivations – 'I agree'/'I disagree'. For instance, a state's position is usually formulated by multiple individuals, committees and departments. Until a position, which the state can express, is formulated internally, that state will be externally silent. Additionally, silence may be intended to provide a cooling-off period, so that a dispute does not arise and good relations are maintained. Further, a state may agree with the law's interpretation by another state, but not with the facts that the latter state complains of.

However, ICTs have developed and apply an inference of opposition and of a dispute from or despite state silence. This inference is biased in favour of establishing a dispute, over any other meaning (or the lack of meaning) that silence may have.[8] The reasoning behind the inference and its potential critics are connected to and have wider implications for the function of international adjudication and its place in international affairs.

On one view, the inference of a dispute from state silence favours the 'international rule of law', namely that international rules are meant to be applied and enforced by ICTs,[9] which is an aspect of the *public* function performed by international adjudication. Intimately connected to this reasoning is that states cannot be allowed unilaterally to control an ICT's jurisdiction.[10] Further, proponents of the school of thought of the public function of international adjudication may agree with those who argue that introducing formalism for the establishment of a dispute and of

[3]R. Higgins, 'Respecting Sovereign States and Running a Tight Courtroom', (2001) 50 ICLQ 121, at 131–2.

[4]For jurisdiction of LOSC tribunals, e.g., Art. 286. Before 2011, the ICJ envisaged that a dispute can begin prior to the institution of proceedings and crystallize *during* the proceedings: e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412, para. 85; Rosenne, *supra* note 1, at 510–11. Since 2011, the ICJ requires that the dispute exists on the application's filing: e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, [2016] ICJ Rep. 3, para 73.

[5]E.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. India*), Jurisdiction and Admissibility, Judgment of 5 October 2016, [2016] ICJ Rep. 255.

[6]It is insufficient that the interests of two states are in conflict. *South West Africa Cases* (*Ethiopia v. South Africa*; *Liberia v. South Africa*), Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Rep. 319, at 328. This reasoning clarified the definition of a 'dispute' in *Mavrommatis Palestine Concessions* (*Greece v. United Kingdom*), Objection to Jurisdiction, Judgment of 30 August 1924, [1924] PCIJ Rep. Series A, No. 2, at 11 ('a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons').

[7]*Ecuador v. United States*, PCA Case No. 2012-5, Memorial of the Respondent U.S. on Objections to Jurisdiction, 25 April 2012, at 2, available at pcacases.com/web/sendAttach/580.

[8]Similar reasoning regarding acquiescence: D. Azaria, 'State Silence as Acceptance: A Presumption and an Exception', (2024) *The British Yearbook of International Law* 1.

[9]G. G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', (1957) 92 RCADI 1; H. Lauterpacht, *The Function of Law in the International Community* (1933); H. Lauterpacht, *The Development of International Law by the International Court of Justice* (1958); C. Brown, 'The Inherent Powers of International Courts and Tribunals', (2006) 76 *The British Yearbook of International Law* 195, at 230–6.

[10]*Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment of 18 August 1972, [1972] ICJ Rep. 46, at para. 27.

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jurisdiction, would hinder applicants from accessing justice.[11] For them, there is no need to introduce conditions for silence to mean opposition.

On another view, ICTs perform a *private* function: the resolution of disputes between the litigants to which the latter have consented.[12] Clauses, which require the existence of a 'dispute', form the basis upon which states consent to submit themselves to an ICT's jurisdiction. As the United States (US) argued in *Ecuador* v. *US*, projecting on a respondent's silence the meaning of opposition, when there is no opposition, exceeds the respondent's consent, insofar as no real dispute exists,[13] and departs from the voluntarist basis of international adjudication. The latter departure may lead states to lose belief in international adjudication.[14]

Further, critics of the inference of a dispute from silence might argue that, by favouring international adjudication, the inference encourages disputes, in order for litigation to take place. They might also contend that the inference reflects a bias in favour of international adjudication over non-judicial means of settlement, even though adjudication is 'simply an alternative to the direct and friendly settlement ... between the parties'.[15] Once a claimant addresses a claim at another state, an ICT's jurisdiction is established, simply because the addressee has not responded to the claim, even if the addressee has offered informal discussions. For instance, in *South Africa* v. *Israel* (2024), South Africa alleged in its *Note Verbale* that Israel committed genocide in Gaza. Israel responded by offering discussions.[16] In South Africa's view, since Israel did not address South Africa's claim, a dispute and the ICJ's jurisdiction had been established.[17]

[11]*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Marshall Islands v. United Kingdom*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 861, para. 23, (Judge Yusuf (VP), Dissenting Opinion); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Marshall Islands v. United Kingdom,* Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 900, at 901 (Judge Bennouna, Dissenting Opinion); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Marshall Islands v. United Kingdom*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 907, 913–21, paras. 9–30 (Judge Cançado Trindade, Dissenting Opinion); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 1039, paras. 30–33 (Judge Sebutinde, Separate Opinion); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 1063, para. 40 (Judge Robinson, Dissenting Opinion); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 1093, paras. 3–6 (Judge Crawford, Dissenting Opinion). Indicative critical scholarship: M. A. Becker, 'The Dispute that Wasn't There: Judgments in the *Nuclear Disarmament* Cases at the International Court of Justice', (2017) 6(1) *Cambridge International Law Journal* 4; V. J. Proulx, 'The World Court's Jurisdictional Formalism and its Lost Market Share', (2017) 30 LJIL 925.

[12]M. Kawano, 'The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes', (2013) 346 RCADI 452; H. Xue, *Jurisdiction of the International Court of Justice* (2017), 105; Brown, *supra* note 9, at 230.

[13]See *Ecuador v. United States*, *supra* note 7, at 3.

[14]*Certain Property* (*Liechtenstein v. Germany*), Preliminary Objections, Judgment of 10 February 2005, [2005] ICJ Rep. 69 (Judge ad hoc Fleischhauer, Declaration).

[15]*Free Zones of Upper Savoy and the District of Gex*, Order, [1929] PCIJ Rep. 3, Series No A 22, at 13; *Frontier Dispute (Burkina Faso v. Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554, para. 46.

[16]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Verbatim Record CR 2024/2, 12 January 2024, at 27–8, paras. 21–27.

[17]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Verbatim Record CR 2024/1, 11 January 2024, at 45, para. 11. The Court found *prima facie* that a dispute existed owing to the express statements of the two states. It did not rely on Israel's alleged silence. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional measures, Order of 26 January 2024, paras. 26–28, available at www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf.

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Despite its extraordinary consequences for international adjudication, state silence as opposition has mostly escaped scholars' attention,[18] who have, instead, focused on acquiescence.[19]

This study argues that a dispute can and should be inferred from silence *under specific conditions*.[20] First, a state must remain silent (Section 2). Second, the silence must be in response to a claim by another state (Section 3). Third, the claim must be made in circumstances that call for the silent state's reaction: (i) the claim must be such as to call for the reaction of the silent state; (ii) the silent state must be aware of the claim and be in a position to react (Section 4). Fourth, reasonable time of silence must pass from when the awareness requirement is met (Section 5). The dispute's inference should not be drawn only when no 'other reasonable explanations' for silence exist (Section 6).

The study considers all decisions, as of 29 February 2024, of the ICJ, the International Tribunal for the Law of the Sea (ITLOS), tribunals under Annex VII of the United Nations Convention on the Law of the Sea (LOSC), and inter-state investment tribunals under the Permanent Court of Arbitration (PCA).[21] It relies on the 15 decisions where the inference of a dispute from silence was pleaded, relied on or mentioned by the ICTs (Table 1, below).[22] It also relies on state practice in the form of pleadings in the aforementioned 15 decisions, which although minimal, is geographically representative.[23] The individual opinions of judges and arbitrators offer guidance and critical analysis of the judicial decisions.

There is no suggestion in judicial decisions, state practice, scholarship or by judges that the inference of a dispute and its conditions are based on customary international law or a general principle of law. However, it can be argued that state pleadings support custom and/or a general

[18]E.g., exceptionally but incidentally on silence: G. Abi-Saab, *Les Exceptions Préliminaires dans la Procédure de la Cour Internationale* (1967), 124, 129.

[19]Indicatively: I. C. MacGibbon, 'Customary International Law and Acquiescence', (1957) 33 *The British Yearbook of International Law* 115; J. Barale, 'L'acquiescement dans la jurisprudence internationale', (1965) 11 AFDI 389.

[20]*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom)*, Preliminary Objections of the United Kingdom of 15 June 2015, para. 44(b), available at icj-cij.org/sites/default/files/case-related/160/20150615_preliminary_objections_en.pdf; *Ecuador v. United States*, PCA Case No. 2012-5, Award of 29 September 2012, 34 R.I.A.A.1, para. 223.

[21]Human rights courts are not examined here, because the dispute's existence is not a jurisdiction requirement. WTO Panels and the Appellate Body are not examined, because the Dispute Settlement Understanding (DSU) requires prior consultations and a dispute exists once at the end of consultations the parties do not reach agreement. Indicative conciliation commissions, which inferred rejection from silence, but fall outside this study: *Différend Società Mineraria et Metallurgica di Pertusola* (Décisions Nos 47, 95 and 121, 11 May 1950, 8 March 1951 and 3 March 1952), 8 RIAA 174.

[22]*United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), Questions of Jurisdiction and Admissibility, Judgment of 24 May 1980, [1980] ICJ Rep. 3, paras. 47, 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, [1988] ICJ Rep. 12, paras. 38, 43; *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*; *Equatorial Guinea intervening*), Preliminary Objections, Judgment of 11 June 1998, [1998] ICJ Rep. 275, para. 93; *Georgia v. Russian Federation*, *supra* note 4, paras. 112–113. See *Ecuador v. United States*, Award, *supra* note 20, para. 224; *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Jurisdiction and Admissibility, Award of 29 October 2015, (2015) 33 RIAA 1, para. 167; *Marshall Islands v. India*, *supra* note 5, paras. 45–48; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. Pakistan*), Jurisdiction and Admissibility, Judgment of 5 October 2016, [2016] ICJ Rep 552, paras. 45–48; *Marshall Islands v. United Kingdom*, *supra* note 1, paras. 48–52; *M/V 'Norstar' Case* (*No. 25*) (*Panama v. Italy*), Preliminary Objections, Order, [2016] ITLOS Rep., paras. 101–102; *M/T 'San Padre Pio'* (*No. 27*) (*Switzerland v. Nigeria*), Order of 6 July 2019, [2018-19] ITLOS Rep. 375, para. 58; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Gambia v. Myanmar*), Provisional Measures Order of 23 January 2020, [2020] ICJ Rep. 3, para. 28; *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Special Chamber, Preliminary Objections, Judgment of 28 January 2021, [2021] ITLOS Rep., para. 334; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Gambia v. Myanmar*, Preliminary Objections, Judgment of 22 July 2022, [2022] ICJ Rep. 2, para. 76; *South Africa v. Israel*, Order, *supra* note 17, paras. 25–28. The ICJ found that *prima facie* a dispute existed owing to South Africa's statement in the UNGA and Israel's statement on a website.

[23]State practice beyond pleadings is almost non-existent, e.g., Statement of Ireland, 31 October 2023, Sixth Committee, UNGA, available at www.gov.ie/pdf/?file = ; assets.gov.ie/291645/02b70329-59fe-482e-9468-710a844e10e7.pdf#page = null.

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Table 1. Reasoning in ICT Decisions as to the Existence of a Dispute

Decision Name in chronological order	Relied only on silence		Relied on silence along with other evidence		Silence did not vitiate dispute
	Found Dispute	No dispute	Found dispute	No dispute	
1. US v Iran	X				
2. Headquarters Agreement					X
3. Cameroon v Nigeria					X
4. Georgia v Russia			X		
5. Ecuador v US		X			
6. South China Sea Arbitration					X
7. RMI v India		X			
8. RMI v Pakistan		X			
9. RMI v UK		X			
10. Norstar	X				
11. San Padre Pio					X
12. Gambia v Myanmar (Provisional Measures)			X		
13. Mauritius/Maldives			X		
14. Gambia v Myanmar (Preliminary Objections)			X		
15. South Africa v Israel					

principle of law in this respect, strengthened by the reasoning of ICTs.[24] Alternatively, it can be argued that the decisions of ICTs interpret the term 'dispute' in the treaty-based or unilaterally expressed consent of states.

In any event, where state practice and judicial decisions offer little support for a particular condition, the analysis relies on normative reasoning that conforms to principles of international law, such as good faith, and on reasoning that is in harmony with international jurisprudence.

Section 7 concludes that the inference of a dispute from silence must be encouraged, and the conditions for inferring a dispute from silence should be retained in international adjudication. The inference prevents the tactical 'weaponization' of one's silence in order to undermine international justice. Further, the conditions, under which the inference can be made, address the two schools of thought about the inference and international adjudication. They perform primarily an evidentiary function. Because silence can only be interpreted to mean opposition, *when* a particular context is present, the conditions ensure high probability that the silent state rejects the claim, and that not all instances of silence entail that a dispute exists. They thus address the criticism that voluntarism may be undermined. At the same time, because they are the necessary interpretative context of silence, the conditions are a matter of substance, not a formality. Even assuming *arguendo* that the conditions introduce some degree of formalism for evidentiary purposes, they also perform two additional subsidiary functions: a cautionary and a channelling function.[25] In a field, such as international law, where party autonomy is a default, the conditions ensure that a claiming state and the claim's addressee are being cautioned that, by

[24]By analogy see Brown, *supra* note 9, at 199–205.

[25]For functions of legal formalities: L. L. Fuller, 'Consideration and Form', (1941) 41 *Columbia Law Review* 799.

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making claims of particular *quality*, the claiming state generates a *legal* process, which can lead to a dispute (cautionary function). Additionally, the conditions indicate that a *particular* legal process – a 'dispute' – is being generated, as opposed to any other legal process, such as international law-making or state responsibility, where silence can, instead, mean acquiescence (channelling function).

2. A state's failure to respond

Here, 'failure to respond' or 'silence' concerns the absence of a state's oral or written speech act, when it is combined with lack of change of the silent state's conduct. A state's silence may be complete or thematic.[26]

Complete silence involves instances where a state does not respond at all to another state's views. An example discussed below is Myanmar's silence in response to Gambia's *Note Verbale* alleging that Myanmar violated the Genocide Convention (*Gambia* v. *Myanmar*).

However, state behaviour operates along a continuum between complete silence and responsive speech. A state may use 'non-responsive speech': it may speak without taking a position on a claim made by another state. Such instances constitute 'thematic silence'.

For instance, in *Cameroon* v. *Nigeria* (1998), which partly concerned territorial boundary delimitation, Nigeria objected to the Court's jurisdiction claiming that Nigeria never took a position about Cameroon's claims, and thus a dispute did not exist prior to Cameroon filing the application.[27] During the oral proceedings, the Court asked Nigeria whether its claim that a dispute did not exist signified that there was *agreement* between Cameroon and Nigeria.[28] Nigeria responded, but did 'not indicate whether or not it agrees with Cameroon'.[29]

In *South China Sea Arbitration* (2015), China had regularly communicated to the Philippines its views about its 'historic rights', its 'nine-dash line', and that 'China's Nansha Islands [are] fully entitled to Territorial Sea, [EEZ] and Continental Shelf'. However, China did not clarify some legal issues about these claims that the Philippines had taken a view on.[30]

In *Georgia* v. *Russia* (2011), Russia's Minister of Foreign Affairs made a statement, from which, along with other statements in the United Nations (UN) Security Council, the ICJ inferred a dispute between Georgia and Russia.[31] The statement of Russia's Minister commented on Georgia's allegations against Russia, but did not condemn them or take a position on them.[32]

Finally, in *South Africa* v. *Israel*, South Africa alleged *inter alia* in a *Note Verbale* that Israel committed genocide in Gaza. Israel responded to the *Note Verbale* requesting discussions with South Africa, but did not take a position on South Africa's allegation.[33]

State practice and decisions of ICTs do not adopt the term 'thematic silence', although they have relied on instances of thematic silence when assessing whether a dispute exists.[34] This study relies on cases involving complete or thematic silence to argue that opposition can be inferred in either situation. Further, because speech is the immediate context of thematic silence, this context

[26]D. Kurzon, 'Towards a Typology of Silence', (2007) 39 *Journal of Pragmatics* 1673, at 1678–84.

[27]*Cameroon v. Nigeria*, Preliminary Objections, Verbatim Record 1998/5, 9 March 1998, at 41, 46, available at www.icj-cij.org/sites/default/files/case-related/94/094-19980309-ORA-01-00-BI.pdf.

[28]Ibid., para. 85.

[29]Ibid., para. 92.

[30]See *South China Sea*, Jurisdiction and Admissibility, *supra* note 22, para. 167.

[31]See *Georgia v. Russia*, Preliminary Objections, Judgment, *supra* note 22, paras. 112–113.

[32]Ibid., para. 112.

[33]See *South Africa v. Israel*, *supra* note 22, paras. 25–28.

[34]See *Headquarters Agreement*; *Cameroon v. Nigeria*; *South China Sea*; *Georgia v. Russia*, *supra* note 22. In *Georgia v. Russia*, there is no evidence that the Court considered that the statement of Russia's Minister was an instance of thematic silence.

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may prove that the silent state is aware of another state's claim (Section 4.2) or that the silent state is not otherwise impaired from reacting (Section 4.3).

3. A claim

Since *Georgia* v. *Russia* (2011), the ICJ considers that 'the existence of a dispute may be inferred from [a state's failure] to respond to a *claim* in circumstances where a response is called for'.[35] The Court's reasoning is compatible with its jurisprudence that in order for a dispute to exist, it must be shown that a state's *claim* is positively opposed by another state. Other ICTs have since followed the same reasoning.[36]

A dispute can be inferred from silence in response to a *claim*, which:

1. concerns a breach or expresses views about matters other than a breach of international law;
2. uses assertive language;
3. is about the silent state's conduct or view and is made by statement;
4. is communicated externally.

These circumstances perform primarily an evidentiary function, but also cautionary and channelling functions.

3.1. The claim may concern a breach or not

Most instances of inter-state litigation concern disputes that involve allegations of a breach of international law. However, states may have opposing views about matters that do not concern a breach. A state's claim may concern territorial title, maritime delimitation, whether a state is or not party to a treaty, whether a reservation is valid, or the identification or interpretation of international law.[37]

In the absence of a compromissory clause, which restricts an ICT's jurisdiction to disputes concerning the application of the law and/or to claims regarding a breach, a 'dispute' can be established by claims that do not concern the breach of a rule. Numerous decisions support this position.[38] For instance, in *Ecuador* v. *US*, the US argued that there was no dispute, because, under general international law, a 'dispute' requires an allegation of breach, and Ecuador did not claim a breach in this case.[39] The Tribunal, whose jurisdiction under the 1993 Ecuador-US BIT covered 'disputes … concerning the interpretation or application of the Treaty', found that no dispute existed. However, it did *not* do so on the ground that the applicant's claim did not concern a breach.[40]

3.2. The claim uses assertive language

The claim (to which another state remains silent) must use assertive language. Speculative positions or exhortations do not make a legal claim. As shown below, state practice and case law

[35]See *Georgia v. Russia*, *supra* note 4, para. 30. The Court relied expressly on its reasoning in *Cameroon v. Nigeria*. However, in that decision, it had not spelt out these circumstances. See *Cameroon v. Nigeria*, *supra* note 22, para. 89.

[36]See *South China Sea*, *supra* note 22, para. 161; M/V '*Norstar*', *supra* note 22, para. 99; *Ecuador v. United States*, Award, *supra* note 22, para 212.

[37]*e.g. Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*), Merits, PCIJ Rep. Series A No. 7, at 18; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, [2022] ICJ Rep. 614.

[38]See *Cameroon v. Nigeria*; *South China Sea*; and *Mauritius/Maldives*, *supra* note 22. In *Cameroon v. Nigeria* and *South China Sea*, the applicants had also made claims about a breach, which the ICT addressed separately. See *Cameroon v. Nigeria*, *supra* note 22, paras. 84–93; *South China Sea*, *supra* note 22, paras. 55–57, 147.

[39]Contra *Ecuador v. United States*, Memorial of the United States, *supra* note 7, at 1–3, 5, 30–1.

[40]See *Ecuador v. United States*, *supra* note 22, paras. 198–206, see also paras. 223, 207.

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supports this condition. The reasoning behind it is that a state should be expected to react to a concrete and clear claim (Section 4.1.2).

When the claim alleges a breach of international law, it must condemn the conduct of the addressee. For instance, in *Marshall Islands*, the ICJ reasoned that there was no dispute between the Marshall Islands and each respondent, partly because one of the statements of the Marshall Islands in the United Nations General Assembly (UNGA) meeting on Nuclear Disarmament was:

> formultated in hortatory terms and [could not] be understood as an allegation that the [respondent] (or any other nuclear power) was in breach of any of its legal obligations. It does not … say that the nuclear-weapon states are failing to meet their obligations in this regard.[41]

Where the claim does not concern a breach, some state practice supports that the claim must be assertive. For instance, in *Mauritius/Maldives*, both Maldives and Mauritius supported that claims must be assertive, rather than speculative.[42] Although the Chamber did not specifically comment on this matter, it reasoned that the Maldives were called to respond to Mauritius' invitation to negotiate taking into account also the earlier claims of Mauritius, which were assertive.[43] Further, as it will be shown in Section 4.1.2.2 below, in relation to instances that do not concern a breach, the claiming state must articulate not only its own views but also the diverging views of the state that later remains silent (unless the silent state has communicated its views earlier). The latter can only happen if the positions are set out in assertive language.

3.3. A claim about another state's conduct or view made by statement

ICTs reason that for a dispute to exist, it must be shown that the parties hold 'positively opposed' claims. However, there is lack of clarity and disagreement as to the *evidence* of a *claim*. Scholars agree with Judge Morelli's proposition that a dispute exists when the 'manifestations of will' of the parties oppose.[44] Two independent or in exchange express manifestations of will suffice.

But, Morelli also argued, with some subsequent support, that conduct can manifest a claim; hence two diverging conducts or the conduct of one state followed by another state's complaint establish a dispute.[45] Abi-Saab disagrees. For him, mere conduct cannot manifest a legal claim.[46] This reasoning leads him to argue that a 'dispute' does not (yet) exist, when the conducts of two states diverge;[47] and that, when a state's conduct is complained of by another state, a dispute does not yet exist, because the claim of one state cannot alone establish a dispute.[48]

[41]See *Marshall Islands v. India*, *supra note,* 22, para. 46; *Marshall Islands v. Pakistan*, *supra* note 22, para. 46; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 49.

[42]Written Observations in Reply to the Written Observations of Mauritius, Submitted by the Maldives, 15 April 2020, p. 235, para. 36(d), available at https://www.itlos.org/fileadmin/itlos/documents/cases/28/published/C28_PO_Written_Observations_Maldives.pdf; *Mauritius/Maldives,* Verbatim Record, 13 October 2020, ITLOS/PV.20/C28/2/Rev.1, 26–27, available at www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/ITLOS_PV20_C28_2_Rev.1_E.pdf; *Mauritius/Maldives*, Verbatim Record, 15 October 2020, ITLOS/PV.20/C28/4/Rev.1, 26, available at www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/ITLOS_PV20_C28_4_Rev.1_E.pdf. Earlier State practice in support: *Cameroon v. Nigeria*, Observations of Cameroon on Nigeria's Preliminary Objections, 30 April 1996, available at www.icj-cij.org/sites/default/files/case-related/94/8599.pdf, paras. 5.11–5.13; *Ecuador v. United States*, Request of Ecuador to the United States, 28 June 2011, Ann. B, available at pcacases.com/web/sendAttach/576; *South China Sea*, *supra* note 22, para. 165.

[43]See *Mauritius/Maldives*, *supra* note 22, para. 334.

[44]*South West Africa Cases* (*Ethiopia v South Africa*; *Liberia v South Africa*), Preliminary Objections, [1962] ICJ Rep. 564, at 567 (Judge Morelli, Dissenting Opinion).

[45]H. Thirlway, *The International Court of Justice* (2016), 54.

[46]See Abi-Saab, *supra* note 18, at 129.

[47]Ibid., at 128.

[48]Ibid., at 129.

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It is argued here that, even if conduct is, in principle, capable to manifest a claim, a dispute can be inferred from silence *only* when silence 'responds' to a claim that concerns the *other state's conduct or views*. Because the claim must have this content, it can only be made expressly, as explained below.

For instance, take a situation where State B allegedly violates its human rights obligations. State A suspends trade obligations vis-à-vis State B. State A's trade restriction alone without some explanation (even in domestic law) does not express State A's claim that State B violates its human rights obligations. State A's trade restriction might manifest its view that its own conduct is lawful, for instance, because the primary rules permit it or because defences apply. The silence of State B in response to State A's trade restrictions could mean acquiescence to State A's allegedly wrongful trade restriction or waiver of a claim against State A. It does not necessarily mean that State B opposes an alleged view of State A that State B violated its human rights obligations. Instead, an express claim by State A complaining about the conduct of State B (that then remains silent) channels the legal process: a dispute is being generated between State A and B, instead of acquiescence being generated vis-à-vis the conduct of State A.

When the claim concerns the claiming state's own entitlement or interpretation of the law, the claim must *also* explain that the other state's views differ from its own (Section 4.1.2.2). For example, State A adopts and enforces domestic legislation determining the outer limits of its continental shelf. State B, which is a coastal state opposite to the coast of State A, but has not adopted legislation that makes a claim that overlaps with that of State A, becomes aware of State A's legislation but does *not* respond. If State A does not also claim that *State B*'s *views* about their continental shelves *deviate* from State A's claim, the silence of State B in response to the claim of State A may mean acquiescence. Instead, when the claim is about State A's own entitlement *and* about the *other state's deviating position*, the silent state *agrees* that its position deviates and thus opposes the claim of the claiming state.

This reasoning is supported by the four cases that involved claims unconcerned with breaches. For instance, in *Cameroon* v. *Nigeria*, Cameroon explained its position that its boundary with Nigeria was established based on numerous treaties, and articulated what it considered to be Nigeria's claims over Bakassi Peninsula and elsewhere.[49] The ICJ considered that Nigeria's silence as to its position regarding the whole boundary did not vitiate the dispute's existence.

In *Ecuador* v. *US*, Ecuador by *Note Verbale* stated its understanding of what the correct shared interpretation of the Bilateral Ecuador-US Investment Treaty was. It also asked the US to 'confirm, by a note of reply, the agreed upon [interpretation]. If such a confirming note is not forthcoming or otherwise [the US] does not agree with the interpretation of [the Treaty] by [Ecuador], an unresolved dispute must be considered to exist' concerning the interpretation of the BIT.[50] The US confirmed receipt of the *Note Verbale* and indicated that it will respond in the future. The Tribunal found that there was no dispute, because silence could not be interpreted as opposition in this case. However, the Tribunal did not consider that Ecuador's claim in the *Note Verbale* was unclear.[51]

In *South China Sea*, the Tribunal did not address this issue. However, the Philippines had complained to China about some of China's alleged entitlements.[52]

Finally, in *Mauritius/Maldives*, Maldives in its submission to the Commission on the Limits of the Continental Shelf (CLCS) had made claims about its continental shelf. After assuring

[49]See *Cameroon v. Nigeria*, *supra* note 42, paras. 5.05, 5.13–5.16, 5.18–5.20, 5.24, 5.31; *Cameroon v. Nigeria*, Verbatim Record 1998/4, 6 March 1998, at 23–30, particularly at 28, para. 15 and at 29, para. 18, available at icj-cij.org/sites/default/files/case-related/94/094-19980306-ORA-01-00-BI.pdf; *Cameroon v. Nigeria*, Verbatim Record 1998/6, 11 March 1998, at 34–43, available at icj-cij.org/sites/default/files/case-related/94/094-19980311-ORA-01-00-BI.pdf.

[50]See *Ecuador v. United States*, Request of Ecuador to the United States, *supra* note 42, Ann. B, at 3–4; *Ecuador v. United States*, Counter-Memorial of Ecuador, 23 May 2012, at 45, para. 89, available at pcacases.com/web/sendAttach/586.

[51]See *Ecuador v. United States*, Award, *supra* note 22, para. 197.

[52]See *South China Sea*, Award, *supra* note 22, paras. 147, 165–167, 169–170.

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Mauritius that it would amend its submission to consider Mauritius' claim, Maldives did not amend its submission,[53] and Mauritius protested. The ITLOS Special Chamber considered that Maldives were silent towards Mauritius' 'invitation to discuss about the maritime delimitation' (eight years after Mauritius' protest), and reasoned that these were circumstances calling for Maldives' response.[54] In its 'invitation', Mauritius had *not* explained how its own and Maldives' claims opposed. However, the context – namely, the earlier exchanges between the parties and the fact that both states had adopted domestic legislation making overlapping claims – made clear the parties' individual claims.

Overall, silence in response to conduct alone is unlikely to mean positive opposition, because conduct might make an implied claim that one's own conduct is lawful or irrespective of whether it makes an implied claim, silence in response to it may mean acquiescence. Thus, a claim about someone else's conduct or views can only be made by statement, rather than by mere conduct. The claim's quality and form perform a channelling function. Silence in response can mean opposition rather than acceptance.

However, this does not mean that prospective parties to the dispute must negotiate, where there is no such express requirement.[55] When there is a requirement for negotiations, and these are exhausted without settlement, a dispute necessarily exists. If prior negotiations are not required, prior exchanges *may* help show that a dispute exists.[56] For instance, the ICJ rightly reasoned that unco-ordinated manifestations of will communicated expressly and publicly established *prima facie* a dispute: a statement made by South Africa in the UNGA (alleging Israel committed genocide) and a separate statement of Israel communicated through a public website of Israel's defence ministry (condemning any allegation of genocide).[57]

However, for opposition and a dispute to be inferred from silence, silence must be in *response* to a prior claim. Silence is thus necessarily seen as part of an 'exchange'. Unilaterally communicating one's claim either directly and bilaterally, for instance, by sending a *Note Verbale*, making expressly the claim in a multilateral forum or other modes discussed in Section 4.2, suffices.[58]

3.4. The claim must be communicated externally

A state's claim must be expressed externally: publicly or privately and/or confidentially to another state. No decision inferred a dispute from silence in response to views communicated only between organs of the claiming state.[59] Further, no state has argued in favour of such proposition. Views communicated only between the internal organs of one state may indicate an 'intention', but do not constitute a claim.

Separately, that the claim must be externally communicated is distinct from, but consistent with, the requirement of awareness, examined in Section 4. Internal communications between state organs do not call for another state's response, even when the silent state is actually aware of them.

[53]See *Mauritius/Maldives*, *supra* note 22, paras. 329–331.

[54]Ibid., para. 334.

[55]See Xue, *supra* note 12, at 114–15.

[56]See *Georgia v. Russia*, *supra* note 22, at 85, paras. 30, 37, 113; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*), Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 858, para. 3 (Judge Abraham, Declaration); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422, para. 54; *Nicaragua v. Colombia*, Preliminary Objections, Judgment, *supra* note 4, para. 73.

[57]See *South Africa v. Israel*, *supra* note 22, paras. 26–27.

[58]See Abi-Saab, *supra* note 18, at 124, especially note 133; Ch. de Visscher, *Aspects Récents du Droit Procédural de la Cour International de Justice* (1966), 33.

[59]By analogy regarding acquiescence: *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 603.

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4. Circumstances calling for a state's response

State practice and ICTs decisions generally support that, for silence to mean opposition, a *claim* must exist in 'circumstances calling for a state's response'.[60] No decision has spelt out *which* are these circumstances. State and judicial practice support to varying degrees that the following cumulative circumstances call for another state's reaction:

1. Circumstances that concern the claim:
   (i) The claim is directed at the state that then remains silent;
   (ii) The claim is of 'sufficient clarity';
   (iii) The context supports the above;
2. The state that remains silent is aware of the claim;
3. The silent state is 'in a position to react'.

These are discussed in detail below. When there is little support in state and judicial practice for the aforementioned contextual factors, the normative reasons in favour are explained.

4.1. Circumstances that concern the claim

4.1.1. The claim must be addressed at the state that then remains silent

ICTs do not clearly draw a distinction between those to whom the statement is communicated ('addressees of the statement') and those at whom the claim is directed ('addressees of the claim').[61] Yet, a claim directed at one state can be contained in a statement addressed to a bigger group of states that may or may not include the state against which the claim is directed. The paradigmatic example is a statement in the UNGA or intergovernmental conferences. Further, a statement may be addressed to a third state(s) or an international organization (IO), while the claim's addressee may be a third state.[62] Alternatively, a statement may be made to the press thus addressing the wider public, but the claim contained in that statement is directed at a particular state.[63]

The potential mismatch between the statement's addressee and the claim's addressee is the consequence of diplomacy and human communication. A state may intend to raise awareness among other states or IOs or among the wider public about its claim against another state. The goal may be to make its cause heard by the statement's addressee(s) and to undermine the reputation of the claim's addressee, in order to achieve economic or political advantages or to

[60]State practice: see *Ecuador v. United States*, Request of Ecuador to the United States, *supra* note 42, at 7, para. 14; *Preliminary Objections of Myanmar, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, Preliminary Objections of the Union of Myanmar, 20 January 2021, at 183, para. 576, paras. 708–9, available at www.icj-cij.org/public/files/case-related/178/178-20210120-WRI-01-00-EN.pdf; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, Written Observations of Gambia on the Preliminary Objections Raised by Myanmar, 20 April 2021, para. 5.6, available at www.icj-cij.org/public/files/case-related/178/178-20210420-WRI-01-00-EN.pdf. Decisions: see *Georgia v. Russia*, *supra* note 22, para. 40; *Ecuador v. United States*, *supra* note 22, para. 212; *Marshall Islands v. India*, *supra* note 22, para. 37; *Marshall Islands v. Pakistan*, *supra* note 22, para. 37; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 40; *Gambia v. Myanmar*, *supra* note 22, para. 75; M/V '*Norstar*', *supra* note 22, paras. 94, 99; *South China Sea*, *supra* note 22, para. 161.

[61]See *Georgia v. Russia*, *supra* note 22, paras. 35, 63; *Marshall Islands v. India*, *supra* note 22, para. 45; *Marshall Islands v. Pakistan*, *supra* note 22, para. 45; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 48; *Gambia v. Myanmar*, *supra* note 22, para. 64; *Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, [2022] ICJ Rep. 211, at 220–1, para. 35.

[62]E.g., statements of Georgia's President in the European Parliament (an EU organ) making claims against Russia; see *Georgia v. Russia*, *supra* note 22, para. 93.

[63]E.g., statements of Georgia's President at *CNN* accusing Russia that it conducted ethnic cleansing in Abkhazia and South Ossetia.

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convince the claim's addressee to resolve the dispute through non-judicial means or to submit itself to an ICT's jurisdiction.

However, the claim must be directed at the state, which then remains silent. This condition is separate from awareness (Section 4.2). It is justified by good faith. A state can only be expected to react when it is clear to an objective observer that a claim is directed at that state.

The claim's addressee is the entity whose legal interests are directly affected by the claim. A statement may expressly refer to the state or group of states at which the claim is addressed.[64] When it does not, the claim's addressee can be identified by interpreting the unilateral statement, relying on the statement's text in its context.[65]

If the claim alleges a breach, the claim's addressee is the state or states whose *conduct* is being criticized. [66] Separately, the reference to the alleged conduct will also meet the distinct requirement that the claim must be of 'sufficient clarity' (Section 4.1.2.1).

When the claim does not allege a breach, the claim is directed at the state that is affected by the claim. When a state makes a claim regarding the interpretation of a bilateral treaty, the claim is necessarily directed at the other treaty party, even if it is also directed at individuals that may enjoy rights or benefits under the treaty. Further, when the claim concerns the interpretation of a multilateral treaty but in the bilateral relationship with another state specifically, the addressee is that other state. For instance, in *South China Sea*, the Philippines expressed in *Notes Verbales* sent to China its positions as to its own and China's entitlements in South China Sea pursuant to LOSC.

However, when a state makes a claim regarding the interpretation of a *multilateral* treaty without claiming a breach *but* does not indicate the claim's addressee (either expressly or by context), the claim is directed at all treaty parties. Because silence in response to such claims may mean acceptance regarding the treaty's interpretation,[67] more contextual circumstances are required, in order for opposition to be inferred from the silence of any of the other parties. As discussed below (Section 4.1.2.2), the claim must be clear as to the position of the claiming state *and* that the position of the addressee(s) departs from that of the claiming state.

4.1.2. The claim must be of 'sufficient clarity'

Judicial decisions and state practice support that the claim must 'refer to the subject-matter of the [rule being invoked] with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter'.[68] In *Gambia v. Myanmar* (2022), the ICJ called this requirement 'sufficient particularity'.[69]

The following conditions make the claim sufficiently clear:

1. When a claim concerns a breach, it makes some factual allegation regarding the *conduct* of the addressee state;

[64]See *Marshall Islands v. India*, *supra* note 22, para. 47; *Marshall Islands v. Pakistan*, *supra* note 22, para. 47; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 50.

[65]ILC, Report of the International Law Commission on the Work of its 58th Session, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, UN Doc. A/61/10 (2006) at 377–8; *Gambia v. Myanmar*, *supra* note 22, para. 72.

[66]See *Georgia v. Russia*, *supra* note 4, paras. 51–53, 56–60, 64–67, 71–72, 74–77, 81, 84–85, 90, 93, 95–97, 99, 103–104, 108, 113.

[67]ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, UN Doc A/73/10 (2018) (SASP Conclusions with commentaries), Conclusion 10(2).

[68]Decisions: see *Georgia v. Russia*, *supra* note 22, para. 30; *Marshall Islands v. India*, *supra* note 22, para. 46; *Marshall Islands v. Pakistan*, *supra* note 22, para. 46; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 49. State practice: see *Ecuador v. United States*, Counter-Memorial of Ecuador, *supra* note 50, at 44, para. 86; *Gambia v. Myanmar*, *supra* note 60, paras. 524–531.

[69]See *Gambia v. Myanmar*, *supra* note 22, para. 72.

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2. When the claim does not concern a breach, the claim articulates the position of the claiming state *and* how this differs from the position of the addressee state;
3. The claim is sufficiently clear as to its subject-matter.

These are discussed in detail below. Because of these contextual conditions, the voting in favour or against a particular resolution or decision of an intergovernmental forum is insufficient to call for the reaction of another state, in the absence of which opposition can be inferred. Voting alone is unclear as to the position of a state, since resolutions frequently contain numerous exhortations and/or claims. A state that votes in favour or against a particular resolution may accept or disagree with only some of that resolution's statements. However, a state's statement in connection to its voting may be clear (about the aspects discussed below) and may thus establish a dispute in combination with a state that then remains silent.

4.1.2.1. When a claim concerns a breach, it must refer to the conduct of the addressee state. A claim alleging a breach of international law must articulate the *conduct* of the addressee state. However, a detailed factual allegation is not required. State practice before the ICJ and the ICJ's reasoning about state silence and the existence of a dispute offer more support to this condition than LOSC state practice and jurisprudence.[70] For instance, in *Hostages in Iran*, the US had explicitly and repeatedly protested against the occupation and holding of hostages in the US Embassy in Tehran.[71] In *Headquarters Agreement*, the UN Secretary-General had repeatedly protested to US officials about the (future) adoption of the Anti-Terrorist Act and its inconsistency with the Headquarters Agreement.[72] In *Georgia* v. *Russia*, the Court found that there was a dispute based on Georgia's claims, which clearly (albeit briefly) articulated Russia's conduct.[73]

In *Marshall Islands*, the Marshall Islands made a general criticism of the conduct of all nuclear-weapon states. However, because the statement did 'not *specify the conduct that gave rise to the alleged breach*', the Court reasoned that a reaction of India, UK or Pakistan was not called for, 'given the statement's *very general content* . . . '.[74]

In *Gambia* v. *Myanmar*, Gambia's statements in the UNGA mentioned 'terrible crimes' and the 'Rohingya issue'.[75] Although Myanmar argued that there was no dispute, because *inter alia* the claim must articulate the facts alleged,[76] the Court found that Gambia's UNGA statements were sufficiently particular, because their context was the UN Fact-Finding Mission Reports that made

[70]*M/V 'Norstar'*, Preliminary Objections, Verbatim Record of 20 September 2016, ITLOS/PV16/C25/1/Rev.1, at 17, available at www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Verbatim_Records/ITLOS_PV16_C25_1_Rev.1_1.pdf; *M/V 'Norstar'*, Preliminary Objections, Verbatim Record of 21 September 2016, ITLOS/PV16/C25/3/Rev.1, at 5, 7, available at www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Verbatim_Records/ITLOS_PV16_C25_3_Rev.1_1.pdf; *M/V 'Norstar'*, Preliminary Objections, Verbatim Record of 22 September 2016, ITLOS/PV16/C25/6/Rev.1, at 2, available at www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Verbatim_Records/ITLOS_PV16_C25_6_Rev.1.pdf; ITLOS pointed out that Panama's letters mentioned Norstar's unlawful detention by Italy; *M/V 'Norstar'*, *supra* note 22, para. 97; Switzerland: *M/T 'San Padre Pio'*, Verbatim Record of 21 June 2019, ITLOS/PV.19/C27/1/Rev.1, at 17, available at www.itlos.org/fileadmin/itlos/documents/cases/27/ITLOS_PV19_C27_1_Rev1_E.pdf; Nigeria: *M/T 'San Padre Pio'*, Verbatim Record of 22 June 2019, ITLOS/PV.19/C27/4/Rev.1, at 6; *M/T 'San Padre Pio'*, *supra* note 22, paras. 56–61, available at www.itlos.org/fileadmin/itlos/documents/cases/27/ITLOS_PV19_C27_4_Rev1_E.pdf.

[71]*United States v. Iran*, Memorial of the USA, at 136–140, available at www.icj-cij.org/sites/default/files/case-related/64/9551.pdf. See also *United States v. Iran*, *supra* note 22, para. 47.

[72]See *Headquarters Agreement*, *supra* note 22, paras. 10–14, 36–38.

[73]See *Georgia v. Russia*, *supra* note 22, paras. 109–111.

[74]See *Marshall Islands v. India*, *supra* note 22, para. 47; *Marshall Islands v. Pakistan*, *supra* note 22, para. 47; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 50 (emphasis added).

[75]See *Gambia v. Myanmar*, Preliminary Objections, *supra* note, 22, paras. 67, 69.

[76]See *Gambia v. Myanmar*, Preliminary Objections of Myanmar, *supra* note 60, paras. 524, 531, 679.

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factual allegations regarding Myanmar's conduct.[77] Concerning Gambia's *Note Verbale* in response to which Myanmar had been silent, the Court considered that the *Note Verbale* called for Myanmar's response, because it referred to the findings of the Fact-Finding Mission, which described Myanmar's conduct.[78]

Finally, the factor that the claim mentions the conduct of the addressee state is separate from whether the claim is directed at the silent state. It is possible that a claim expressly identifies its addressee without articulating the conduct complained of. In this case, the claim is not sufficiently clear as discussed here. However, it is also possible that a claim does not explicitly indicate its addressee, but it is sufficiently clear about the conduct complained of and thus sufficiently provides the context for identifying the claim's addressee (Section 4.1.1).

4.1.2.2. When the claim does not concern a breach, it must articulate how the claiming state's position differs from that of the addressee state. As explained in Section 3.3, when a state makes claims about its own entitlements or a treaty's interpretation, the silence of another state (party) may communicate acceptance of that claim. For opposition to be inferred instead, state practice and all decisions discussed in this study support the position that the claiming state's understanding that there is a divergence of views must be articulated (unless the state's views have been expressed earlier and are the context in which its silence is interpreted). This quality of the claim channels the meaning of state silence in response to that of opposition rather than acceptance.

4.1.2.3. The claim must be sufficiently clear about its subject-matter. International decisions consistently support that while the state making a claim does not need to make reference to a specific rule of law,[79] a claim that is vague as to its subject-matter cannot call for the reaction of another state, and a dispute cannot be inferred from that state's silence.[80] That the claim must be sufficiently clear about its subject-matter concerns the content of a dispute,[81] and thus an ICT's *ratione materiae* jurisdiction, which is often limited in compromissory or optional clauses.[82] But, since *Marshall Islands*, the ICJ's reasoning supports that the requirement concerns the dispute's existence.[83]

However, the claim's clarity as to its subject-matter is best understood as a requirement concerning the dispute's existence, when assessing *whether a dispute can be inferred from silence*. Although no ICT has expressly stated this requirement for the inference of a dispute from silence, this requirement is supported by the principle of good faith.[84] A state should be expected to react when it is clear to an objective observer what is being claimed.

[77]See *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, paras. 72–73.

[78]Ibid., para. 74.

[79]See *Georgia v. Russia*, *supra* note 22, para. 30; *Ukraine v. Russia*, *supra* note 61, para. 44; *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, para. 72; *Marshall Islands v. India*, *supra* note 22, para. 47; *Marshall Islands v. Pakistan*, *supra* note 22, at 47; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 50.

[80]See *Georgia v. Russia*, *supra* note 22, para. 30; *Ukraine v. Russia*, *supra* note 61, para. 44; *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, para. 72; *Marshall Islands v. India*, *supra* note 22, para. 47; *Marshall Islands v. Pakistan*, *supra* note 22, para. 47; *Marshall Islands v. United Kingdom, supra* note 1, para. 50.

[81]B. Bonafé, 'Establishing the Existence of a Dispute Before the International Court of Justice: Drawbacks and Implications', (2017) 45 *Questions of International Law* 3, at 17.

[82]See *Georgia v. Russia*, *supra* note 22, para. 30; *Ukraine v. Russia*, *supra* note 22, para. 44.

[83]See *Marshall Islands v. India*, *supra* note 22, para. 46; *Marshall Islands v. Pakistan*, *supra* note 22, para. 46; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 49; *Gambia v. Myanmar*, Preliminary Objections of Myanmar, *supra* note 60, paras. 524, 528–531, 575–576; *Ecuador v. United States,* Counter-Memorial of Ecuador, *supra* note 50, at 44, paras. 86–87. The US did not challenge this requirement. See also *Ecuador v. United States*, Dissenting Opinion of Viñuesa, 29 September 2012, para. 147, available at pcacases.com/web/sendAttach/7132.

[84]By analogy to the expectation to react in relation to acquiescence: R. Kolb, *Good Faith in International Law* (2017), at 96–7.

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The reasoning behind this requirement is to caution the claim's addressee and the claiming state that a dispute is being generated and to channel among different disputes: to help identify a dispute about a particular topic by virtue of the claim.[85]

Let us assume that there is no *ratione materiae* limitation to a court's jurisdiction, and the prospective applicant directs a claim at the prospective respondent, such as, 'State A violates international law'. This claim is unable to convey the claimant's position. The prospective respondent cannot understand the former's position and cannot take a position on it. It is possible that State A agrees with the allegation depending on the claim's subject-matter. For instance, State A may agree that it violates the right to property, while it may disagree that it commits ethnic cleansing.

Similarly, when claims do not concern a breach, a claim whose subject-matter is unclear, such as 'I, State A, have rights in the North Sea', does not call for the reaction of coastal or other states. Such a claim could be about any of the following various topics: innocent passage, freedom of navigation, sovereign rights, fishing rights, and so on and so forth. It is possible that a coastal state may agree, for instance, that State A enjoys freedom of navigation, but it may disagree that State A has sovereign rights over the continental shelf. Thus, some clarity about the claim's subject-matter is necessary for a response to be called for and for a dispute to be inferred from silence.

Finally, to identify the claim, the text of the statement must be interpreted in its context (Section 4.1.3), in accordance with the rules of interpretation of unilateral declarations.[86] When a statement contains multiple express claims, international decisions support that all claims have been made.[87]

4.1.3. The claim's context

Statements and silence must be interpreted in their *context* in order to identify whether a dispute exists. Some examples of modern context that can be relevant when interpreting silence are the following.

4.1.3.1. Bilateral or multilateral settings. The context may be the bilateral exchanges between the parties.[88] Multilateral settings may also constitute the context of statements and silence in response. The subject-matter of an intergovernmental conference is part of the context in which the claim is interpreted and thus part of the context in which the silence in response to that claim is interpreted.[89]

[85]See *Georgia v. Russia*, *supra* note 22, para. 30 (emphasis added); *Marshall Islands v. India*, *supra* note 22, para. 46; *Marshall Islands v. Pakistan*, *supra* note 22, para. 46; *Marshall Islands v. United Kingdom*, *supra note* 1, para. 49. For criticism: see Bonafé, *supra* note 81, at 20–3. With variations, individual judges and States also impliedly support the cautionary and channelling function of this requirement: *Georgia v. Russia*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 323, at 326, para. 9 (Judge Greenwood, Separate Opinion); *Gambia v. Myanmar*, Preliminary Objections of Myanmar, *supra* note 60, at 167, para. 540 (to enable the *respondent and the Court* to determine whether the claim made in the application is the matter already in dispute, or whether the application includes new or additional claims); J. Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation', (2017) 48 *Ocean Development and International Law* 269.

[86]See Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, *supra* note 65; *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, para. 72.

[87]See *Ukraine v. Russia*, *supra* note 61, para. 46; *Georgia v. Russia*, *supra* note 22, para. 113.

[88]See *South China Sea*, *supra* note 22, para. 167; *Mauritius/Maldives*, *supra* note 22, para. 334.

[89]See *Georgia v. Russia*, *supra* note 22, paras. 82, 85, 88, 95, (e.g., considering that a dispute about the racial discrimination could not be established because Georgia had requested that the views of its organs be circulated under UNGA agendas that did *not* concern ethnic cleansing); *Marshall Islands v. India*, *supra* note 22, para. 46; *Marshall Islands v. Pakistan*, *supra* note 22, para. 46; *Marshall Islands v. United Kingdom*, *supra* note, 1, para. 49 (considering that the respondents were not expected to react, because the subject-matter of the conference, where the Marshall Islands made the relevant statement did not concern nuclear disarmament, which was the subject-matter of the claim made in that statement). Different assessment of the conference's context, but confirming the context's relevance: see *Marshall Islands v. United Kingdom*, Judge Crawford, Dissenting Opinion, *supra* note 11, at 1104, para. 27.

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4.1.3.2. Other institutional processes. Expert treaty bodies (ETBs), such as the Human Rights Committee, have developed reporting processes. When the claims concern the breach by another state, and are made in the claiming state's periodic reports to ETBs, they do not call for the reaction of the state at which the claims are directed. This is because normally periodic reporting concerns one's own conduct; not another state's conduct.[90]

Further, the Reports of Fact-Finding Missions established by IOs may constitute the context for interpreting state claims. They can clarify the claim's addressee and/or subject matter.[91]

4.1.3.3. The claiming state's status as a state other than the injured state does not undermine the claim's clarity. The status of the claiming state, as a state other than the injured state, does not undermine the claim's clarity for establishing the existence of a dispute. If the contrary reasoning were accepted,[92] only claims by injured states, namely only states specially affected by a breach of an *erga omnes (partes)* obligation, could call for the reaction of the allegedly responsible state. Yet, in some breaches of *erga omnes (partes)* obligations, there may be no specially affected state, such as when a state violates human rights against its own nationals. In such cases, the responsible state's silence would shield it from the jurisdiction of an ICT, because no claim by any state could call for its reaction. Therefore, that the claim is made by a state other than the injured state does not weaken the claim's clarity.

4.2. Awareness of another state's claim

Judges and scholars have vehemently criticized the requirement that a claim's addressee must be aware, or at least could not have been unaware of the claim, primarily on the ground that it introduces an unnecessary requirement of prior notice of the claim.[93] However, given that the response of the claim's addressee cannot be anticipated – that state may expressly take a position or it may remain silent – the requirement of awareness ensures that *if* the response is silence, then silence can be interpreted as opposing the claim.[94]

In *Gambia* v. *Myanmar*, Myanmar had argued that (i) the prospective respondent must be aware or at least could not have been unaware of the claimant's position, *and* (ii) the claimant must be aware or at least could not have been unaware of the respondent's position.[95] Gambia challenged the latter requirement,[96] because it would give a 'silent veto' to a prospective respondent.[97] The Court categorically rejected the 'mutual awareness' requirement. If the respondent was required to *expressly* oppose the applicant's claims, 'a respondent could prevent a finding that a dispute exists by remaining silent in the face of an applicant's legal claims. Such a consequence would be unacceptable'.[98] Later, the Court reasoned that Myanmar's *rejection* was

[90]See *Georgia v. Russia*, *supra* note 22, para. 69.

[91]See *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, paras. 72, 74.

[92]See Myanmar's argument in *Gambia v. Myanmar*, Preliminary Objections of Myanmar, *supra* note 60, at 695–7, 708; *Gambia v. Myanmar*, Verbatim Record CR 2022/1, 21 February 2022, at 54, para. 31, and at 58–9, paras. 61–62, available at www.icj-cij.org/sites/default/files/case-related/178/178-20220221-ORA-01-00-BI.pdf. Although the ICJ inferred Myanmar's opposition from its silence, it did not expressly reject Myanmar's argument.

[93]For requirement: see *Georgia v. Russia*, *supra* note 22, para. 36; *Belgium v. Senegal*, *supra* note 56, at 422, para. 54; *Marshall Islands v. India*, *supra* note 22, paras. 38, 48, 52; *Marshall Islands v. Pakistan*, *supra* note 22, paras. 38, 48, 52; *Marshall Islands v. United Kingdom*, *supra* note 1, paras. 41, 52; *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, para. 104. Criticism: see note 11, *supra*.

[94]Impliedly: *Marshall Islands v. United Kingdom*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 1034, para. 8 (Judge Donoghue, Declaration).

[95]See *Gambia v. Myanmar*, Preliminary Objections of Myanmar, *supra* note 60, para. 575.

[96]See *Gambia v. Myanmar*, Written Observations of The Gambia, *supra* note 60, at 77–8, paras. 5.31–5.34.

[97]*Gambia v. Myanmar*, Verbatim Record CR 2022/2, 23 February 2022, at 56, paras. 41–42, available at www.icj-cij.org/sites/default/files/case-related/178/178-20220223-ORA-01-00-BI.pdf.

[98]Ibid., para. 71.

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inferred from its silence.[99] Thus, by rejecting the mutual awareness requirement, the Court has also rejected a proposition that it must be proven that the originally claiming state also *understood* that by being silent, the silent state rejected the original claim.

The awareness requirement comprises two alternative options: 'actual awareness' ('be aware') and 'constructive awareness' ('could not have been unaware').[100] The ICJ relies on the terms 'awareness' and 'knowledge' interchangeably.[101]

Usually, a state becomes aware of a claim through direct communication (e.g., by *Note Verbale*).[102] However, when the claim is made (i) in an inter-state multilateral forum, (ii) through press releases or foreign media, or (iii) domestic media, constructive awareness becomes crucial.

4.2.1. Of claims in inter-state multilateral settings

Inter-state multilateral settings provide fora for *public* communication between states. They provide a setting where diplomatic tactics surrounding silence may take place. For instance, a state may abstain from a meeting, where it may be expected that a claim directed at it may be made by another state, precisely in order to avoid knowledge and thus to avoid the establishment of an ICT's jurisdiction.

It is argued that constructive awareness is met when claims are made in permanent multilateral settings, because constructive awareness is the corollary of the effective functioning of permanent multilateral fora. A different approach is needed when assessing whether constructive awareness is met in *ad hoc* multilateral settings.

Permanent inter-governmental conferences, be they organs of IOs, such as the UNGA, or not, are composed of IO Members or all treaty parties respectively. They may have a multitude of competences, but they constitute permanent forums in which states exchange views. In practice, if states do not attend, bodies that administratively support the functioning of each conference or organ of the IO publicize the debates among all members.

International decisions support that awareness is met when claims are made in such fora. For instance, in *Georgia* v. *Russia*, Russia did not argue that it was not aware of Georgia's statements in the UNGA or UNSC. The Court rejected the relevance of those statements for the existence of a dispute, but not on the ground that Russia lacked constructive knowledge of Georgia's statements in these fora.[103] In *Gambia* v. *Myanmar*, the ICJ reasoned that Myanmar could not have been unaware of Gambia's allegations in the UNGA general debate.[104] Similarly, in *South Africa* v. *Israel*, it noted that 'Israel was represented' at the UNGA extraordinary meeting, where South Africa alleged that 'the events … in Gaza have illustrated that Israel is acting contrary to its obligations [under] the Genocide Convention'.[105]

Presence in such a meeting can be evidence of actual awareness of a claim made therein. Separately, there is no state practice and no international decisions that support and explain the reasoning behind the proposition that constructive knowledge is met when a claim is made in a permanent multilateral forum. It is argued here that, when a state is present and even if it is absent during a meeting when a statement is directed at it, constructive awareness is met, because constructive awareness is the corollary of the effective functioning of these conferences. For instance, the UN Members intended the UNGA to function effectively to achieve the objectives for

[99]See *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, para. 76.

[100]Judge Crawford calls this 'objective awareness'. See *Marshall Islands v. United Kingdom*, Preliminary Objections, Judge Crawford, Dissenting Opinion, *supra* note 11, para. 1.

[101]See *Gambia v. Myanmar*, Preliminary Objections, *supra* note 22, paras. 72, 76.

[102]See *M/V 'Norstar'*, *supra* note 22, para. 96; *Gambia v. Myanmar*, Provisional Measures Order, *supra* note 22, paras. 27–28; *Ecuador v. United States*, *supra* note 22, para. 209.

[103]See *Georgia v. Russia*, *supra* note 22, para. 85.

[104]Ibid., paras. 72–73.

[105]See *South Africa v. Israel*, *supra* note 22, para. 26.

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which it was instituted,[106] including the efficient communication between states. Further, from a policy perspective, this reasoning ensures that states are not encouraged to not be present in the UNGA in order to avoid having awareness.

On the other hand, *ad hoc* conferences are convened by IOs or by governments on a particular subject-matter. States, which have not been invited and states that have been invited but do not attend, cannot have constructive knowledge of claims made in an *ad hoc* conference based on the reasoning applicable to permanent inter-state fora.

In *Marshall Islands*, the Marshall Islands had made a statement at an *ad hoc* Conference on the humanitarian impact of nuclear weapons. India and Pakistan were present. The UK objected that it did not participate, and that the Marshall Islands did not notify it of this statement.[107] The Court noted that the UK was not present,[108] but drew no particular consequence from this fact. In all three judgments, which have identical reasoning, the Court reasoned that the content and context of the statement were not such as to raise the expectation of response.[109] The Court's decision thus provides no evidence as to whether constructive awareness was or not met (for the UK in this case).

Three normative arguments can be made in favour of constructive awareness when a state is *not* present at an *ad hoc* conference. The third is persuasive.

First, Judge Sebutinde, in her Separate Opinion, in *Marshall Islands* v. *UK*, argued that the UK's specific stance to all negotiations of nuclear-disarmament was the background against which the UK's absence can be understood as a tactic so as to avoid awareness.[110] She argued that, in these narrow circumstances, constructive knowledge must be met. Although compelling, this argument depends on whether there is evidence that the state's absence is a tactical choice. It does not support generally that constructive awareness is met where a state is not present at an *ad hoc* conference.

Second, in his dissenting opinion, in *Marshall Islands* v. *UK*, Judge Robinson argued that in the modern world of communications technology, it is reasonable that the statement of the Marshall Islands in the Nayarit Conference would *not* have escaped the UK's attention.[111] However, if, as Judge Robinson suggests, states are expected to know any statement made against them in any *ad hoc* conference that they have not attended, all states would be burdened significantly, and developing countries would be burdened unreasonably.

Third, building on, but departing from, Judge Robinson's argument, it could be argued that states that have particular interests in a field, such as those that hold nuclear weapons, cannot be unaware of claims against them in *ad hoc* conferences that concern those particular interests, even if they do not attend, assuming that these statements are public through modern communications media. This approach, which is compatible by analogy with existing jurisprudence about acquiescence,[112] would represent reality better, thus not burdening states unreasonably, when they do not have particular interest in a field.

[106]Similar reasoning, but leading to different result: *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 179.

[107]See *Marshall Islands v. United Kingdom*, *supra* note 20, para. 48.

[108]See *Marshall Islands v. United Kingdom*, *supra* note 1, paras. 28, 50.

[109]See *Marshall Islands v. India*, *supra* note 22, para. 47; *Marshall Islands v. Pakistan*, *supra* note 22, para. 47; *Marshall Islands v. United Kingdom*, *supra* note 1, para. 50.

[110]See *Marshall Islands v. United Kingdom*, Preliminary Objections, Judge Sebutinde, Separate Opinion, *supra* note 11, para. 28.

[111]See *Marshall Islands v. United Kingdom*, Preliminary Objections, Judge Robinson, Dissenting Opinion, *supra* note 11, paras. 62–63.

[112]*Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, at 139.

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4.2.2. Of claims in press releases and global or regional media

State representatives regularly make statements through mass or social media, which have foreign or global reach. Ministries of Foreign Affairs also often make press releases, including on their websites. Yet, statements in the media do not guarantee receipt and thus actual awareness of the statement. Their principal purpose is not to bring a state's views to the attention of the claim's addressee, but to raise the awareness of the wider public – domestic, regional and worldwide – about a state's views, thus gaining political support or undermining the reputation of the state at which the claim is directed.

Some support in case law exists in favour of the position that actual awareness of claims made in global or regional media can be met. For instance, in *Georgia* v. *Russia*, the ICJ found that a dispute existed between Georgia and Russia based on statements of Russian representatives,[113] which proved that they had *actual* knowledge of Georgia's in press briefings or statements in media of global or regional reach.[114]

State practice offers minimal support that constructive knowledge would be met in such instances. For instance, in relation to the *BBC* interview by Georgia's President-elect, the Court, in *Georgia* v. *Russia*, considered that the context and content of the statements in that interview did not call for Russia's reaction. However, the Court's reasoning was *not* that Russia lacked constructive knowledge of those statements.[115]

Further, Georgia had argued that statements of Georgia's President 'in a press conference with foreign journalists', in his '*CNN* interview' as well as the press briefing of Georgia's Ministry of Foreign Affairs made claims that were opposable to Russia.[116] It also pointed out that Georgia's President-elect had made allegations about ethnic cleansing in a 2004 interview in *BBC*, which was broadcasted in Russia.[117] For Georgia, Russia had constructive knowledge of Georgia's claims.

Russia did not argue that it did not have constructive knowledge of *CNN* interviews, press releases or interviews in regional broadcasters,[118] but expressly argued that statements made in *Georgian* media were *not* opposable to it.[119] It can be extrapolated that Russia accepted that it had constructive awareness of claims in press releases or through global or regional media.

Although state practice and jurisprudence do not support sufficiently that constructive knowledge would be met for statements made in global media, it could be argued that, depending on the particular interests that a state has in a particular field or in a relationship with another state, constructive knowledge would be met, given the widespread publication of such statements. This reasoning would be compatible, by analogy, with existing jurisprudence.[120] It would also reflect better the reality of states' capacity.

4.2.3. Statements addressed to domestic audience

In practice, state officials make statements addressed entirely to their state's domestic audience but conveying claims directed against another state. Such statements can be, and often are, made in

[113]See *Georgia v. Russia*, *supra* note 22, paras. 109–111.

[114]Ibid., para. 112.

[115]Ibid., para. 77. The judges' individual opinions do not suggest that constructive knowledge would *not* be met.

[116]*Georgia v. Russia*, Written Statement of Georgia of 1 April 2010, paras. 2.64–2.65, available at www.icj-cij.org/sites/default/files/case-related/140/16101.pdf; *Georgia v. Russia*, Verbatim Record CR 2010/9, 14 September 2010, at 17, para. 12 and at 18 paras. 14–15, available at www.icj-cij.org/sites/default/files/case-related/140/140-20100914-ORA-01-00-BI.pdf.

[117]*Georgia v. Russia*, Verbatim Record 2010/11, 17 September 2010, at 11, para. 11, available at www.icj-cij.org/sites/default/files/case-related/140/140-20100917-ORA-01-00-BI.pdf.

[118]*Georgia v. Russia*, Verbatim Record 2010/8, 13 September 2010, at 20, para. 27, and at 2, para. 37, available at www.icj-cij.org/sites/default/files/case-related/140/140-20100913-ORA-01-00-BI.pdf; *Georgia v. Russia*, Verbatim Record 2010/10, 15 September 2010, at 19, para. 24, available at www.icj-cij.org/sites/default/files/case-related/140/140-20100915-ORA-01-00-BI.pdf.

[119]See *Georgia v. Russia*, Verbatim Record 2010/8, *supra* note 118, at 36, para. 25.

[120]See *Fisheries*, *supra* note 112, at 139.

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domestic political party conferences or through domestic newspapers or media. Such statements may be intended to maximize domestic political benefits or minimize domestic political costs. However, it is argued here that, despite the domestic political motivations behind them, claims made to domestic audience *can* constitute evidence of the existence of a dispute with another state. On the one hand, states are likely to know statements of other states made in a domestic context. In reality, domestic media, especially of *neighbouring* states, will reproduce such statements, and ministries of foreign affairs have dedicated departments on particular topics or on relations with particular states. On the other hand, states should be expected to behave diligently, including when they make claims about other states or about their relationship with other states, irrespective of which audience they address. As a result, when the claim's addressee responds by rejecting the claim made against it, even if that original claim has been made exclusively to a domestic audience, a dispute is established. But, when the claim's addressee remains silent, a dispute can be established, if claim's addressee does not deny that it actually knew the claim.

However, when the claim's addressee denies actual awareness, constructive awareness becomes pertinent. There is no express support, in state practice or international decisions, that states have constructive awareness of other states' statements made in the latters' domestic media. For instance, in *Georgia* v. *Russia*, among the evidence that it submitted, Georgia included interviews of its officials in Georgian media.[121] Russia argued that: 'it must be for Georgia to … communicate a claim, not for Russia to go out to seek it by watching Georgian television'.[122] The Court did not address this issue.

It might be argued that the ICJ's reasoning, in *Nicaragua* v. *Colombia*, implies that a state has constructive knowledge of claims made by another state to the latter's domestic audience. The facts of this case did not concern silence and the Court did not deal with the inference of a dispute from silence. However, it might arguably be relied on by analogy. In determining whether a dispute existed, the Court reasoned that 'Colombia *could not have misunderstood*' Nicaragua's position[123] in a statement that Nicaragua's President had made in an event of the Nicaraguan Sandinista Youth organization,[124] without evidence that this statement was notified to Colombia. The constructive knowledge envisaged by the Court here was about Colombia's *knowledge of* Nicaragua's *response* to *Colombia's original publicly made claim*.

However, the reasoning of constructive awareness, when assessing the legal meaning of state silence, is to ensure that the silent state is expected to respond in the absence of which a dispute *will* be established. Instead, awareness of the response rejecting one's original claim (i.e., mutual awareness), which is what the Court was concerned with in *Nicaragua* v. *Colombia*, is about knowledge that a dispute *has been* established. Given this distinction, it could be argued that a lower constructive knowledge threshold might be justified for the latter 'leg' of knowledge, but not in relation to the expectation to react to an original claim. In any event, the Court has since categorically rejected the latter requirement in *Gambia* v. *Myanmar* (Section 4.2), and this weakens the strength of an analogy with its reasoning here.

Further, an analogy with the reasoning, in *Fisheries*,[125] is inapposite. In that case, Britain tolerated Norway's legislation, which was adopted *and enforced for 60 years*, not an instantaneous statement in a domestic audience. Additionally, subsequent judicial reasoning supports that states are not expected to know other states' domestic law.[126] If states are not expected to know the

[121]See *Georgia v. Russia*, Written Statement of Georgia, *supra* note 116, Ann. at 173, 293.

[122]See *Georgia v. Russia*, Verbatim Record 2010/8, *supra* note 118, at 36–7, para. 25. Georgia did not press on this evidence in its oral pleadings. See *Georgia v. Russia*, Verbatim Record 2010/9, *supra* note 116; *Georgia v. Russia*, Verbatim Record 2010/10, *supra* note 118; *Georgia v. Russia*, Verbatim Record 2010/11, *supra* note 117.

[123]See *Nicaragua v. Colombia*, *supra* note 4, para. 73 (emphasis added).

[124]C. E. Flores and K. Chávez, 'Daniel: A 40 Años del Martirio de Allende, debe Prevalecer la Paz', *EL19*, 1 September 2013.

[125]See *Fisheries*, *supra* note 112, at 139.

[126]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guineu intervening)*, Judgment of 10 October 2002, ICJ Rep. 2002, at 303, para. 266; Appellate Body Report European Communities-Customs

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domestic legal developments in another state, *a fortiori* they cannot be expected to know statements made purely domestically.

The reasoning that is more harmonious with existing jurisprudence is that, as a default, states are *not expected* to know claims against them which have been made in an entirely domestic context of the claiming state. However, the relationship between the two states and the significance of the subject-matter in their relationship, as well as their previous exchanges about it, may contribute to constructive knowledge. Separately, if a state actually knows of claims that the claiming state made in its own domestic audience, actual awareness is met and a dispute can be established (by statement or silence in response).

4.3. The silent state is 'in a position' to respond

When a silent state is deprived of 'a fully operational government and administration', such as when a state is afflicted by civil war or international armed conflict,[127] some ICTs have refused to infer acquiescence. There is no state practice or international decision that has considered that a dispute cannot be established when the silent state is experiencing the aforementioned circumstances. However, the reasoning behind the aforementioned proposition is that a state's will should be taken to be manifested when the state is reasonably capable to manifest its will. Thus, to the extent that the inference of a dispute from silence relies on an inference of rejection from silence, as the Court has reasoned in *Gambia* v. *Myanmar*, the same reasoning should apply to the inference of opposition from silence.

A concern arises when the claim directed at the silent state concerns the very situation in which the silent state is involved thus causing its 'incapability'. For instance, if a state being involved in an armed conflict is taken not to be in a position to react during that time, it could prevent the establishment of a dispute about the lawfulness of its own use of force from being established merely by remaining silent. It could be argued that in such situations, a dispute can be established by virtue of that state's silence. In such case, the silent state's situation may be a factor for assessing the reasonable time of silence (Section 5).

In any event, when a state is thematically silent (it uses non-responsive speech), the assumption should be made that it is in a position to respond.

5. Reasonable time of silence

For silence in response to another state's claim to mean opposition, silence must be held for a reasonable time. Although the first decision to rely expressly on reasonable time of silence for inferring rejection from that silence was *Gambia* v. *Myanmar (Preliminary Objections)* (2022), scholars, already in the previous century, had supported this requirement.[128]

Under general international law, there is no fixed time of silence for establishing a 'dispute', in the same way that there is no fixed time for establishing other legal situations, such as acquiescence, prescription or estoppel.[129] What is reasonable time of silence depends on the circumstances of each case. Various factors can be relevant.

Classification of Frozen Boneless Chicken Cuts, adopted 25 September 2005, WT/DS269/AB/R, para. 334. See also SASP Conclusions with commentaries, *supra* note 67, at 80–1, para. 19.

[127] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment of 12 October 2021, [2021] ICJ Rep. 206, para. 79; *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award of 9 October 1998, 22 RIAA 209, paras. 415, 502.

[128] See Abi-Saab, *supra* note 18, at 124, 129; M. Bos, *Les Conditions du Procès en Droit International* (1957), 204.

[129] ICJ Pleadings, *Temple of Preah Vihear*, vol. II, at 203 (Reuter).

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For instance, in *Gambia* v. *Myanmar*, in its pleadings, Gambia relied on the claim's nature and gravity, and the silent state's (Myanmar's) *actual* knowledge.[130] The Court did *not* accept that one month of silence, in and of itself, and in general, is reasonable. It considered: (i) 'the nature and gravity of the allegations', and (ii) that Myanmar *had* 'knowledge of the allegations' *prior* to receiving the *Note Verbale*.[131] Further, the Court did not consider that the two circumstances constitute a mandatory minimum threshold. The Court merely relied on the circumstances of the particular case.

The Court did not explain the meaning of the 'nature and gravity of the allegation'. These are two different concepts, and are subject to multiple interpretations. Owing to the case's facts, the Court's reasoning entails that short periods of silence are reasonable vis-à-vis allegations of breach of *erga omnes (partes)* obligations, and by implication of the smaller groups of *erga omnes* obligations which constitute *jus cogens*. However, a wider conclusion that longer time would be required, if a breach of bilateral obligations were alleged, is incorrect. The context, facts and circumstances of the case must be considered as a whole. For instance, where the claim alleges a breach of bilateral(isable) obligations, which significantly affect vulnerable populations, a one-month period of silence may be reasonable. An example is when the silent state is accused of restricting innocent passage, which is a lifeline for imports of products of subsistence of civilian population. Here, the interests at stake may be of great importance, despite the fact that the obligation allegedly breached is not *erga omnes (partes)*.

Further, by analogy, some state practice before and decisions of ICTs as well as scholarship about acquiescence support that other factors may be relevant for assessing whether the time of silence is reasonable for inferring a dispute. For instance, Kolb argues that the frequency of the conduct to be opposed, the legal relationship in question, the importance of interests at stake, the intensity of the parties' relationship, and whether knowledge of the claim is actual or constructive, may shorten or elongate the reasonable time of silence for establishing acquiescence.[132] Additionally, in *Temple Preah Vihear*, Cambodia argued that the claim's subject-matter (such as, territorial boundaries claims) may require a shorter period of silence for establishing acquiescence; as does conduct that is dense and frequent.[133] For the Court, two years of silence vis-à-vis a territorial boundary claim established acquiescence.[134]

Shorter time of silence may be reasonable for inferring a dispute from silence than establishing acquiescence.[135] This can be explained by the reasoning behind attributing each legal meaning to silence. On the one hand, state consent and its equivalent, namely acquiescence, cannot be easily presumed. On the other hand, shorter periods of silence are reasonable for inferring a dispute, than those expected for acquiescence, because the inference aims to ensure that international adjudication is not unilaterally undermined by a silent state.

6. 'Other reasonable explanations' for silence do not preclude the inference of a dispute

In *Ecuador* v. *US*, the Tribunal reasoned that the 'inference of "positive opposition" is warranted *only when all other reasonable interpretations of the respondent's conduct and surrounding facts*

[130]See *Gambia v. Myanmar*, Written Observations of The Gambia, *supra* note 60, paras. 5.25–5.27; *Gambia v. Myanmar*, *supra* note 97, at 56, para. 50; *Gambia v. Myanmar*, Verbatim Record 2022/4, 28 February 2022, at 18–19, para. 36, available at www.icj-cij.org/sites/default/files/case-related/178/178-20220228-ORA-01-00-BI.pdf.

[131]See *Gambia v. Myanmar*, Preliminary Objections, Judgment, *supra* note 22, para. 72.

[132]See Kolb, *supra* note 84, at 92–3.

[133]See *Temple of Preah Vihear*, *supra* note 129, at 203–4.

[134]*Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] ICJ Rep. 6, at 22–5.

[135]*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, para. 140; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12.

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can be excluded'.[136] This reasoning led the Tribunal to find that because the US had a reasonable alternative motivation behind its silence, the circumstances did not warrant the inference of 'positive opposition'.[137]

The Tribunal's reasoning should not be adopted. First, there is no support in the prior decisions relied on by the Tribunal,[138] or subsequent decisions (Table 1). There is also no state practice. Second, although it could be argued that *Ecuador* v. *US* is consistent with the reasoning that 'proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt',[139] 'a less exacting standard of proof' than that of 'high level of certainty' applies in some cases.[140] The inference of a dispute from silence should be one of these cases for the following reasons. The *Ecuador* v. *US* reasoning would make it impossible to infer opposition from silence, because alternative reasonable explanations can be provided for silence even when all factors discussed in this study are present. This is partly because multiple motivations may exist behind silence. For instance, in *Georgia* v. *Russia*, one reasonable explanation for the (thematic) silence of Russia's MFA would be that the US had requested both Georgia and Russia to tone down their 'narratives' and Russia was doing so, while pointing out that Georgia was not. This does not mean that it did not *also* oppose Georgia's claims. Additionally, the reasoning, in *Ecuador* v. *US*, is premised on the assumption that what matters is the *true* will of the silent state. However, even when interpreting statements, what matters is not what a state truly believes, but what it 'says'. Similarly, what matters is silence's *communicative* content: whether in light of the circumstances surrounding it, silence can reasonably communicate a view. Finally, allowing a state to argue subsequently that did not truly oppose would undermine legal certainty.

7. Conclusions

State silence appears in its prototypical complete form less often than when silence is conjoined with various instances of speech or action. In the latter scenarios, states seem to perceive statements and conduct other than silence as stronger evidence of a dispute. The way states plead 'silence' depends on each case's facts. However, only in two instances have states argued that a dispute exists entirely based on a prospective respondent's silence: Ecuador, in *Ecuador* v. *US*; and Panama, in *Norstar*. In all other 11 cases,[141] states provided as evidence of a dispute not only the (prospective) respondent's silence, but also the respondent's other conduct–linguistic or non-linguistic.[142] Further, as shown in Table 1, ICTs have found a dispute, exclusively based on silence,

[136]See *Ecuador v. United States*, *supra* note 22, para. 223 (emphasis added).

[137]Ibid., para. 219.

[138]See *Ecuador v. United States*, *supra* note 22, paras. 220–222.

[139]*Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 18.

[140]*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment of 31 January 2024, [2024] ICJ Rep. para. 81, available at www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf.

[141]The *Gambia v. Myanmar* case involves, to date, two decisions. Hence, while the decisions examined in this study are 15, the cases are 14. In *South China Sea*, Philippines did not plead about China's (thematic) silence. Hence, it is not included here.

[142]See *United States v. Iran*, Memorial of the USA, *supra* note 71, at 135, 143, 153; *Headquarters Agreement*, Advisory Opinion, *supra* note 22, paras. 37, 39, 41; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*Headquarters Agreement*), Oral pleading of the UN Legal Advisor, at 194–5, paras. 2–6, available at www.icj-cij.org/sites/default/files/case-related/77/077-19880411-ORA-01-00-BI.pdf; *Cameroon v. Nigeria*, Observations of Cameroon, *supra* note 42, paras. 5.05, 5.13–5.15.16, 5.18–5.20, 5.24, 5.31; *Georgia v. Russia*, Written Statement of Georgia, *supra* note 116, paras. 2.26, 2.30, 2.110, 2.128, 2.130; *Marshall Islands v. India*, Verbatim Record 2016/1, at 18–19, paras. 14–16, and at 38, para. 21, available at www.icj-cij.org/sites/default/files/case-related/158/158-20160307-ORA-01-00-BI.pdf; *Marshall Islands v. Pakistan*, Verbatim Record 2016/2, at 13, para. 17, and at 33–4, paras. 20–21, available at www.icj-cij.org/sites/default/files/case-related/159/159-20160308-ORA-01-00-BI.pdf; *Marshall Islands v. United Kingdom*, Verbatim Record 2016/9, at 18, para. 7 and at 19, para. 9, available at www.icj-cij.org/sites/default/files/case-related/160/160-20160316-ORA-01-00-BI.pdf; *Gambia v. Myanmar*, The Gambia's Application Instituting Provisional Measures, at 15–16, paras. 21–22,

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only exceptionally, in only two decisions: *Hostages in Iran* and *Norstar*. In contrast, in one decision, *Ecuador* v. *US*, the tribunal found no dispute where the applicant relied exclusively on the respondent's silence;[143] and, in three decisions, *Marshall Islands*, the ICJ found that no opposition of views can be inferred from the absence of any reaction.

Where the facts involve silence *and* speech, silence remains a relevant factor–expressly mentioned–in ICTs' assessments. In four other decisions, ICTs relied on the respondent's statements *and* silence to establish a dispute (Table 1), arguably as a *supplementary* evidence of a dispute's existence.[144] Further, in five decisions, silence did not vitiate the dispute's existence, which was found to have been established by way of actions or speech (Table 1).

This study has argued that when assessing whether a dispute can be inferred from silence, the following circumstances must exist: a claim has been made in circumstances that call for the silent state's reaction; the silent state is aware of the claim; and reasonable time of silence passed. All these conditions apply to silence in response to claims made in bilateral or multilateral contexts, to claims that concern bilateral relations or obligations that protect community interests, to claims communicated diplomatically or through the media, and to jurisdiction based on compromissory clauses or unilateral consent.

While these conditions appear to be identical to those that apply when assessing whether acquiescence can be inferred from silence, there is a material distinction. For opposition to be inferred from silence, the claiming state (i) either alleges that the *other* state (that then remained silent) violated international law or (ii) it claims rights for itself *and* articulates the diverging position of the silent state. Instead, for acquiescence to be inferred from silence, the claiming state claims that its own conduct is lawful or that itself has entitlements or obligations (Section 3.3.).

The inference of opposition and the conditions, under which it can be made in order to establish the jurisdiction of an ICT, face two camps of critics relatively represented in the two schools of thought about the function of international adjudication. On the one hand, those favouring voluntarism, the idea that the adjudication's goal is to resolve disputes, and a less litigious legal order argue that the inference and its conditions ignore state consent, prioritize litigation over other alternative means of settlement, and even encourage disputes. For them, the inference should not be made or should be made only in the exceptional circumstance where no other reasonable explanation can be furnished for a state's silence.

On the other hand, those favouring adjudication argue that the conditions reflect unnecessary formalism hampering access to justice,[145] and undermining the international rule of law. For them, there is no need to rely on an inference of a dispute from silence. At least in relation to claims that concern breaches of international law, a mere complaint against another state's conduct suffices to establish a dispute. As it has been explained (Section 3.3.), the counter-argument has been made that this approach should not be adopted because it entails that the position of only *one* state creates a dispute. Case law is consistent that the opposing views of two states establish a dispute.

availale at www.icj-cij.org/sites/default/files/case-related/178/178-20191111-APP-01-00-EN.pdf; *Gambia v. Myanmar*, Verbatim Record 2019/20, 12 December 2019 at 27, para. 22, available at www.icj-cij.org/sites/default/files/case-related/178/178-20191212-ORA-01-00-BI.pdf; *Gambia v. Myanmar*, Written Observations of Gambia, *supra* note 60, para. 5.11; *Gambia v. Myanmar*, *supra* note 97, at 52, para. 24; *San Padre Pio*, Verbatim Record of 21 June 2019, ITLOS/PV.19/C27/1/Rev.1, at 16, available at www.itlos.org/fileadmin/itlos/documents/cases/27/ITLOS_PV19_C27_1_Rev1_E.pdf; *Mauritius/Maldives*, Written Observations of Mauritius, at 136–145, available at https://www.itlos.org/fileadmin/itlos/documents/cases/28/published/C28_PO_Written_Observations_Mauritius.pdf.

[143]See *Ecuador v. United States*, *supra* note 22, para. 224.

[144]For different weight of various evidence: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70 (Judge Simma, Separate Opinion).

[145]See note 11, *supra*.

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Judge Abraham has argued that a presumption could be made that a state always believes that its conduct is lawful.[146] A dispute would be established immediately once a complaint was made, because two claims (one based on a presumption) would oppose. There would be no need to infer a dispute from silence in response to the complaint. However, to date, ICTs have not adopted this approach in relation to assessing whether a dispute exists, and states have not yet made such an argument in their pleadings. Additionally, some caution is called for because a general presumption that a state always believes that its conduct is lawful may have wide-ranging implications. For instance, a state breaching international law would be presumed generally to make a claim (simply by virtue of its breach) that it acts lawfully. Such a claim would call for the reaction of other states and may lead to law evolution.[147] Further, the concepts of (silent) ex post facto waiver of a claim or acquiescence to the lapse of a claim concerning another state's responsibility might lose their relevance: the initial (presumed) claim of lawfulness coupled with silence in response would entail *ab initio* consent.

For as long as the approach that relies on the reaction of the prospective respondent is followed for inferring a dispute, and the facts involve the latter's silence and unchanged conduct, the inference of a dispute from silence and the conditions under which the inference can be made 'speak to' both the aforementioned rival criticisms. On the one hand, because it prevents tactical silences intended to undermine international justice, the inference must be encouraged. On the other hand, the *context* in which silence *can* be interpreted to mean opposition performs an evidentiary function and enables the dispute's establishment despite a state's abstention from expressing a view. These contextual factors or conditions are thus a matter of substance, not of form. They are also compatible with the reasoning that only opposing *claims* (manifestations of will) of the parties in question can establish a dispute's existence.[148] They thus address the concerns about undermining voluntarism. Further, the conditions serve subsidiary functions. A claiming state is being cautioned that, by making claims of particular quality, it generates a *legal* process, *and* a *particular* legal process–a 'dispute', as opposed to any other legal process, such as acquiescence in international law-making. Similarly, the claim's addressee is being cautioned that a legal process and a particular legal process is being generated, which *can* crystalize into a dispute, even by its silent response. For these reasons, the conditions for inferring a dispute from silence should be retained in international adjudication.

[146] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70 (Judge Abraham, Separate Opinion), at 224, and at 231, para. 24.

[147] For criticism see, e.g., D. Azaria, 'State Silence and the Law on the Use of Force', in D. Azaria (ed.), *State Silence Across International Law* (2025); M. E. O'Connell, 'Taking *Opinio Juris* Seriously', in E. Cannizzaro and P. Palchetti (eds.), *Customary International Law On the Use of Force: A Methodological Approach* (2005), 9, at 15; G. P. Buzzini, 'Les comportements passifs des Etats et leur incidence sur la réglementation de l'emploi de la force en droit international général', in Cannizzaro and Palchetti, ibid., 79, at 87–92.

[148] See *Section 3.3, supra*.

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