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Symposium: Public Interest Litigation at the International Court of Justice



Introduction

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The International Court of Justice (ICJ or Court) has unmistakably opened its doors to public interest litigation, a term referring to litigation for the purpose of vindicating interests that are shared by the international community. Public interest litigants aim not to advance their own interests, but those of the public at large, including not only States, but also other actors, such as individuals at risk of genocide or harm related to climate change. The Court has definitively shifted away from its controversial decision in the 1966 *South West Africa* cases, in which it decided that international law does not recognize an “*actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest”.¹ While the Court signaled a retreat from this stance just a few years after *South West Africa*, in the *Barcelona Traction* case of 1970, litigants before the ICJ did not sufficiently test the extent of this retreat until decades later.² Recent cases have clarified that this legal shift is complete.

1 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, I.C.J. Reports 1966, p. 6, para. 88.

2 *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 3, para. 33.

In its 2012 Judgment in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court held that any State party to the Convention against Torture could invoke the responsibility of another State for an alleged failure to comply with the treaty's obligations *erga omnes partes*.³ In other words, all States have a common interest in compliance with the convention, and therefore have standing to invoke responsibility before the Court. Yet, the particular facts of this case left many commentators with lingering questions about whether the door to public interest litigation was really open, or just slightly ajar. Because of Belgium's specific interest in the extradition of former Chadian president Hissène Habré from Senegal to Belgium, doubts persisted about whether the Court would reach a similar decision in a case where no comparable interest existed.

The Court's decisions thus far in *The Gambia v. Myanmar* case have definitively dispelled these doubts.⁴ In both its 2020 Provisional Measures Order and its 2022 Judgment on Preliminary Objections, the Court confirmed that The Gambia has standing to bring a claim regarding Myanmar's alleged failure to comply with its obligations under the Genocide Convention. The Gambia need not possess a special interest in order to vindicate a common interest in compliance with the *erga omnes partes* obligations under the Genocide Convention. Indeed, the link between The Gambia and Myanmar is more tenuous than the link between Belgium and Senegal, with little hint of a special interest on the part of The Gambia.

While the door to public interest litigation is open, substantive and procedural questions remain.⁵ One substantive question concerns the breadth of the category of obligations *erga omnes (partes)* that could be the subject of public interest litigation. International litigation may go a long way towards settling this question, but in the meantime, a strong argument can be made that a very wide range of multilateral treaties set out *erga omnes partes* obligations with respect to which all States parties have a common interest in ensuring compliance. After all, most if not nearly all multilateral treaties aim to protect certain shared values or to achieve certain shared goals, which States parties in turn

3 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, para. 69.

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment on Preliminary Objections.

5 Yusra Suedi and Justine Bendel, "Public Interest Litigation: a pipe dream or the future of international litigation?" in Justine Bendel and Yusra Suedi (eds.), *Public Interest Litigation in International Law* (forthcoming Routledge, 2023).

have a common interest in enforcing.⁶ Thus far, public interest cases before the ICJ have concerned only the Convention against Torture and the Genocide Convention, but a very wide range of multilateral treaties could conceivably be understood as containing obligations *erga omnes partes*, the enforcement of which is a matter of common concern. In years to come, litigation could potentially concern the enforcement of multilateral treaties concerning not only genocide and human rights, but also the environment, disarmament, freedom of the seas, and transnational crime, to name a few possibilities.

The authors who have contributed to this symposium have taken up a range of other important questions, mostly of a procedural character, about future public interest litigation at the ICJ. Public interest litigation before the ICJ raises a host of important procedural questions, including not only standing, but also the specific requirements for the indication of provisional measures, issues of transparency and participation, and the process by which requests for advisory opinions reach the Court. This collection of pieces helps to chart the path forward in future contentious and advisory cases before a court that has to date produced a very limited body of jurisprudence that could be considered to be of a public interest character. In the coming years, however, the Court is due to issue judgments or opinions in a number of public interest cases, and in all likelihood, the Court's public interest docket will continue to grow.

In an article on provisional measures, Nataša Nedeski, Tom Sparks and Gleider Hernández explore the potential contours of a contentious case concerning the enforcement of obligations to prevent and mitigate climate change.⁷ Because the wheels of international justice turn slowly, their piece focuses not on merits proceedings, but on provisional measures orders, which typically take days or weeks rather than years to obtain. Given the state of the climate change emergency, speed is of the essence. Their article examines the possibility of grounding such litigation in the no harm principle under international environmental law, and it systematically explores the ways in which obstacles to a successful provisional measures order could be surmounted. Their analysis of the requirements for the indication of a provisional measures order will be indispensable for any future litigants in contentious climate change cases at the Court.

6 Cecily Rose, "Enforcing the 'community interest' in combating transnational crimes: the potential for public interest litigation", 69 *Netherlands International Law Review* (2022), 57–82.

7 Nataša Nedeski, Tom Sparks and Gleider Hernández, "The World is Burning, Urgently and Irreparably – a Plea for Interim Protection against Climatic Change at the ICJ" (in this Volume).

In an article on advisory opinions, Jane Hofbauer explores the potential of advisory proceedings as a means to advance the public interest.⁸ This article is highly topical, given the United Nations General Assembly's recent requests for advisory opinions from the ICJ on climate change, as well as Israel's policies and practices in the Occupied Palestinian Territory.⁹ Because the ICJ's contentious jurisdiction is in many ways best suited to bilateral, rather than multilateral disputes, its advisory jurisdiction represents a potentially fruitful avenue for the pursuit of answers to legal questions of general, public interest. This article explores the fascinating if limited history of public interest advisory requests before the ICJ, and also considers whether the challenges posed by large-scale participation in advisory opinions require amendments or additions to the Court's Rules of Procedure or Practice Directions.

Finally, in an article on intervention, Brian McGarry explores the participation of third States in public interest litigation before the ICJ.¹⁰ Intervention at the ICJ has a limited history, but is undoubtedly of growing importance, partly in light of the fact that more than 30 States have filed declarations of intervention in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. But the other pending genocide case – *The Gambia v. Myanmar* – may be most revealing of the Court's contemporary stance on intervention in public interest cases. Should a number of third parties follow through on their declared intention to intervene in the case between The Gambia and Myanmar, then the Court would potentially have an opportunity to clarify the role of third parties in cases concerning the public interest.¹¹ This article offers insights that

8 Jane A. Hofbauer, "Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice" (in this Volume).

9 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem; Obligations of States in respect of Climate Change*.

10 Brian McGarry, "Obligations *Erga Omnes* (*Partes*) and the Participation of Third States in Inter-State Litigation" (in this Volume).

11 Government of the Maldives, "The Republic of Maldives to File Declaration of Intervention in Support of the Rohingya People, at the International Court of Justice", 25 February 2020, <<https://progressivevoicemyanmar.org/2020/02/25/the-republic-of-maldives-to-file-declaration-of-intervention-in-support-of-the-rohingya-people-at-the-international-court-of-justice/>>; Government of the Netherlands, "Joint statement of Canada and the Kingdom of the Netherlands regarding today's decision of the International Court of Justice in the Rohingya genocide case between The Gambia and Myanmar", 22 July 2022, <<https://www.government.nl/documents/diplomatic-statements/2022/07/22/joint-statement-canada-netherlands-rohingya-genocide-case-between-gambia-and-myanmar>>; Government of the United Kingdom, "The UK announces new sanctions and legal action in support of Myanmar's Rohingya community", 25 August 2022, <<https://>

will help to shape debate on the novel questions raised by intervention in cases involving *erga omnes* (*partes*) obligations.

Taken together, these pieces suggest that public interest litigation before the ICJ, if pursued carefully and strategically, has great potential to work towards the enforcement of shared interests. This symposium aims to contribute to a growing body of literature on public interest litigation before international courts and tribunals, in particular the procedural challenges raised by such litigation. While the door to public interest litigation is open, the path forward requires careful study.

www.gov.uk/government/news/uk-statement-on-the-5th-anniversary-of-the-rohingya-crisis#:~:text=The%20UK%20will%20always%20face,intervene%20in%20The%20Gambia%20v%3E;Government%20of%20Germany,%20Federal%20Foreign%20Office%20on%20the%20fifth%20anniversary%20of%20the%20attacks%20against%20Rohingya%20communities%20in%20Myanmar%20and%20the%20refugee%20crisis%20they%20triggered%3F&hl=en, 25 August 2022, <<https://www.auswaertiges-amt.de/en/newsroom/news/-/2548384>>.