

IS INTERNATIONAL ADJUDICATION A GLOBAL PUBLIC GOOD? PROCEDURE VS. GPG BEFORE THE ICJ

A ADJUDICAÇÃO INTERNACIONAL É UM BEM PÚBLICO GLOBAL? PROCEDIMENTO VS. GPG ANTES DO ICJ

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Abstract

International institutions and international law have a relevant role not only in the provision of Global Public Goods, but also in their maintenance and administration. Community interests are related to GPG, as they tend to transcend States' individuals' interests and ensure the protection of the international community. The protection of human rights can be considered the most prominent among other expressions of community interest. As a component of the international governance structure, international courts and tribunals (ICTs) can be considered a key element to the promotion of the international rule of law, including the provision of GPG. As the principal judicial organ of the UN, the ICJ is able to promote GPG by adjudicating inter-State claims. However, the Court's intrinsic tension between State consent and global values may undermine its capacity to promote public interest. One may wonder whether procedural law

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could be used as an obstacle for the achievement of substantive rights, in particular, for the protection of GPG. Backlashes include situations where international adjudication prioritises procedures to the detriment of community interests. Procedural reforms in cases involving GPG have been advanced, in particular of the rules regarding fact-finding and evidence. They aim at ensuring the normative and democratic legitimation of ICTs, and in particular of the ICJ.

Keywords: Global Public Goods; International Court of Justice; Procedure; Fact-finding; Evidence.

Resumo

As instituições internacionais e o direito internacional têm um papel relevante não apenas na provisão de Bens Públicos Globais, mas também em sua manutenção e administração. Os interesses da comunidade estão relacionados ao GPG, pois tendem a transcender os interesses individuais dos Estados e garantir a proteção da comunidade internacional. A proteção dos direitos humanos pode ser considerada a mais proeminente entre outras expressões de interesse da comunidade. Como um componente da estrutura de governança internacional, os tribunais e tribunais internacionais (TICs) podem ser considerados elementos-chave para a promoção do estado de direito internacional, incluindo a provisão de GPG. Como o principal órgão judicial da ONU, o ICJ é capaz de promover o GPG ao julgar reivindicações interestaduais. No entanto, a tensão intrínseca do Tribunal entre o consentimento do Estado e os valores globais pode comprometer sua capacidade de promover o interesse público. Pode-se perguntar se o direito processual poderia ser usado como um obstáculo para a obtenção de direitos substantivos, em particular, para a proteção do GPG. Retrocessos incluem situações em que a adjudicação internacional prioriza os procedimentos em detrimento dos interesses da comunidade. Reformas processuais em casos envolvendo GPG foram avançadas, em particular das regras relativas à apuração de fatos e evidências. Eles visam assegurar a legitimação normativa e democrática das TIC e, em particular, da CIJ.

Palavras-chave: Bens Públicos Globais; Corte Internacional de Justiça; Procedimento; Averiguação; Evidência

INTRODUCTION

The term Global Public Goods ('GPG') is gaining importance and is frequently used in international discourse to refer to values or interests that are considered to be good for the international community as a whole (KAUL, CONCEIÇÃO, LE GOULVEN, MENDOZA, 2003, p. 23; BODANSKY, 2012, p. 668; COGOLATI, HAMID, VANSTAPPEN, 2015, p. 6; BURNELL, 2008, p. 49). GPG are also known for their properties of non-rivalry and non-excludability that result in the production of benefits to which everyone is entitled or which affect all countries. These features, however, create a tension that ultimately leads to underinvestment and undersupply as free-rider and collective action problems arise (PITARAKI, 2007, pp. 658-9; KAUL, 2017, p. 41; SHAFFER, 2012, pp. 678-9).

Since the market does not adequately provide GPG, international institutions and international law have a relevant role not only in their provision, but also in their maintenance and administration. Even though the concept of GPG might still be considered new to international law, its main features, implications and challenges are familiar to it (KAUL, 2017, p. 52; BODANSKY, 2012, pp. 652-3). Indeed, in international legal discourse the term GPG is often linked but not limited to the idea of *erga omnes* norms, which reflect fundamental values of the international community (NOLLKAMPER, 2012, pp. 775-6; SIMMA, 1994, p. 243). If *erga omnes* obligations relate to the provision of a GPG or to the prohibition of a global public bad, such obligations would entail the protection of common interests that should be owed to the international community as a whole.

More broadly, 'community interests' (SIMMA, 1994, pp. 233-242; BENZING, 2006, p. 371) and 'common concern' are also related to GPG, as they tend to transcend States' individuals' interests and ensure the protection of the international community (ESTY, 2006, p. 1540). Expressions of GPG can be traced in the protection of human rights, the protection of culture and the environment, the preservation of international peace and security, the management of spaces beyond national territorial jurisdiction, the preservation of international financial stability and a multilateral trade regime, among others (KAUL, GRUNBERG, STERN, 1999, pp. 9-11; BURNELL, 2008, p. 40; WOLFRUM, 2011, pp. 1132-3; COGOLATI, HAMID, VANSTAPPEN, 2015, p. 6; BURNELL, 2008, p. 5; SIMMA, 1994, pp. 236-243). The protection of human rights can be considered the most prominent among other expressions of 'community interest' (SIMMA, 1994, p. 242). As put by Wolfrum, 'despite an ongoing discussion about the

exact features and the ways and means of their establishment, the existence of community interests is now accepted' (WOLFRUM, 2011, p. 1132).

International law is not only a tool for co-existence among States, but also, and ultimately, a mechanism for the production and protection of GPG (BODANSKY, 2012, p. 658). The 'recognition of community interest in positive law' reflects this trend (BENZING, 2006, p. 370). In the words of Judge Simma, 'international law has been moving in this direction for some decades now' (SIMMA, 1994, p. 234). If this reflects the current reality, one cannot deny that the realization of community interests also depends on the existence of an institutional structure for the promotion and protection of these interests. However, in the current scenario, there is no supranational authority or appropriate public institution on a global level capable of compelling States to accomplish global achievements related to community interests (BENZING, 2006, pp. 369, 372; CAFAGGI, CARON, 2012, p. 645).

THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS (ICTS) IN THE PROVISION OF GPG AND ITS CHALLENGES

As a component of the international governance structure, international courts and tribunals (ICTs) can be considered a key element to the promotion of the international rule of law, including the provision of GPG (ULFSTEIN, 2014, pp. 859-860); NOLLKAMPER, 2012, pp. 769-770). ICTs are equipped to protect, express and shape values that reflect GPG by the power granted in international treaties (BENZING, 2006, p. 377). By developing international law, ICTs can be qualified as both 'intermediate GPG' and contributors to the protection and promotion of final GPG (NOLLKAMPER, 2012, p. 783; SHAFFER, 2012, p. 691).

The way in which ICTs deal with inter-State dispute settlement procedure and community interests embodied in GPG reflects the basic question of how courts regard the nature and scope of their own judicial function. Dispute settlement cannot solely capture the full relevance of international courts' decisions (VON BOGDANDY; VENZKE, 2014, p. 15). Indeed, the role of international courts is not limited to the bilateral dispute settlement between States. They perform other important functions, such as the development of normative expectations – in order to achieve international adjudication's full potential, which is the realisation of justice (HELFER, 2014; ALVAREZ, 2014, p. 464). By developing international law, the role of ICTs encompasses the protection and development of the international community and its values (SIMMA, 1994; VON BOGDANDY; VENZKE, 2014, p. 38; LAUTERPACHT, 1958; CANÇADO

TRINDADE, 2010). In other words, ICTs have an important role – one of ‘global governance’ (VON BOGDANDY; VENZKE, 2011, pp. 990-2) – thereby contributing to the protection of and promotion of GPG.

As the principal judicial organ of the UN, the ICJ is able to promote GPG by adjudicating inter-State claims (NOLLKAMPER, 2012, pp. 769-770). Although not reflecting an integrated regime capable of protecting specific values, such as the European Court of Human Rights or the Inter-American Court of Human Rights, the ICJ’s recognition and application of *erga omnes* obligations is in itself a patent example of its prominent role in the protection of the interests of the international community. Nevertheless, the Court’s intrinsic tension between State consent and global values may undermine its capacity to promote public interest (ICJ, *South West Africa (Ethiopia/South Africa; Liberia/South Africa)*, Judgment, 1966, para. 88)³. Indeed, the main obstacle to the enforcement of GPG is the bilateral nature of inter-State judicial dispute settlement, while GPG associated with community interests ‘cannot be reduced to bilateral schemes’ (NOLLKAMPER, 2012, p. 770; KLABBERS, 2011; BENZING, 2006, p. 376).

Broadly, the rules of substantive international law that protect community interests are considered GPG, whereas the rules guiding international adjudication are of a procedural nature. Common to all international courts is a set of rules governing the process of adjudication, generally labelled as procedural. While procedure may guide and shape the application of substantive law, it should itself be guided and shaped in a manner to ensure the protection of community interests (NOLLKAMPER, 2012, p. 772). In other words, in cases involving *erga omnes* obligations, community interests should arguably guide the interpretation and development of procedural rules. This supposed positive relationship, in which procedure allows for an ‘efficient application of substantive law that embodies public goods’ (NOLLKAMPER, 2012, p. 770), is not without difficulties. One may wonder whether procedural law could be used as an obstacle for the achievement of substantive rights, in particular, for the protection of GPG. Backlashes include situations where international adjudication prioritises procedures to the detriment of community interests.

³ In the *South West Africa* cases (*Ethiopia/South Africa; Liberia/South Africa*), the ICJ rejected the existence of an *actio popularis* or a ‘right resident in any member of a community to take legal action’ for vindicating a public interest. See *South West Africa (Ethiopia/South Africa; Liberia/South Africa)* (Second Phase: Judgment) [1966] ICJ Rep 6, para. 88. For an analysis of ICJ case law regarding the possibility of an *actio popularis*, see WOLFRUM, Rüdiger, 2011, 1138-9.

PROCEDURE VS. GPG IN ICJ CASE LAW: AN IMPOSSIBLE MARIAGE?

As far as the ICJ is concerned, the tension between the multilateral nature of the conflicting substantive law and the bilateral nature of its own proceedings may generate significant backlashes. Procedures often act as a barrier to the achievement of GPG. The well-known *Monetary Gold* principle, as well as the *East Timor* case illustrate the prevalence of traditional bilateralism over community interests ((ICJ, *Monetary Gold Removed from Rome in 1943 (Italy/France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, 1954; ICJ, *East Timor (Portugal/Australia)*, 1995)⁴. In the latter, the Court did not exercise jurisdiction over Australia since Indonesia had not consented to the jurisdiction of the Court, thereby applying the so-called doctrine of the indispensable party and not adjudicating on the substance of the claim (ORAKHELASHVILI, 2011, p 392; WOLFRUM, 2011, pp. 1142-3)⁵. In its decision in *Jurisdictional Immunities of the State* case (ICJ, [*Germany/Italy, Greece Intervening*], 2012)⁶, even though grave violations of human rights law and humanitarian law were at issue (see par. 93 of the Court's judgment), the Court decided to uphold State immunity, as it was qualified as procedural law (*Jurisdictional Immunities of the State, supra*, para 100)⁷. The supposed procedural character of immunities and the critical binary distinction between procedure-substance 'blocked the Italian courts from adjudicating the substance of the claims, regardless of whether or not it was based on violations of norms of *ius cogens*' (NOLLKAMPER, 2012, p. 789; WOJCIKIEWICZ ALMEIDA, 2016, p. 516). The Court was considered conservative in its final decision when avoiding to address an important matter of international law and not relativising the notion of jurisdictional immunity in order to safeguard human rights and international humanitarian law, notably in cases in which the victims have no other means of redress (WOJCIKIEWICZ ALMEIDA, 2016, p. 526)⁸.

⁴ *Monetary Gold Removed from Rome in 1943 (Italy/France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Question: Judgment) [1954] ICJ Rep 19; *East Timor (Portugal/Australia)* (Merits: Judgment) [1995] ICJ Rep 90.

⁵ Another example would be the *Case Concerning the Delimitation of Maritime Areas (Canada/France)*, paras. 78-79.

⁶ *Jurisdictional Immunities of the State (Germany/Italy, Greece Intervening)* (Merits: Judgement) [2012] ICJ Rep 99

⁷ The violations committed by Germany in the Italian territory during World War II were taken by Luigi Ferrini to the Italian Corte de Cassazione, that guaranteed compensation to the victims and stated that Germany's jurisdictional immunity did not apply when confronted with a *jus cogens* rule (Article 53 of the Vienna Convention on the Law of Treaties).

⁸ See dissenting opinion of Judge Cançado Trindade: 'a crime is a crime, apart of who may have committed it' (*Jurisdictional Immunities of the State (Germany v. Italy)* (Judgment: Dissenting Opinion of

There were also lost opportunities in which the Court could have opted for the protection of community interests, but preferred, instead, to rely on procedure (WOLFRUM, 2011, pp. 1137-1138). Such a stance can be perceived through its ruling on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where the Court refused to acknowledge Serbia's responsibility as a genocide perpetrator, despite evidence in the form of witnesses' testimonies along with previous ICTY decisions. This case was the first ever to be brought to the Court based on the Convention on the Prevention and Punishment of the Crime of Genocide. The Court concluded that Serbia and Montenegro failed to prevent the genocide in Srebrenica without having had recourse to indirect proof or inferences. The ICJ's timid and conservative ruling appeared, however, to have lost an opportunity to expand international interests and propel the importance of protecting *jus cogens*.

Furthermore, the Court took a somewhat similar stance on the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case (ICJ, 2016, Preliminary Objections: Memorial of the Marshall Islands, paras 51-59)⁹: in 2016, the Marshall Islands brought to the ICJ three cases against India, Pakistan and the UK, as nuclear weapon States, in which it invoked the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as well as customary international law in the proceedings. The Court adjudged that it could not proceed to the merits of the case on the grounds that a dispute was inexistent at the time of the filing of the application. The 'Nuclear Arms Race' case represents a flagrant example of a formalistic decision made by the Court (VENZKE, 2017, p. 68). Being a politically-charged dispute, the Court was reluctant to exercise its jurisdiction and emphasised the formal considerations (Preliminary Objections: Dissenting Opinion of Judge Crawford, 2016)¹⁰, therefore basing its decision on the 'Objective Awareness criterion' (Preliminary Objections: Judgment, 2016, para 17)¹¹, and stating that there was no actual dispute between the two

Judge Trindade), *supra*, 245). As Judge Yusuf also pointed out, the Court has lost an opportunity to provide guidance on rules of international law and to clarify them, as the principal judicial organ of the United Nations (Jurisdictional Immunities of the State (Germany v. Italy) (Judgment: Dissenting Opinion of Judge Yusuf), *supra*, par. 58).

⁹ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands/United Kingdom) (Preliminary Objections: Memorial of the Marshall Islands) [2016], 51-59.

¹⁰ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands/United Kingdom) (Preliminary Objections: Dissenting Opinion of Judge Crawford) [2016] General List No. 160 ICJ, 2

¹¹ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary Objections: Judgment), *supra*, 17

parties (para 23)¹². A dispute, according to the ICJ, consists of a disagreement on a point of law or fact (PCIJ, *Mavrommatis Palestine Concessions*, 1924)¹³, supposing that the claim of one party is positively opposite to the other. The Court also added the need for it to be demonstrated, on the basis of evidence, that the respondent was aware, or could not have been unaware, that its views were “positively opposed” by the applicant (ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race*, para 41)¹⁴. By adopting such a reasoning, it seems that the Court has hardened its criteria for dispute assessment, even going beyond its own *jurisprudence constante* and creating a higher threshold for the determination of the existence of a dispute.

However, some judges have questioned this excessive formalism. The dissenting opinions of Judges Crawford, Trindade, Robinson, Bennouna and Bedjaoui are based on the ‘reason of being’ of the ICJ, as a tool for contributing to peace through international law (Dissenting Opinion of Judge Bennouna, para 2)¹⁵. In the Vice-President’s opinion (para 4)¹⁶, it is difficult to determine the existence of a dispute without specifying its subject-matter, which is not identified in the judgment. Judge Bennouna emphasised that the duty of the Court is to be more vigilant in cases like this, due to the question of crucial importance for world security (para 2)¹⁷. Judge Cançado Trindade, on the other hand, drew attention to the UN Charter having relevance to the judicial settlement of international disputes (Dissenting Opinion of Judge Trindade, para. 119-127)¹⁸. Considering nuclear weapons a threat to humanity and the fact that this case represents the third attempt to address such issues by the Court (ICJ, *Nuclear Tests (New Zealand/France)*, 1974; *(Australia/France)*, 1974)¹⁹, the Judge recognised the Court’s ‘inter-State myopia’, assuming an evasive posture and avoiding clearly pronouncing itself on the

¹² *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary Objections: Judgment)*, supra, 23

¹³ *Mavrommatis Palestine Concessions (Greece/Great Britain) (Objection to the Jurisdiction of the Court: Judgment)* [1924] PCIJ Judgement No. 2, Series A No. 2 11

¹⁴ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to nuclear Disarmament (Preliminary Objections: Judgment)*, supra, para. 41

¹⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary objections: Dissenting Opinion of Judge Bennouna)*, supra, 2

¹⁶ *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary Objections: Dissenting opinion of Vice-President Yusuf)*, supra, para. 4

¹⁷ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary objections: Dissenting Opinion of Judge Bennouna)*, supra, 2

¹⁸ *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary Objections: Dissenting Opinion of Judge Trindade)*, supra, para. 119-127.

¹⁹ *Nuclear Tests (New Zealand/France) (Preliminary Objections: judgment)* [1974] ICJ Rep 457; *Nuclear Tests (Australia/France) (Questions of jurisdiction and/or admissibility: judgment)* [1974] ICJ Rep 253

substance of the matter (Dissenting Opinion of Judge Trindade, para. 45)²⁰. Scholarship has also criticised the Court's position for being excessively formalistic and disconnected from the seriousness of the substantive issue submitted to the Court (PROULX, 2017, p. 96; DUGARD, 1973, p. 292; VENZKE, 2017, p. 68).

These examples demonstrate that the Court can sometimes be overly attached to procedure, resting on technicalities, so as to avoid deciding on the merits of high profile and politically-charged cases. In order for the goal of protecting procedure to not prevail over the protection of community interests, one should expect that procedural law follows substantive law and *vice versa*. As noted by Jenks, 'if we wish so to develop the law as to respond to the challenge of our times our procedures and remedies must be sufficiently varied and flexible for the purpose' (JENKS, 1964, p. 184). As a consequence, ICT's procedural law should allow for the adjudication of claims involving GPG, otherwise procedural law should be adjusted (NOLLKAMPER, 2012, p. 770). Arguably, the ICJ does not apply differentiated rules of procedure based on the prominent bilateral or multilateral interest in a dispute-settlement (BENZING, 2006, p. 385; WOLFRUM, 2011, pp. 1138-9). The idea is that 'the more the generation of legal normativity in the practice of international adjudication becomes visible, the more traditionally prevailing requirements for judicial procedures need to be supplemented by further considerations' (VON BOGDANDY; VENZKE, 2011, p. 1362; CHINKIN, 2006, pp. 1331, 1366; PALCHETTI, 2002, p. 139; WOLFRUM, 2001).

This paper argues that there is a disconnection between community interests and procedure, which has not been attuned to reflect contemporary international law challenges deriving from GPG (BONAFÉ, 2011). Procedures can be interpreted, enhanced, *voire* designed in order to ensure the promotion of GPG (NOLLKAMPER, 2012, pp. 787-788). As far as interpretation is concerned, the ICJ has held that 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation', which includes contemporary community interest to the detriment of pure application of procedural rules (ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) 1980, 2017, paras 73-76)²¹. If interpretation of procedural rules must take into account the applicable substantive law, i.e., the necessary

²⁰ Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Preliminary Objections: Dissenting Opinion of Judge Trindade), *supra*, 45

²¹ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) 1980 <<http://www.icj-cij.org/files/case-related/65/065-19801220-ADV-01-00-EN.pdf>> accessed 28 June 2017 [73]-[75], 76

promotion of GPG, the same applies to their inception. According to Art. 30 of the Statute of the ICJ, the Court possesses the power to ‘frame rules for carrying out its functions’. Considering that a relevant function is to protect community interests, the Court should assume expanded procedural powers in order to ensure the effective application of substantive law whenever GPG are at issue.

Independently from consent, Courts can adjust and tailor their own rules for multiparty aspects, such as standing and participation of third parties, evidence, among other topics (NOLLKAMPER, 2012, pp. 787-8). Indeed, the procedural law of international judicial institutions is largely a product of their own making (VON BOGDANDY; VENZKE, 2011, pp. 1362; KOLB, 2006, pp. 793, 795). International tribunals are endowed with an inherent competence not only with regard to their own jurisdiction (*compétence de la compétence*), but also with regard to the interpretation of the provisions of their respective jurisdictional instruments. As clearly put by Judge Cançado Trindade, ‘it is an “inherent power” of an international tribunal such as the ICJ to see to it that the procedure operates in a balanced way, ensuring procedural equality and the guarantees of due process, so as to preserve the integrity of its judicial function’ (*Certain Activities carried out by Nicaragua in the Border Area Proceedings joined with Construction of a Road in Costa Rica along the San Juan River Order: joinder of proceedings: Separate Opinion of Judge Trindade*, 2013)²². Therefore, self-regulation is considered as the prevailing system and an important source of independence of an ICT, being ‘one of the ways in which such a creature may escape its makers’ (SOREL, 2007).

It is worth noting that judicial rule-making is limited to procedural issues and does not encompass rules on jurisdiction and admissibility, which are usually circumscribed by the treaties and statutes. Also, the fact that a *jus cogens* norm is involved in a dispute cannot set aside jurisdictional rules. In the *East Timor* case, the Court had already affirmed that ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things’ (ICJ, *East Timor*, 1995, para 29)²³. Such a statement was complemented by the Court’s observation, in the *Armed Activities* case, that ‘the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute’. The Court has gone further to clarify that ‘the fact that a dispute relates to compliance with a norm having

²² Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua) Proceedings joined with Construction of a Road in Costa Rica along the San Juan River (Nicaragua/Costa Rica) (Order: joinder of proceedings: separate opinion of Judge Cançado Trindade) [2013], para 14.

²³ East Timor (Portugal/Australia) (Judgment) [1995] ICJ Rep 102, para. 29).

such a character [the prohibition of genocide] (...) cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute' (ICJ, *Armed Activities*, 2006, para 64)²⁴

In any case, it appears that the ICJ has been very modest in utilising its powers to expand procedural rules beyond its mandate to ensure application of substantive law embodied in GPG (MCWHINNEY, 2006, p. 3). If changes in substantive law, notably when GPG are at stake, are not reflected in the procedure of contentious inter-State judicial dispute settlement, there is indeed a need to expand rules permitting the standing and participation of the international community in bilateral proceedings. In the same vein, judicial procedures could be expanded in a way to strengthen the democratic legitimation of judicial decisions; procedural rules providing for greater transparency and opportunities of participation would reflect this trend (VON BOGDANDY; VENZKE, 2011, pp. 1362; CRAWFORD, KEENE, 2016, p. 225).

There is indeed a tendency towards further 'multilateralisation' of procedural law whenever GPG are at stake (BENZING, 2006, p. 408). If ICTs fulfil certain criteria such as transparency, accountability and due process, they may be viewed as legitimate (VON BOGDANDY, 2013, p. 375). According to the Court's survey conducted as a preparation to the Seminar held on the occasion of the 70th Anniversary of the Court's first inaugural sitting, the topic of evidence and fact finding has been identified as the most questionable one, thereby requiring important reform proposals, notably regarding the Court's treatment of scientific cases (CRAWFORD, KEENE, 2016, p. 225). The establishment of fact and rules of evidence within the ICJ are both relevant for the legitimation of international adjudication, notably when GPG are concerned (VON BOGDANDY; VENZKE, 2011, pp. 1362; BENZING, 2006, p. 383; TEITELBAUM, 2007, p. 119; KLEIN, 1996, p. 329; FOSTER, 2011; LACHS, 1993, p. 205).

REFORM PROPOSALS: EVIDENCE AND FACT-FINDING IN ICJ PROCEDURE

Several issues deserve further analysis with a view to promoting the interests of the international community: fact-finding in complex cases involving community interests; and transparency in the production of documentary evidence and its consequences in community interests' cases. This article will focus on the latter, as requests for disclosure of evidence are vital to the protection of GPG by international courts. This has motivated an intense debate in the Bosnian and Croatian *Genocide* cases, which also dealt with matters involving GPG - the

²⁴ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo/Rwanda) (Jurisdiction and Admissibility: Judgment)* [2006] ICJ Rep 6, para. 64.

protection of human rights. However, the debate regarding the powers of the Court to draw adverse inferences towards nonproduction of documents predates the *Genocide* cases and is worth revisiting.

In the *Corfu Channel* case, the Court found that a State victim of a breach in international law is often unable to furnish direct proof of facts that give rise to responsibility, notably in situations in which the other State exercises exclusive control over a territory. Therefore, the State victim 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence' (para 18)²⁵. However, in the Court's view, the use of inferences for assessing the truth must 'leave no room for reasonable doubt' (See FITZMAURICE, 2002)²⁶. Although the Court set forth a method for drawing inferences (SCHARF; DAY, 2012, p. 125), it established a high standard of proof for taking such inferences into consideration (TEITELBAUM, 2007, p. 136).

In the first *Genocide* case, Bosnia and Herzegovina affirmed that Serbia and Montenegro had a special duty of diligence in preventing genocide and that the proof of its lack of diligence could be inferred from fact and circumstantial evidence (ICJ, Reply of Bosnia and Herzegovina, 2007, para 22)²⁷. Serbia and Montenegro had considered parts of relevant documents as being classified. In its judgment, the Court concluded that Serbia and Montenegro failed to prevent the genocide in Srebrenica, without it having had recourse to indirect proof or inferences. Indeed, the Court rejected the approach suggested by Bosnia and Herzegovina based on negative inferences (TEITELBAUM, 2007, pp. 138-9) and did not call upon Serbia and Montenegro to produce the requested documents (Judgment, para 44)²⁸. It only stated that it noted 'the Applicant's suggestion that the Court may be free to draw its own conclusions' (Judgment, para 206)²⁹. However, no conclusions were drawn in that case. The second *Genocide* case, opposing Croatia to Serbia, followed the same path (ICJ, Judgment,

²⁵ Corfu Channel case, (Judgment) [1949] I.C.J. Rep 4, 18.

²⁶ Corfu Channel case, (Judgment) [1949] I.C.J. Rep 4, 18.

²⁷ Reply of Bosnia and Herzegovina, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), (Judgment) [2007] ICJ Rep 43, 839, para 22

²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, para 44.

²⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, 129, para 206. As pointed out by Vice-President Al-Khasawneh, in the absence of a request for production of documents, it was not up to the Court to take 'formal note' of a refusal under Article 49, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment: Dissenting opinion of Vice-President Al-Khasawneh) [2007] ICJ Rep 43, para 35.

2015)³⁰, as the Court did not deviate from its ruling of 2007 in matters related to evidence (GATTINI, CORTESI, 2015, p. 899; GATTINI, 2007, p. 889).

In these cases, although the situation was perfectly justifiable, the Court did not draw any adverse inference from refusals to reply to a request for information under Article 49 of its Statute. This has continued to be so in ICJ current practice, since the Court did not use its power to draw an adverse inference from Costa Rica's request for Nicaragua to provide evidence under its control in the recent *Road* and *Certain Activities* cases (para 35)³¹. To date, the ICJ has taken a soft stance towards nonproduction, without shifting the burden of proof or making adverse findings of fact (SCHARF, DAY, 2012, p. 128). These cases demonstrate that the Court is missing good opportunities to put into effect the powers attributed to it by the Statute and the Rules with regard to evidence³².

According to Art. 49 of the Statute, the Court may request the parties to produce of any documents or explanations. This article must be read in conjunction with Article 62 of the Rules, which clarifies that such evidence or explanation is 'necessary for the elucidation of any aspect of the matters in issue'³³. Art. 62 also addresses the possibility of the Court seeking *proprio motu* any other information for this purpose. However, such power is not binding upon the parties, as indicates the wording of Article 49 (the Court can 'call upon' parties to submit evidence) (TAMS, 2006, p. 1107; SCHARF, DAY, 2012, p. 127). Drawing from the WTO practice (*Canada – Measures Affecting the Export of Civilian Aircraft*, 1999, para 187)³⁴, it has already been suggested that the Court's jurisprudence could construe the binding character of its power to request information, based on a teleological interpretation of its Statute and Rules and on the duty of collaboration incumbent upon States for the collection of evidence (DEVANEY, 2016, pp. 180-7).

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment) [2015] ICJ Rep 3.

³¹ First round of argument by Costa Rica in *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua); *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua v Costa Rica), CR 2015/3, 63, para 35. Another example would be the *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) (Judgment) ICJ Reports 1980, 10.

³² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment: Dissenting Opinion of Judge ad hoc Mahiou) [2007] ICJ Rep 43, para. 61.

³³ The procedure provided for Article 49 of the Statute and 62 of the Rules was used for the first time by Italy in ELSI case (Elettronica Sicula S.p.A. (ELSI), Pleadings, Vol. III 1987, 131 and 432). See HIGHET, K., 'Evidence, The Chamber and the ELSI Case' in RB Lillich (ed.), *Fact-Finding before International Tribunals* (Transnational Publishers: 1992) 42.

³⁴ See *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/R, 2 August 1999 para 187.

Even if the Court's power to request information was to be binding on the parties, given the lack of enforcement mechanism of its requests, it could only have recourse to adverse inferences. This is not a new power to be conferred on the Court since Art. 49 of the Statute already provides the Court with the possibility of taking formal notice of any refusal to comply with its requests. The possibility of drawing adverse inferences, although never put in practice by the ICJ, is a common practice in other dispute settlement mechanisms, such as the WTO and the Iran-US Claims Tribunal (HOLTZMANN, 1992, p. 104), and other international criminal and human rights tribunals (See ICJ, [*Croatia v Serbia*] (Judgment: Dissenting Opinion of Judge Cançado Trindade, 2015, para. 98-115; DEVANEY, 2016, p. 181)³⁵.

As discussed above, the Court has not made significant use of its power (i) to request information under Article 49 of the Statute, nor developed a practice of granting discovery requests, i.e., (ii) requests by the parties. Much has been debated on the need for the Court to take a more proactive approach and make greater use of its fact-finding powers. As for requests made by the Court itself under Article 49 of the Statute, whenever a requested party fails to produce evidence, 'the Court could consider issuing a procedural order notifying the parties of its intention to draw an adverse inference in order to give the State an opportunity to comply' (CRAWFORD, KEENE, 2016, p. 228; MALINTOPPI, 2016, p. 426).

This problem is even more acute whenever the Court deals with the protection of fundamental values or community interests, such as the prohibition of genocide. Grave violations of human rights and acts of genocide are in breach of absolute prohibition of *jus cogens*³⁶. As highlighted by Judge Cançado Trindade in his dissenting opinion in the second *Genocide* case, human rights tribunals feel obliged to resort, even more forcefully, to presumptions and inferences whenever 'the cases lodged with them disclose a pattern of widespread and systematic gross violations of human rights' (ICJ, *Croatia v Serbia*, Judgment: Dissenting Opinion of Judge Cançado Trindade, 2015, para 123)³⁷. The same might be applicable to the ICJ when it deals with global fundamental values. As a general proposal, the Court should be encouraged to draw adverse inferences, notably in cases involving community interests, in line with the jurisprudence of other international courts and tribunals.

³⁵ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment: Dissenting Opinion of Judge Cançado Trindade) [2015] ICJ Rep 3, para. 98-115. See also DEVANEY, James Gerard, *supra*, 181.

³⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment: Dissenting Opinion of Judge Cançado Trindade) [2015] ICJ Rep 3, para. 83.

³⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment: Dissenting Opinion of Judge Cançado Trindade) [2015] ICJ Rep 3, para. 123.

Concerning requests made by the parties, the Court could also be more active in addressing requests for the disclosure of information. The issue has been hotly debated in the *Genocide* cases. The only exception is the *ELSI* case in which the United States was requested to make available to the Court a financial statement it had mentioned in the oral proceedings (ICJ, 1969)³⁸. The Italian counsel asked the Chamber to request the disclosure of such document, which was granted and performed by the President. As a result, the United States made available the requested document³⁹.

Drawing from its practice in the *ELSI* case, another possibility would be for the Court to make fuller use of the practice piloted in the *ELSI* case whereby requests for documents would be transmitted by the Court for it to be able to filter such requests. In order to put this in practice, Article 62 of the Court's Rules could be amended accordingly (SARVARIAN, 2017, p. 77). Needless to say that in cases involving community interests, the Court should make greater use of its powers to obtain evidence and engage actively with any objection to disclosure of documents before it. As put by Judge ad hoc Mahiou in his dissenting opinion in the first *Genocide* case, in face of grave accusation of genocide, 'it is therefore logical and to be expected that the Court should be called upon or that it should itself employ every means offered it by its Statute to arrive at clear findings on the authenticity or otherwise of alleged facts' (ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, 2007, para 59)⁴⁰.

CONCLUSION

No doubt remains that the ICJ has played a significant role in the protection of GPG, in particular in the development of the international protection of human rights⁴¹. After a so-called first phase marked by 'hesitation and constraint', to borrow Simma's words, the ICJ has indeed become more concerned with human rights in recent years (SIMMA, 2013, pp. 579-85).

³⁸ Elettronica Sicula S.P.A. (ELSI) (Judgment) [1989] ICJ Rep 15.

³⁹ Verbatim Record C 3/CR 89/4 of 16 February 1989 45. See for more details, James Gerard Devaney, *supra*, 182-3.

⁴⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment: Dissenting Opinion of Judge ad hoc Mahiou) [2007] ICJ Rep 43, para 59.

⁴¹ The PCIJ had also made a contribution to the protection of minority rights, for example, in the following cases: Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland (1923) PCIJ, Series B 6; Rights of Minorities in Upper Silesia (Minority Schools) (1928) PCIJ, Series A 15; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (1932) PCIJ, Series A/B 44; and Minority Schools in Albania (1935) PCIJ, Series A/B 64.

According to Simma, there is a 'first phase' that comprises a 'first group of decisions', in which 'human rights appear in more or less incidental ways'⁴²; a 'second group of decisions', in which 'human rights considerations occupied more space but served as trigger to engage in other discussions far from human rights'⁴³; and a 'third group of cases' that deal with the 'right of self-determination of peoples'⁴⁴. This is maybe due, among other factors, to a change of judicial culture (including State's submissions to the Court)⁴⁵ and to the presence of judges with strong backgrounds in human rights (HIGGINS, 2007, p. 746; CROOK, 2004, p. 7; NEUMAN, 2011, p. 102). Topics such as reservations to human rights treaties⁴⁶ and the concept of self-determination⁴⁷ illustrate the Court's long-standing commitment to human rights and the practice of referencing the work of human rights treaty bodies in its judgments (HIGGINS, 2007, p. 746-8).

ICJ's more recent case law appears, though, to reveal a 'qualitative leap' as far as human rights are concerned, such as the *Nuclear Weapons Advisory Opinion* (1996)⁴⁸, the *Wall Opinion* (2004)⁴⁹, *Congo v. Uganda* (2005)⁵⁰, *Congo v. Rwanda* (2006)⁵¹, the Genocide Cases – *Bosnia-*

⁴² Corfu Channel (1949), Barcelona Traction (1970), Tehran Hostages (1980), LaGrand (2001), and Avena (2004).

⁴³ Advisory Opinion on Reservations to the Genocide Convention (1950), Advisory Opinion on the Interpretation of Peace Treaties (1951), Advisory Opinions on South West Africa (1950, 1955, 1956), Military and Paramilitary Activities in and Against Nicaragua (1986), Advisory Opinion in the Mazilu case (1989), Advisory Opinion in the Kumaraswamy (1999).

⁴⁴ South West Africa, Western Sahara, East Timor, Advisory Opinion on the Wall (2004), and Advisory Opinion on the Kosovo Declaration of Independence (2010).

⁴⁵ For instance, in the Preliminary Objections in the case opposing Nicaragua to Colombia, the former referred to the law and practice of the IACtHR. See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17.03.2016, p. 39.

⁴⁶ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6; and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, I.C.J. Reports 2006.

⁴⁷ *South West Africa, Second Phase*, Judgment of 18 July 1966, [1966] ICJ Rep. 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16; *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12.

⁴⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

⁴⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136.

⁵⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168.

⁵¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6.

Herzegovina v. Serbia (2007)⁵² and *Croatia v. Serbia* (2015)⁵³; *Georgia v. Russia* (2011)⁵⁴; and *Belgium v. Senegal* (2009). Latest cases featuring a human rights dimension comprise *Ukraine v. Russian Federation* (submitted in 2017)⁵⁵ and *Qatar v. United Arab Emirates* (submitted in 2018)⁵⁶. However, the apogee of human rights protection at the ICJ is indubitably marked by the *Diallo* case. As celebrated by Simma, ‘the human rights rose like a phoenix from the ashes of the *Diallo* case’ (SIMMA, 2013, p. 593). The *Diallo* judgment on merits motivated judge Cançado Trindade to qualify the current time as ‘the new era of international adjudication of human rights cases by the ICJ’⁵⁷.

Therefore, there is no doubt that international adjudication contributes to the achievement of community interests embodied in GPG. This is because ‘community interests’ (BENZING, 2006, p. 371) and ‘common concern’ are also related to GPG, as they transcend states’ individual interests and ensure the protection of the international community (SIMMA, 1994, pp. 217-384). By developing international law within a multifunctional approach, the ICJ can directly participate in the provision of final GPG. However, as demonstrated above, such a contribution is mitigated by the ICTs treatment of procedural rules, which may impose an obstacle to substantive law. The existing tension between bilateralism and community interests is duly reflected in ICJ case law. Whenever the Court deals with issues involving general interest, it tends to rest on technicalities to avoid deciding on high profile and politically charged cases.

The proposed amendments on topics such as fact-finding and evidence were identified among specific reform proposals by the Counsel Survey conducted in preparation for the Seminar held on the 70th Anniversary of the Court’s first inaugural sitting (CRAWFORD, KEENE, 2016, pp. 225-30). There were calls for ‘greater transparency, a more interactive and less formalistic bench and increased openness to the practices and jurisprudence of other

⁵² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

⁵³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 2015, p. 3.

⁵⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70.

⁵⁵ 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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 104.

⁵⁶ Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures, Order of 23 July 2018.

⁵⁷ Application of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures, Order, Separate Opinion of Judge Cançado Trindade, ICJ Reports 2018, par. 7-8.

international tribunals, both on matters of substance and procedure’ (CRAWFORD, KEENE, 2016, p. 225).

There is indeed a tendency towards further ‘multilateralisation’ of procedural law whenever community interests are at stake (BENZING, 2006, p. 408). As pointed out by Judge Simma, ‘international law is finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order’ (SIMMA, 1994, p. 234)⁵⁸. This would enhance both the Court’s ‘normative’ and ‘democratic’ legitimacy (FOLLESDAL, 2013, p. 345; BEHN, FAUCHALD, LANGFORD, 2015).

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⁵⁸ According to Judge Simma, ‘classic bilateralist international law has fallen far behind the present State of consciousness of international society’.

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