doi:10.1017/amp.2023.83

WHOSE DISPUTE IS IT ANYWAY? MULTILATERAL LITIGATION BEFORE INTERNATIONAL COURTS

This panel was convened at 4:00 p.m. on Friday, March 31, 2023, by its moderator, Yueming Yan of The Chinese University of Hong Kong, who introduced the panelists: Gleider Hernández of the Catholic University of Leuven (KU Leuven); Ben Juratowitch of Essex Court Chambers; Brian McGarry of Leiden University; and Mónica Pinto of the University of Buenos Aires Law School. This session was led by Pem Chhoden Tshering of Sidley Austin LLP and coordinated by Belén María Ibañez of Curtis, Mallet-Prevost, Colt & Mosle LLP.

Remarks by Yueming Yan* & Pem C. Tshering**

In recent years, the increasing number of third-party interventions in international legal proceedings has sparked debates regarding the role of multilateralism in the adjudication and execution of international law. In the Preliminary Objections judgment issued by the International Court of Justice (ICJ or Court) in *The Gambia v. Myanmar* case, the Court held that the presence of an *erga omnes partes* obligation provided sufficient grounds for The Gambia to establish standing to bring its claim. This case constitutes a clear example of a multilateral litigation brought by a party that is not specially affected by the harm claimed in the underlying matter. It has raised questions as to whether the Court is adopting a more expansive stance regarding the scope of *erga omnes* obligations and the impact this could have on future decisions when the Court is faced with similar legal issues. Meanwhile, the mounting number of third-party intervention requests in ongoing cases such as *Ukraine v. Russian Federation* raises pertinent questions about the legal nature of these interventions, the Court's stance towards them, and the legal significance the Court will ascribe to them in its deliberations.

In light of the aforementioned considerations, this session was designed to delve into the factual and legal aspects of these cases, while navigating the conceptual and practical complexities and ramifications arising from multilateral participation. The discussion primarily revolved around three key topics: (1) standing & obligations *erga omnes*; (2) intervention as per Article 62 and Article 63 of the ICJ Statute; and (3) multilateralism in international litigation. The panelists specifically addressed the extent and implications of *erga omnes* obligations, their relationship with *locus standi* and *erga omnes partes*, the emerging trends in applying these obligations before the Court and other international tribunals, and the contrasting practices of Article 62 and Article 63 interventions. Notably, recent cases like *The Gambia v. Myanmar* and *Ukraine v. Russian Federation* were scrutinized in detail.

By engaging the diverse experience of our distinguished panelists, the session aimed to foster research and innovation through these discussions beyond the mere resolution of disputes between directly affected states. The stated objective was to explore whether there is a need for the creation of rules that specifically accommodate multilateral participation in addressing certain questions of international law, paving the way for a more certain, inclusive, and robust framework.

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In this contribution, the panelists summarize and synthesize their reflections from the discussion. Additionally, the panelists leverage this opportunity to delve deeper into the subject matter, expanding on their initial ideas and raising new thought-provoking points that contribute to the ongoing conversation. By doing so, this contribution aims to enhance the understanding and analysis of this pertinent topic.

Remarks by Ben Juratowitch*

Overview of The Gambia v. Myanmar

July 22, 2022 seems like a long time ago in the world of international law, but that was the date of the Preliminary Objections judgment in *The Gambia v. Myanmar* case.[1] In essence, The Gambia claimed in that case that Myanmar is responsible for genocide in respect of the Rohingya people. Myanmar, among other objections, argued that The Gambia had no standing to bring that claim and that even if the obligation not to commit genocide is an obligation owed *erga omnes*, and therefore to all other states, in order to bring a case to the International Court of Justice (ICJ or Court) a state had to be "injured" or "specially affected" or "specially injured," depending on which version of the various terms one prefers. The Court held that the fact that there was an obligation *erga omnes partes* was enough for The Gambia to have standing and therefore to bring the claim. It is a mistake to regard this issue as having been novel in *The Gambia v. Myanmar*. Rather, it goes back to *Belgium v. Senegal*,[2] a case that involved torture and so there was universal jurisdiction and the Belgian courts had issued an arrest warrant. There was therefore a particular factual link with Belgium. Both Myanmar in its objections and Judge Xue in her dissenting opinion sought to put particular emphasis on those points as indicators that *Belgium v. Senegal* was not a relevant precedent. A fair reading of it however, in my view, is that *Belgium v. Senegal* was already saying that an *erga omnes* obligation was enough for a case to be brought without the need for a state to be specially affected. If there was any doubt about that, it has been removed by the Court's decision in *The Gambia v. Myanmar*.

Q: Would you agree that in *all* future disputes involving *erga omnes* obligations raised under the Genocide Convention the Court will accept the applicant's *locus standi* even where that state may not have been directly affected?

I think that does follow. I would go even further and say that it is not just that there would be jurisdiction under the Genocide Convention, but that there is no difference in principle between an obligation *erga omnes partes*—owed under a treaty—and an obligation *erga omnes* owed under customary international law. If there is a "dispute," in the sense that the Court has characterized that term, and if there is jurisdiction, then that suffices so long as there is an obligation *erga omnes*. It is not just genocide. Thinking back to *Barcelona Traction*, the Court said:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[3]

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[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Judgment, Preliminary Objections, 2022 ICJ Rep. 477 (July 22).

[2] Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 ICJ Rep. 422 (July 20).

[3] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) (Second Phase), Judgment, 1970 ICJ Rep. 3, 32, para. 34 (Feb. 5).

Of course, that was in 1970. There is now also no doubt that the recognition of self-determination is an obligation owed *erga omnes*. In my view, on the logic of *The Gambia v. Myanmar*, and for that matter, *Belgium v. Senegal*, self-determination, aggression, and other obligations owed *erga omnes*—even if not *erga omnes partes*—would also come within this principle subject to there being jurisdiction and there being a dispute between the parties before the Court.

Q: Is the Court adopting a more liberal position regarding the scope of *erga omnes*?

In *The Gambia v. Myanmar*, one of the points the Court made was that if standing was not allowed in a case like this, there would be many situations where there was a breach but there was no state that was able to bring a claim for the very reason that many cases of genocide exist within one state's boundaries. The whole purpose of the Genocide Convention and other obligations *erga omnes* is that international law does have something to say about such cases. Here that is given teeth by the existence of the obligation being enough to allow the bringing of the case. What one sees in Judge Xue's dissent and in Myanmar's objections is an effort to reduce the ability of international law to act as a meaningful form of control of behavior within the boundaries of the state alleged to be responsible for genocide or other acts coming within the *erga omnes* category. One of the obligations *erga omnes* on which it is useful to concentrate is self-determination. There are a number of situations in which there is a problem interior to the boundaries of a state where neither that state nor necessarily the neighboring states may have an interest in taking, or the political will to take, the point, but a state from another part of the world may be willing to do so on an *erga omnes* basis. When it comes to identifying obligations owed *erga omnes*, there is the list that I gave from *Barcelona Traction*. The existence of aggression in that list is notable. Seeking to catalog obligations *erga omnes* would, however, take us over our time limit.

Q: Can third states establish a legal interest under Article 62 of the ICJ Statute solely on the grounds of a breach of an obligation *erga omnes*?

I understood Brian to say that although Article 62 requires an "interest of a legal nature," an obligation *erga omnes* would not be enough; it would be enough on the basis of *The Gambia v. Myanmar* for it to provide the standing of the applicant state, but it would not be enough for another state to apply to intervene under Article 62 with effectively the same position as The Gambia. I would like to probe that a little bit because the words of *Barcelona Traction* on *erga omnes* are "legal interest."[4] It is a different context, but introducing a "specially affected" test into Article 62 seems to minimize the importance of the obligation being *erga omnes* in the first place. If the test is: "is there an interest of a legal nature?" and the obligation is *erga omnes* and therefore owed as between the different states, if a state in addition to the applicant state wishes to intervene, it would in principle be admissible under Article 62 as it would constitute an interest of a legal nature. For my part I do not see the difference between an applicant state and a state seeking to intervene under Article 62, although I entirely take the point that there might be questions about the utility and desirability of that, as well as case management implications.

Questions from the Audience

Remarks of Pierre d'Argent: You need to have a dispute, which is always a bilateral matter. The specificity of *erga omnes* or *erga omnes partes* obligations is that in any given case you can

[4] *Id*, para. 33.

invoke responsibility. The words "in any given case" are present in the judgment in *The Gambia v. Myanmar* and *Belgium v. Senegal*. They come from the resolution of the Institut de Droit International where the rapporteur on *erga omnes* obligations was Special Rapporteur Gaja. The specificity is that in any given case, you can invoke responsibility. If from that invocation of responsibility, a bilateral dispute arises, then, if there is jurisdiction because you have a jurisdictional clause you can go to the Court. The requirement of a dispute is jurisdictional both from a statutory point of view and from the point of view of the treaty provision at stake—the compromissory clause. Once you have a bilateral dispute—and you can have that bilateral dispute between states where there is no state that is specially affected or injured—the beauty of *erga omnes* obligations is that you can seize the Court and that is the lesson we learn from the judgment. In the provisional measures phase, Myanmar conceded that The Gambia was entitled to invoke its responsibility but contended that this would not be sufficient to bring a case before the Court. The Court rejected that and confirmed this rejection in the judgment on preliminary objections.

In addition, the words of Article 62 are not only an "interest of a legal nature"—I fully agree with Ben that looking at those words, of course they include *erga omnes*—but the sentence continues: "which may be affected by the decision in the case." This is the requirement that you have to show in order to be admissible under Article 62 and the question is to think whether by definition if an *erga omnes* obligation is at stake, then the decision of the Court is likely to affect the interest of any state. That I am not sure of. That is why I agree with Ben that the words "interest of a legal nature" can encompass *erga omnes* obligations, but I think that because the sentence does not stop there, there is a requirement of particularization under Article 62 which in my opinion would be an obstacle for many states. It does not mean that you cannot bring another dispute. If you have created the dispute bilaterally, you can bring it to the Court. Finally, in relation to Article 63, the only requirement is that you are party to the Statute and party to the multilateral treaty that is before the Court. For the rest, *erga omnes* or not *erga omnes*, that is absolutely irrelevant. The fact of the matter is that because there is an *erga omnes* obligation at stake in the *Ukraine v. Russian Federation* case, states are politically incentivized to intervene, but legally speaking it is entirely irrelevant.

Ben Juratowitch

Pierre, thank you very much. Two aspects of that on which I would like to make a brief comment. One is: "in any given case" and the idea that disputes are bilateral. Although disputes are bilateral, there can be multiple bilateral disputes. What the difference between multiple bilateral disputes and a multilateral dispute is might not mean anything in practice, but there needs to be a dispute and I think we agree that is crucial. On the interesting question of Article 62, in a sense this entire discussion is premature because the Court's practice on intervention is so underdeveloped and it is about to become, in an awful hurry, quite developed. Whilst it is true that the sentence goes on to say "which may be affected by the decision in the case," to what does the "which" refer? It is the interest of the legal nature. It is not that the state needs to be specially affected.

Q: Is there any prospect for joint interventions by multiple states?

We are yet to see how the Court deals with a joint intervention but my own view would be that in principle that would make the Court very happy because it would mean fewer interventions, more coordination and cooperation, and less duplication, all of which means fewer pages to read, fewer arguments to consider and more efficiency. I think in practice it is a very good idea.

Remarks by Gleider Hernández*

For quite some decades after *Barcelona Traction*, the notion of obligations *erga omnes* seemed to float in the international legal ether, as it were; it was neither "not law," but nor could anyone point with any precision to how it could be fitted into the international system. What, concretely, might be the *legal* effects of breaching an obligation *erga omnes*? And more to the point here, how might obligations *erga omnes* be enforced through traditional legal mechanisms, including inter-state courts and tribunals?

The *parcours* of obligations *erga omnes* before the International Court of Justice (ICJ or Court) is well-known. For perhaps twenty or thirty years after *Barcelona Traction*, which recognized obligations owed to the international community as a whole as being *erga omnes*, the notion seemed to percolate throughout international legal discourse, but with little concrete application. Rhetorical flourishes to "fundamental" or "intransgressible" international norms aside—which, in the main, were better interpreted as proto-references to peremptory norms (*jus cogens*)—most twentieth century discussion of the concept turned on nebulous notions of community interest. A handful of ICJ pronouncements gave minor clarification to the scope obligations *erga omnes*, sometimes explicitly (*East Timor*),[5] sometimes more obliquely (*Construction of a Wall*, in discussing the legal consequences of a breach of self-determination).[6] Frankly, it was only Part Three of the International Law Commission's Articles on State Responsibility (ILC Articles), that clarified some of the legal consequences of a breach of an obligation *erga omnes*, and put forward the proposal, in Article 48 of the ILC Articles, that "[a]ny State other than an injured State" could be entitled to invoke responsibility for obligations "owed to the international community as a whole." But the Commentary to Article 48 insisted this was mere progressive development, and until 2012, this remained the mainstream view.

The watershed would be the Belgian application submitted against Senegal, *Obligation to Prosecute or Extradite*. For the Court, Article 48 of the ILC Articles embodied a codification of customary international law, and that consequently, all states parties to the Convention Against Torture (*a fortiori* including Belgium) had a legal interest in ensuring compliance with obligations contained in the Convention; these were characterized as "obligations *erga omnes partes*."[7] The Court would follow this up quickly in 2013 in the *Whaling in the Antarctic* judgment, in which Australia was entitled to invoke obligations *erga omnes partes*, consented to by all parties to the International Convention for the Regulation of Whaling (ICRW), against the scientific whaling program being conducted by Japan[8] in order to protect whales, which, by any estimation, were not Australian in any sense.

To my mind, this pair of judgments, and the emphasis on the *partes* element, were crucial to legitimating obligations *erga omnes* as an emanation of state consent, as expressed in their acceptance of certain multilateral treaties. It bears noting that, save for self-determination as recognized in *East Timor* (though declared inadmissible) and the non-binding advisory opinion in *Construction of a Wall* and the 2019 advisory opinion on the *Separation of the Chagos*

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[5] East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, paras. 28–29 (June 30).

[6] Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, 200 (July 9), concluding that "in view of the importance of the character and importance of the rights and obligations involved," all other states were under an obligation not to recognize the unlawful situation resulting the breach, an obligation to co-operate with other states to bring the breach to an end, and an obligation not to render aid or assistance to maintain an existing situation resulting from such a breach.

[7] *Questions Relating to the Obligation to Prosecute or Extradite, supra* note 2, at 449, para. 68.

[8] Whaling in the Antarctic (Austl. v. Japan), Judgment, 2014 ICJ Rep. 226 (Mar. 31).

Archipelago,[9] recent cases involving obligations *erga omnes* all rely upon a multilateral treaty as the basis for the Court's jurisdiction Without purporting to be exposing any particular strategy, this seems sensible: as the Court is fond of recalling in relation to norms of *jus cogens*, it is one thing to acknowledge the character of a norm, but it is quite another for the character of a norm to be the basis for the Court's jurisdiction in the absence of consent. Very simply, that consent is easiest to discern if the claimant can cite to a treaty to which the respondent is a party, though in principle nothing excludes that one day a dispute be heard on the merits between two states having filed "Optional Clause" declarations under Article 36(2) of the ICJ Statute, with the Court's competence established simply by virtue of the purported breach of an obligation *erga omnes simpliciter*. For now, perhaps, "multilateralized" disputes are limited before the Court to those regarding breaches of obligations *erga omnes partes* by a state other than an injured state.

That said, recent case law has been clarifying the scope of the threshold for "interest" or "injury" if an obligation *erga omnes* has been breached, and that threshold is decidedly low. In 2022, the Court declared itself competent to proceed to the merits in respect of *The Gambia v. Myanmar* and, in a 14–2 vote, took a significant position on exactly this threshold.[10] The Gambia had invoked Article IX of the Genocide Convention to assert claims of breaches, by Myanmar, of that Convention against its minority Rohingya population. On this specific point (though amongst an artillery of objections and counterarguments), Myanmar had sought to distinguish its situation from that of Senegal in *Obligation to Prosecute or Extradite* on the basis of Belgium's assertion, in that dispute, that it was also a "specially affected" state.[11] However, as in 2012, the Court would not be drawn on this point, drawing textually from Article IX of the Genocide Convention to conclude that—and this is important—provided that a dispute exists between parties falling within the compromissory clause of the Convention—any of the parties to the Convention and to the dispute may bring claims for such alleged breaches.[12] The existence of a dispute "bilateralizes" or crystallizes the Court's jurisdiction under a compromissory clause, but my reading of the Court's 2022 judgment is that the obligation *erga omnes partes*, multilateral *par excellence*, need not also be bilateralized. No interest, injury, or otherwise need be proven.

This final point is, however, questioned by Judge Xue in her Dissenting Opinion, where she suggests that the existence of a bilateral dispute in fact requires "some link—a territorial, national or other form of connection" so as to make possible a claim before the Court.[13] One can certainly see the logic behind this reasoning; but I would venture that the divergence is based on one's view on the scope of consent that was given when becoming party to a multilateral treaty. Despite its formalistic nature, let us momentarily consider how the plain terms of certain treaty provisions recognize the right of "any party" to invoke the conduct of another party in respect of certain core obligations contained within the treaty. If this is the case, and though there may be room for dispute over the individual terms of a provision and their scope, I see no reason to object to the idea that states may contribute to the creation of obligations *erga omnes*—in the famous Hague lectures of Bruno Simma, limited "to the circle of the other contracting parties"[14]—for whichever norm they might elect, be it human rights protection, the conservation of endangered species like whales, or

[9] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, para. 180 (Feb. 25).

[10] *Application of the Convention on the Prevention of the Crime of Genocide*, *supra* note 1.

[11] *Id.*, para. 95. At paragraph 99, Myanmar even suggested that the claims of a "specially affected" state would take precedence over those of non-injured states, suggesting that Bangladesh was "the most natural" such state. The Court set aside that latter argument in a single paragraph. *Id.*, para. 113.

[12] *Id.*, paras. 110–12.

[13] *Id.*, para. 8 (diss. op., Xue, J.).

[14] Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 229, 370 (1994).

any other norm they deem to be of common concern, such as the prevention of climate change or the spread of infectious diseases. There is a need for cautious and clear interpretation, perhaps, but conceptually, nothing excludes the creation of such procedural mechanisms. The real question will be whether—if ever—international courts will accept claims regarding the breach obligations *erga omnes* with no treaty on which to base the Court's jurisdiction.

Remarks by Brian McGarry*

At the intersection of third-state intervention and obligations *erga omnes*, the central question is whether the breach of such an obligation—which may be invoked as a basis of standing to institute contentious proceedings before the International Court of Justice (ICJ or Court)—is an equally sufficient basis to intervene in such proceedings. While some eminent jurists have taken that view, I consider that this proposition is difficult to sustain in both principle and practice.

From the outset, the scope of this debate is limited to intervention under Article 62 of the ICJ Statute, rather than Article 63. Whereas Article 62 requires an "interest of a legal nature which may be affected by the decision," a third state's interests or particular motivations are irrelevant to the analysis of whether it meets the more straightforward requirements of Article 63 (i.e., membership in a treaty which the Court is called upon to interpret). The Court has since clearly endorsed this view.[15]

As a general matter, there is no clear basis to analogize between the customary requirements for invoking state responsibility before international courts and tribunals,[16] and the statutory requirements for instituting incidental proceedings within these cases, which vary from institution to institution. The difficulty of drawing this analogy is particularly clear in light of the historical rationale and necessity of construing obligations *erga omnes* as a basis for *locus standi*. If applicants were required in every ICJ case to demonstrate a unique injury, other states could simply violate fundamental norms with impunity. They could evade accountability while injuring their own people, or the planet as a whole, so long as they did not breach individual obligations owed to a particular state. In other words, the recognition of obligations *erga omnes* as a basis of standing to invoke responsibility follows logically and necessarily from the recognition of legal obligations owed to the international community.

The *raison d'être* for construing obligations *erga omnes* as a basis of judicial standing is satisfied once a justiciable case is instituted against the injuring state. Such an objective is not furthered by adding more states to ongoing proceedings. This is particularly clear in ICJ practice, where all intervening states have joined proceedings as non-parties.[17] Such states thus do not raise claims, seek remedies, or otherwise alter the scope of the case instituted before the Court. Nor do they demonstrate the existence of a dispute with any of the parties according to the Court's standards for determining the admissibility of newly filed cases. It is not at all apparent why other thresholds applicable to the admissibility of a case, such as *locus standi*, should instead be assimilated into intervention practice.

Article 62 interveners, as the Court has made clear, enter the case in order to seek to inform the Court of their rights, not to allege that those rights have been breached.[18] Their position bears little resemblance to the procedural rights of the state which instituted the case. As the Court has found,

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[15] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Admissibility of the Declarations of Intervention, Order of 5 June 2023, para. 27 (hereinafter *Ukraine v. Russian Federation*).

[16] Articles on Responsibility of States for Internationally Wrongful Acts (2001), Arts. 42–48.

[17] Rejecting the only attempt to intervene as a party in ICJ proceedings, see Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 ICJ Rep. 420 (May 4).

[18] Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, Judgment, 1990 ICJ Rep. 92 (Sept. 13).

their participation may be excluded even when the information they seek to provide is "useful or even necessary" to the Court's determinations in the case.[19]

The conceptual difficulty of equating *locus standi* and the admissibility of intervention is borne out in the Court's practice. There is unsurprisingly little basis in the 1920 *travaux préparatoires* of Article 62 for linking the then-untested mechanism of intervention to the then-unformed concept of obligations *erga omnes*.

Moreover, the Court's jurisprudence runs against this analogy between standing and intervention. One cannot divorce the ICJ's dicta on the meaning of "legal" questions from the context of its reasoning in such decisions, which have concerned the admissibility of the case instituted by the applicant party.[20] Equating an interest in the fulfillment of obligations *erga omnes* with Article 62's threshold requirement is also difficult to reconcile with the Court's most comprehensive decision on intervention, where it rejected an Article 62 request because the intervener's stated interest in influencing the development of international law was insufficiently particular to that state.[21]

The current practice of intervention casts further doubt on this proposition. Turning to the case of *Ukraine v. Russian Federation* instituted in 2022, thirty-three states—all with learned counsel, including members of the present roundtable—unanimously opted to seek intervention under Article 63 of the Statute. Many of these declarations gratuitously referred to interests in the fulfilment of obligations *erga omnes* or *erga omnes partes*, and indicated states' interests in presenting the Court with information beyond the strict scope of treaty interpretation questions.[22] Given that Article 62 encompasses a much wider range of interests than the interpretation of treaties, one might query: are states and the international bar at all confident in the premise that Article 62 is available in the absence of any interest unique to the intervening state? There seems to be rather little appetite to test this proposition (and perhaps as little desire on the part of the Court to address it).

Those who endorse this proposition have at times framed it in terms which are better suited to intervention before certain courts and tribunals other than the ICJ. For example, in his Hague Academy course, Judge Gaja found that "[w]hatever 'interest of a legal nature' is required in Article 62 . . ., it cannot be higher than the one that justifies bringing a claim before the Court."[23]

In my view, portraying this question as a matter of degree is more appropriate in truly "multilateral" systems such as World Trade Organization dispute settlement, where a "substantial" interest is required for intervention.[24] An interest of a "legal" nature under Article 62 of the ICJ Statute—a requirement of kind, rather than degree—should be understood in the specific context of ICJ proceedings.

For these reasons, the interest required for intervention does not resemble the requirements of *locus standi* in origin or practice. Assimilating the doctrines of *locus standi* and intervention could render incoherent an already fragile area of the Court's jurisprudence, and thus threaten the international community's shared interest in the predictability of judicial settlement before the Court.

The other major issue that emerged during the roundtable discussion on intervention was whether a state may intervene prior to the Court's resolution of questions concerning its jurisdiction. The

[19] Continental Shelf (Libya /Malta), Application by Italy for Permission to Intervene, Judgment, 1984 ICJ Rep. 3, para. 40 (Mar. 21).

[20] *See*, *e.g.*, South West Africa, Second Phase (Eth. v. S. Afr.; Liberia v. S. Afr.), Judgment, 1966 ICJ Rep. 6, para. 51 (July 18); *Barcelona Traction, Light and Power Company*, *supra* note 3, para. 33.

[21] Continental Shelf (Tunis./Libya), Application by Malta for Permission to Intervene, Judgment, 1981 ICJ Rep. 3, paras. 19, 33 (Apr. 14).

[22] *Ukraine v. Russian Federation*, *supra* note 15, para. 82.

[23] G. Gaja, *The Protection of General Interests in the International Community*, 364 RCADI 9, 119 (2011).

[24] WTO Dispute Settlement Understanding, Art. 10(2) (Marrakesh, Apr. 15, 1994).

Court's history of deferring consideration of intervention has long suggested a disinclination toward third-state participation during the preliminary objections phase of the proceedings.[25]

Drawing from the views of individual members of the Court,[26] however, I argued that a third state that limits the scope of its intervention to jurisdictional questions may be admitted to intervene despite the "incidental" character of intervention.[27] This may arise in Article 63 intervention in regards to a treaty's compromissory clause, as seen in the current proceedings in *Ukraine v. Russian Federation*, where the Court has since adopted this position.[28] This may perhaps arise as well under Article 62, based on the state's interest in the question of jurisdiction over its unique substantive interest in the case. In this manner, a state with an "interest of a legal nature" in the merits of the case arguably satisfies the requirements for intervention during the jurisdictional phase.

Remarks by Mónica Pinto*

The situation following Russia's decision to conduct a "special military operation" against Ukraine, on the grounds of genocide allegations, brought war back in Europe. The three elements—use of force, genocide allegations, and Europe as the scene—are relevant.

The Genocide Convention embodies the legacy of the Holocaust and the international tribunals at Nuremberg. It is closely related to the origins of international human rights law. The International Court of Justice (ICJ or Court) itself awarded to the Convention a higher legal level than other international legal rules in its Advisory Opinion on the Reservations to the Genocide Convention when, for the first time in its jurisprudence, it acknowledged that there are some (international law) rules that are more important than others:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.[29]

The Convention had not entered into force at that time but the ICJ declared that it was binding on all states. The Court's statement may appear to be dogmatic as it lacks any supporting source of law. In fact, in 1951, there was no room to argue that the Convention had given birth to a customary rule or that such a rule pre-existed or that there was a general principle of law dealing with the matter.

The ICJ's statement in this Advisory Opinion is a prime example of judicial policymaking. The Court realized that only five years had elapsed since the end of the war and it was committed

[25] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Declaration of Intervention of the Republic of El Salvador, Order of 4 October 1984, 1984 ICJ Rep. 215 (Oct. 4).

[26] *Id.* at 218 (sep. op., Nagendra Singh, J.).

[27] Haya de la Torre Case, Judgment of June 13, 1951, 1951 ICJ Rep. 71, 76 (June 13) ("[E]very intervention is incidental to the proceedings in a case"). See further Part III, Section D of the ICJ Rules of Court.

[28] *Ukraine v. Russian Federation*, *supra* note 15, paras. 63–71.

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[29] Reservations to the Convention on Genocide, Advisory Opinion, 1951 ICJ Rep. 15, 23 (May 28).

to the consolidation of the recently established legal and political order, one that made it the principal judicial organ of the United Nations (UN). In so doing, the Court incorporated the political, ideological, and philosophical basis offered by the preamble and endorsed the decision of the peoples of the UN "to save succeeding generations from the scourge of war . . . and to reaffirm faith in human rights, in the dignity and worth of the human person."[30] Finding genocide as being contrary to moral law and to the spirit and aims of the UN, the Court established a normative pre-eminence of the rules on genocide over other rules of international law and that led it to consider that those rules were binding even on third states.

Borrowing Ronald Dworkin's expression regarding the "moral reading" of a country's political constitution,[31] I would say the ICJ provided its moral reading of postwar law, a legal order which considers altogether the maintenance of peace and security and human rights.

This construction of the Genocide Convention permeated the international legal order and the Court's jurisprudence. There is an *iter* in which the Court assessed the existence of *erga omnes* rules—"the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection"[32]—and it stressed that the prohibition of genocide is one of those rules.[33] Later, the Court stated that "the norm prohibiting genocide is certainly a peremptory norm of international law (*jus cogens*)."[34]

As it did in the past, in the *Ukraine v. Russian Federation* case, the Court expressed itself "profoundly concerned about the use of force by the Russian Federation in Ukraine," which "raises very serious issues of international law" and deemed it necessary to emphasize that all states must act in conformity with their obligations under international law rules. The Court noted that:

> the statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention.[35]

It should be recalled that in 1996, the Court had noted "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention."[36] In *The Gambia v. Myanmar* case, the Court assessed twice the standing of a third state to bring claims on the grounds of the Genocide Convention, first in its decision on provisional measures[37] and then in its decision on preliminary objections.[38]

The current *Ukraine v. Russian Federation* case has not yet reached the merits phase; however, the ICJ indicated that it has serious doubts as to the legitimacy of the use of force by a state party to

[30] United Nations Charter, pmbl.

[31] Ronald Dworkin, Freedom's Law. The Moral Reading of the American Constitution 1–37 (1996).

[32] *Barcelona Traction, Light and Power Company*, *supra* note 3, paras. 33–34.

[33] *Id.*

[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 ICJ Rep. 43 (Feb. 26).

[35] *Id.*, para. 45.

[36] *Id.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 1996 ICJ Rep. 595, para. 31 (July 11).

[37] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Provisional Measures, Order of 23 January 2020, 2020 ICJ Rep. 3, para. 41 (Jan. 23).

[38] *Application of the Convention on the Prevention of the Crime of Genocide*, *supra* note 1, para. 108.

try to enforce the Genocide Convention and that "the acts complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention."[39] The decision on Provisional Measures of March 16, 2022 ordered Russia to suspend the operations it maintained in Ukraine, to ensure that neither side takes any step to advance the military operations, and that both Parties refrain from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve.

More than forty states parties to the Genocide Convention made use of their right[40] under Article 63 of the ICJ Statute to intervene in the proceedings and, thus, accepted that the judgment will be binding for them. These states have provided the Court their observations on the construction of that Convention.[41] They have "a direct interest in the construction that might be placed upon provisions of the Convention by the Court in [the] proceedings."[42]

Some interventions flagged the "abusive allegations of genocide [that] . . . risk undermining the character of genocide as a crime of exceptional gravity and the stigma that attaches to it as an affront to the 'most elementary principles of morality' [noting that] [t]his would be contrary to the object and purpose of the Convention."[43] In that same vein, interventions stated that "[i]n advancing such fabricated claims, the Russian Federation has, through the use of force against Ukraine, turned on its head one of the most fundamental multilateral treaties of our times so as to justify an egregious breach of the founding principles of the UN Charter for which it bears a specific responsibility as permanent member of the Security Council."[44]

The case of *Ukraine v. Russian Federation* starts a new wave. In my view, the more than forty declarations of intervention, mainly members of the Western European and Others Group, are trying to armor-plate a binding reading of the preeminent rules of the international legal order as established and evolved from the World War II. The target is an interpretation of the Convention which puts aside, because of its unlawful nature, the use of force by one state against another state on the grounds of allegations of genocide. It also targets a more respectful reading of genocide instead of formatting it to fit the domestic needs of a government.

Russia decided to get to the other side of the fence. It no longer adheres to certain preeminent rules it had helped to build. It is a regrettable situation.

It could be useful to enrich the declarations path adding the political will of states in the big South, America and Asia and Africa. For the time being, however, it looks pretty much as a Western, Global North affair but it should not be like that.

[39] *Ukraine v. Russian Federation, supra* note 15, para. 34.

[40] *Territorial and Maritime Dispute*, *supra* note 17, at 434, para. 36 (May 4); Continental Shelf (Tunis./Libya), *supra* note 21, at 15; Haya de la Torre (Colom. v. Peru), Judgment, 1951 ICJ Rep. 76 (June 13); S.S. "Wimbledon," Judgment, 1923 PCIJ, Ser. A (No. 1), 12.

[41] Whaling in the Antarctic (Austl. v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, 2013 ICJ Rep. 3, para. 7 (Feb. 6).

[42] *Ukraine v. Russian Federation*, *supra* note 15, Declaration of Intervention Under Article 63 of the United Kingdom of Great Britain and Northern Ireland, Aug. 1, 2022.

[43] *Id.*, Declaration of Intervention of the Republic of Latvia, Riga, July 19, 2022, para. 45

[44] *Id.*, Declaration of Intervention of the Republic of Lithuania, July 22, 2022.