



Universiteit
Leiden
The Netherlands

Obligations erga omnes (partes) and the participation of third states in inter-state litigation

McGarry, B.K.

Citation

McGarry, B. K. (2023). Obligations erga omnes (partes) and the participation of third states in inter-state litigation. *Law And Practice Of International Courts And Tribunals*, 22(2), 273-300. doi:10.1163/15718034-bja10099

Version: Publisher's Version
License: [Creative Commons CC BY 4.0 license](https://creativecommons.org/licenses/by/4.0/)
Downloaded from: <https://hdl.handle.net/1887/3728904>

Note: To cite this publication please use the final published version (if applicable).



Obligations *Erga Omnes* (*Partes*) and the Participation of Third States in Inter-State Litigation

Brian McGarry | ORCID: 0000-0003-0111-6251

Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University, Leiden, The Netherlands
b.k.mcgarry@law.leidenuniv.nl

Received 26 September 2022 | Accepted 23 April 2023 |

Published online 21 July 2023

Abstract

This article addresses the role of third States in public interest litigation – i.e., ongoing proceedings concerning interests which they share with the international community. It scrutinizes third-State intervention in inter-State cases through the prism of rules and principles arising in public interest litigation, and aims to clarify the limits of such participation. Having synthesized the relevant law and doctrine of intervention practice before the ICJ and other institutional courts, it considers the extent to which third-State interests find expression through Articles 62 and 63 of the ICJ Statute. It examines the invocation of international legal responsibility on the basis of obligations *erga omnes* and *erga omnes partes*, as well as the prospect of intervention on this basis. It then identifies and addresses jurisdictional and procedural questions arising in these and other instances of “public interest” intervention. It concludes by envisaging the prospective institutional development of multilateral participation in public interest litigation.

Keywords

ICJ – third States – intervention – inter-State procedure – incidental proceedings – obligations *erga omnes partes* – community interests – public interest litigation

1 Introduction

Public interest litigation – in which actions are taken before courts and tribunals to safeguard interests shared with the international community¹ – is a curious notion in the context of inter-State proceedings. Although the International Court of Justice (ICJ, the Court) routinely receives submissions from many States during its advisory proceedings² (often supporting different outcomes in the name of the public interest), this mass participation has not historically featured in the Court’s treatment of contentious cases. Because such proceedings concern live disputes between sovereigns, derive from consensual jurisdiction, and bind the parties with *res judicata* force, they are conducted with greater respect to principles such as the autonomy of parties in adversarial proceedings, and the free choice of means embodied in the UN Charter.³

As such, inter-State courts and tribunals have ensured an equality of parties wherein neither party lays claim to “civil society” or the public interest.⁴ The problem of how these judicial and arbitral bodies may take the public interest into account in contentious proceedings – within the confines of inter-State procedural rules and principles – is thus built into the very architecture of such proceedings. By contrast, no such problem is inherent to the design of investor-State arbitration, for example. Unlike contentious proceedings before the ICJ and inter-State courts, such systems of dispute settlement have notably

-
- 1 See *South West Africa, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, *I.C.J. Reports 1966*, p. 6, para. 88 (defining *actio popularis* as a “right resident in any member of a community to take legal action in vindication of a public interest”). Recalling the development of this practice, see Christine M. Chinkin, “Symposium: The East Timor Case before the International Court of Justice”, 4 *E.J.I.L.* (1993), 217.
 - 2 For an in-depth assessment of the Court’s advisory function in the context of public interest litigation, see further Jane A. Hofbauer, “Not Just a Participation Trophy? Advancing Public Interests in Advisory Opinions at the International Court of Justice” (in this Volume).
 - 3 Charter of the United Nations (San Francisco, 26 June 1945), Art. 33.
 - 4 On the challenges of identifying the interests of the international community, see Bruno Simma, “From Bilateralism to Community Interest in International Law”, 25 *O.R.C.A.D.I.* (1994), 235 (observing that “it is easier to describe the content of community interests than to define their subjects and points of reference”); Giorgio Gaja, “The Protection of General Interests in the International Community”, 364 *R.C.A.D.I.* (2011), 20 (observing that “for an interest to be general, the fact that it concerns more than one or two States is clearly required”, and that such an interest “goes beyond the individual States or entities immediately concerned by a breach”). Characterizing the concept of “civil society” as similarly “chimerical, in particular in an international law context”, see Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (2018), 8.

developed *amicus curiae* practices to reflect the interests of civil society.⁵ Non-governmental submissions have also been accepted in some specialized systems of inter-State dispute settlement, as seen in the practice of the World Trade Organization (WTO).⁶

In this light, the present article frames public interest litigation by third States as participation in ongoing proceedings concerning interests which it shares with the international community. It scrutinizes third-State participation in inter-State cases through the prism of rules and principles arising in public interest litigation. As a practical matter, this inquiry serves to clarify whether limits exist as to which States can participate, under which circumstances, and through which means. It draws reference to ongoing developments in the ICJ's intervention practice, as seen in two pending cases instituted under the Genocide Convention: *The Gambia v. Myanmar*⁷ and *Ukraine v. Russia*.⁸ As this article focuses on specific substantive and procedural rules which may determine the admissibility and scope of third-State participation, it does not examine recent developments in the limited inter-State practice of human rights courts (where this may instead be determined solely as a matter of judicial discretion).⁹

The present article begins by introducing the statutory mechanisms which govern intervention before the ICJ, and the doctrine which has developed in this practice (Part 2). In particular, we shall see that the general form of

5 See Francisco Orrego Vicuña, "Individuals and Non-State Entities before International Courts and Tribunals", 5 *Max Planck Yearbook of United Nations Law* (2001), 53–66; Eric De Brabandere, "Pragmatism in International Law: Non-State Actor Participation in International Dispute Settlement", in Jean d'Aspremont (ed.), *International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011).

6 See, generally, Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (2018).

7 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings, 11 November 2019.

8 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 27 February 2022.

9 Before the European Court of Human Rights, see Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), Art. 36(2) ("The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings"). On the application of this discretion in a case pending between Ukraine and Russia in Strasbourg, see Justine Batura and Isabella Risini, "Of Parties, Third Parties, and Treaty Interpretation: Ukraine v. Russia (x) before the European Court of Human Rights", *EJIL: Talk!*, 26 September 2022, <https://www.ejiltalk.org/of-parties-third-parties-and-treaty-interpretation-ukraine-v-russia-x-before-the-european-court-of-human-rights/>.

intervention found in Article 62 of the ICJ Statute – which provides that a State may request to intervene in a contentious case if it “consider[s] that it has an interest of a legal nature which may be affected by the decision in the case” – raises a more intriguing array of questions in public interest litigation than the form of intervention found in Article 63 of the Statute (which is limited to third-State observations on questions of treaty interpretation).

Having recalled the scope of the “interest of a legal nature” criterion for intervention under Article 62 – and the absence of similar elements when applying Article 63 – this article examines the invocation of international legal responsibility on the basis of obligations *erga omnes*¹⁰ and *erga omnes partes*,¹¹ and the prospect of a third State intervening on the same basis (Part 3). The article then identifies and addresses jurisdictional and procedural questions arising in instances of “public interest” intervention (Part 4). The author concludes by considering the prospective institutional development of multilateral participation in public interest litigation between States (Part 5).

2 Relevant Law and Doctrine in Intervention Practice

In contentious cases before the ICJ and other inter-State courts, an Applicant instituting proceedings must demonstrate the existence of a dispute between the parties concerning the rights or obligations submitted to the court.¹² Separate from this requirement of a bilateral dispute, an Applicant may – in claims which do not concern obligations of an *erga omnes* character¹³ – also be required to demonstrate judicial standing, or *locus standi*, on the basis of a direct injury or other unique interest in bringing the case before the court.

10 On the contours of this concept, see Institut de Droit International, “Resolution on Obligations *erga omnes* in International Law”, Krakow Session (2005), Preamble. See also Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), 2–5; Tom Ruys, “Legal Standing and Public Interest Litigation – Are All *Erga Omnes* Breaches Equal?”, 20(3) *Chin. J. Int. Law* (2021), 458.

11 See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, para. 68 (distinguishing these obligations as those which “are owed by any State party to all the other States parties to the Convention”).

12 See, e.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, *I.C.J. Reports 2016*, p. 833, paras. 20, 44–58.

13 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/49 (Vol. 1)/Corr.4, Art. 48. Framing the obligation *erga omnes* as a “global public good”, see Daniel Bodansky, “What’s in a Concept? Global Public Goods, International Law, and Legitimacy”, 23(3) *E.J.I.L.* (2012), 651, 653.

These customary requirements may be informed or removed altogether by treaties applicable in the case (such as those with compromissory clauses referring any “difference of opinion” to the Court,¹⁴ or those vesting all contracting States with a right to invoke another contracting State’s obligations *erga omnes partes*).

While such requirements may be relevant to the court or tribunal’s exercise of jurisdiction in the case at hand, they are not equally applicable vis-à-vis third States which wish to appear therein. This is quite sensible – non-party interveners in ICJ practice do not seek substantive remedies, nor a declaration that the Respondent has breached international legal obligations toward that State in particular.¹⁵

Article 63 of the ICJ Statute and its nearly-verbatim predecessor in the Statute of the Permanent Court of International Justice (PCIJ) are rooted in the consent-based origins of international arbitration. In other words, Article 63 invites States to inform the interpretation of treaties to which they have voluntarily acceded whenever that treaty’s “construction [...] is in question”. Given this requirement of prior treaty-based consent, it is thus unsurprising to find clear antecedents for Article 63 in an 1875 Resolution of the *Institut de Droit International*,¹⁶ the 1899 and 1907 Hague Conventions establishing the Permanent Court of Arbitration,¹⁷ and the 1907 draft convention and 1910 draft protocol of the International Prize Court.¹⁸ Article 63 in principle requires only that the Court is tasked with interpreting a convention to which these States are treaty parties.

Article 62 of the ICJ Statute, by contrast, provides that any State may request to intervene in a contentious case if it “consider[s] that it has an interest of a legal nature which may be affected by the decision in the case”. While there is thus no requirement of being a party to a convention invoked in the case (other than the ICJ Statute itself), there is evident overlap between Articles 62 and 63. According to its *travaux préparatoires*, the Hague Committee of Jurists – the

14 See Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (2018), 139–140.

15 All States which have intervened under Articles 62 and 63 have done so as “non-parties” to the case at hand, although the ICJ has indicated the possibility of intervening as a full party under Article 62. See discussion *infra*.

16 Institut de Droit International, “Projet de règlement pour la procédure arbitrale internationale” (The Hague, 1875).

17 Convention for the Pacific Settlement of International Disputes (The Hague, 1899); Convention for the Pacific Settlement of International Disputes (The Hague, 1907).

18 Convention relative to the Establishment of an International Prize Court (The Hague, 18 October 1907); Additional Protocol to the Convention relative to the Establishment of an International Prize Court (The Hague, 19 September 1910).

body of eminent legal minds assembled to draft the PCIJ Statute, for consideration by the Council of the League of Nations – foresaw in 1920 that an interest in treaty interpretation is also an “interest of a legal nature”.¹⁹ This overlap has manifested in practice since the first PCIJ case (where Poland’s Article 63 intervention in *s.s. Wimbledon* was initially filed under Article 62),²⁰ and is also evident when interventions are filed under both provisions.²¹

In the context of treaty relations, an “interest of a legal nature” in the ICJ’s interpretation of a given convention might thus be viewed as an interest *inter partes*, held by all contracting parties to the treaty in question. There may be overlap as well between the interests of the Article 63 intervener and a party in such a case. Indeed, many treaty compromissory clauses providing for ICJ jurisdiction encompass disputes arising from the “*interpretation or application*” of the treaty.²²

The ICJ has imbued the vague phrase “interest of a legal nature” in Article 62 with limitations in its case law as well as in its Rules of Court, including the requirement in Article 81(2)(b) thereof that an application to intervene under Article 62 of the Statute must set out “the precise object of the intervention”. In the first instance of a successful Article 62 application, *El Salvador/Honduras, Nicaragua’s* stated object of intervention was to “inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute”.²³ This uniquely held interest is easy to see in disputes concerning sovereignty or delimitation, such as *Cameroon v. Nigeria*, where Equatorial Guinea successfully proffered a similarly phrased object of intervention.²⁴ Even in *Jurisdictional Immunities* (the most recent instance of intervention admitted under Article 62), Greece

19 See UN Office at Geneva, Archive R1299/21/88, Docs. 45, 50.

20 *s.s. “Wimbledon” (United Kingdom, France, Italy v. Germany), Judgment of 28 June 1923 (Question of Intervention by Poland), P.C.I.J. Series A, No. 1 (1923)*, pp. 11, 15.

21 See, e.g., *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case (New Zealand v. France), Order of 22 November 1995, I.C.J. Reports 1995*, p. 288.

22 Some compromissory clauses suitable to public interest litigation go further than this, such as the scope of “interpretation, application *or fulfilment*” in Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) (emphasis added).

23 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Judgment, I.C.J. Reports 1990*, p. 92.

24 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening), Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999*, p. 1029 (“to inform the Court of the nature of the legal rights and interests of Equatorial Guinea that could be affected by the Court’s decision [...]”).

possessed a unique legal interest in the proceedings, stemming from the central role of its judiciary in the case.²⁵

This repeated formulation of the “object of intervention”, and the particularization of the “interest of a legal nature” to the third State’s uniquely held rights and obligations, is no accident. It follows a consistent practice dating to the ICJ’s first judgment on an Article 62 application. In *Tunisia/Libya*, the Court flatly rejected Malta’s general objective to “submit its views to the Court on the issues raised in the pending case”.²⁶ The Court was unable to find that such a generic object of intervention “is really based on an interest of a legal nature which may be affected by the decision in the *Tunisia/Libya* case”.²⁷

The Article 62 intervener thus does not serve to inform the ICJ of legal areas to which it has no unique connection – a task reserved to the Court, as implied by the principle of *jura novit curia*.²⁸ In this sense, the commonly held interest associated with “public interest” litigation – while potentially sufficient for the institution of a new case – may fail to meet the threshold of an “interest of a legal nature” under Article 62 of the Statute. Under Article 63 of the Statute, however, the third State’s “interest” in the proceedings is rather inconsequential to the Court’s analysis of the admissibility of its declaration of intervention, and does not substantially impact construction of the underlying convention in cases where the *erga omnes* character of the applicable rules is not itself in question. By contrast, an interest in the fulfilment of an obligation *erga omnes* may be critical to the third State’s multiplication of the proceedings by instituting a new case against the same Respondent.²⁹

This functional distinction between judicial standing in public interest litigation and intervention – under both Articles 62 and 63 of the Court’s Statute – is developed in more conceptual terms below. The author thereafter queries

25 *Jurisdictional Immunities of the State (Germany v. Italy), Application for Permission to Intervene, Order of 4 July 2011, I.C.J. Reports 2011, p. 494.*

26 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981, p. 3, para. 14.*

27 *Ibid.*, para. 21.

28 See, generally, Takane Sugihara, “The Principle of Jura Novit Curia in the International Court of Justice: With Reference to Recent Decisions”, 55 *Japanese Yearbook of International Law* (2012), 77. Nor does it serve to inform the Court of factual considerations, as the *amicus curiae* is an actor with no role in the Court’s contentious cases. Indeed, in rejecting Italy’s intervention in *Libya/Malta*, the Court noted that its analysis under Article 62 does not consider whether the participation of a third State might be useful “or even necessary” to the Court. *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984, p. 3, para. 40.*

29 The Court retains unfettered discretion to join cases into a single proceeding. See ICJ Rules of Court, Art. 47.

the identification of sources of obligations *erga omnes partes*, as well as the Court's potential influence on third-party practice in other inter-State fora.

3 Intervention and the Invocation of Obligations *Erga Omnes*

3.1 *Third States and Common Interests*

The ICJ has famously developed a lineage of case law since the 1970 *Barcelona Traction* Judgment which recognizes the *locus standi* of all States in respect of breaches of obligations concerning genocide and aggression, slavery and racial discrimination, and the basic rights of the human person.³⁰ In *East Timor*, the Court confirmed that this list includes breaches of the right of self-determination.³¹ The Court's tendency to make such pronouncements in obiter dicta is evident in *Bosnia and Herzegovina v. Serbia and Montenegro*, where it recalled that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*".³²

The customary requirement of a direct injury for *locus standi* in inter-State proceedings developed over the course of the twentieth century, as reflected in the International Law Commission's (ILC) 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).³³ Among these reflections of modern customary international law, Article 42 can in large part be seen as a reflection of the traditional requirement of direct interest, such as arises from a unique injury. Yet whereas Articles 42(a) and 42(b)(i) respectively refer to injuries which "individually" or "specially" affect a particular State, Article 42(b)(ii) refers to the breach of an obligation which radically changes the position of "all other States" to which it is owed.

The lack of requirement of "specially affected" status to invoke breaches of international obligations under Article 42(b)(ii) appears to find closer kin in Article 48 of the ARSIWA, which concerns obligations whose "principal purpose will be to foster a common interest, over and above any interests of States

30 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application), Judgment, I.C.J. Reports 1970*, p. 3, para. 33.

31 *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90.

32 *Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, para. 31. Of course, *locus standi* is relatively clear in cases of neighbouring States engaged in military conflict, due to the presence of direct and unique injury.

33 Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, Vol. II (2) (2001).

concerned individually”, such as for the protection of a group of people.³⁴ In this light, Articles 42(b)(ii) and 48 are distinguishable by the characterization of members of “the international community” as “injured” in the former, and non-injured – yet still entitled to invoke responsibility – in the latter. As suggested above, such distinctions are merely academic in regards to intervening non-parties before the ICJ, which need not demonstrate injury per se (and which cannot in any event seek substantive remedies).

Article 42(b)(ii) especially recalls the twenty-first-century development in ICJ case law of *erga omnes partes* doctrine, given the origins of this provision in the law of treaties.³⁵ Notably, while the ILC’s Commentary frames Article 42 as encompassing non-treaty obligations in theory, the only examples of Article 42(b)(ii) provided therein derive from treaty systems – “a disarmament treaty, a nuclear-free zone treaty, or any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others”.³⁶ The Commentary makes particular reference to the Antarctic Treaty in this light as well.³⁷ In each of these instances, the obligation is “integral”, or interdependent, meaning that its performance by the responsible State is a necessary condition of its performance by all the other States.³⁸

Some ICJ Judges have characterized rules concerning the invocation of State responsibility as giving rise not only to *locus standi* to institute proceedings, but also an “interest of a legal nature” for purposes of intervention under

34 See James Crawford, *Chance, Order, Change: The Course of International Law* (2014), 278. For a typology of such interests in this context, see, generally, E. Benvenisti and G. Nolte, “Community Interests Across International Law: Introduction”, in E. Benvenisti and G. Nolte (eds.), *Community Interests Across International Law* (OUP, 2018), 3. On the role of the PCIJ in this area, see A. Tzanakopoulos, “The Permanent Court of International Justice and the ‘International Community’”, in C.J. Tams and M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice* (Brill, 2013), 339 (referring to *Greco-Bulgarian Communities*, *Advisory Opinion of 31 July 1930, P.C.I.J. Series B, No. 17* (1930), p. 4).

35 See Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, Vol. 11(2) (2001), 117–119 (detailing the influence of Article 60 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)).

36 *Ibid.*, 119.

37 *Ibid.*

38 *Ibid.*, 117–118. While the ARSIWA Commentary credits the notion of “integral” obligations to Sir Gerald Fitzmaurice’s work as ILC Special Rapporteur on the Law of Treaties, that earlier work had more clearly distinguished integral from interdependent obligations. For Sir Gerald, the force of “integral” obligations are “self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others”. Third Report on the Law of Treaties, by Mr. Gerald Fitzmaurice, Special Rapporteur, A/CN.4/115 (1958), pp. 27–28.

Article 62 of the Court's Statute. Judge Cançado Trindade encouraged intervention to "contribute to the progressive development of international law [...] when matters of collective or common interest and collective guarantee are at stake".³⁹ In his Hague Academy course on the protection of general interests in the international community, Judge Gaja observed 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".⁴⁰ He highlighted in this regard a 2005 resolution of the *Institut de Droit International* produced under his rapporteurship, which advocates that the ICJ "should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending" before it.⁴¹

Yet the rubric of "higher" and "lower" degrees of interest fits awkwardly with Article 62's framing and practice. The reference to "legal" nature therein concerns a *kind* of interest, of which any observable degree is in principle sufficient for the purposes of this criterion. On this point, the Court's interpretation of "legal" in its Article 62 practice is consistent with its broader use of the term.⁴² For contrast, one can find an example of a standard of *degrees* of interest in the WTO Dispute Settlement Understanding, which permits intervention by WTO Members which possess a "substantial" interest in the proceedings.⁴³

Most fundamentally, the standing to institute new proceedings, and the statutory requirements for incidental proceedings such as intervention, remain juridically distinct concepts with very different practical consequences. Indeed, as Judge Gaja acknowledged, third-State submissions in cases raising obligations *erga omnes* would amount to a "new form of participation" – a point

39 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, Separate Opinion of Judge Cançado Trindade*, para. 76.

40 Giorgio Gaja, "The Protection of General Interests in the International Community", 364 *R. C. A. D. I.* (2011), 119.

41 Institut de Droit International, "Obligations *Erga Omnes* in International Law" (2005), Art. 4 (reprinted in 71(11) *Annuaire de l'Institut de droit international* (2006), 289).

42 See *infra* discussion of *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, para. 51.

43 Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), Annex 2, Art. 10. As with Article 62 of the ICJ Statute, this term has been defined in practice. The low and seemingly "insubstantial" degree construed in WTO practice can be attributed to the objective (i.e., *erga omnes partes*) character of WTO obligations, and to the multilateral character of its integral dispute settlement system.

reflected in the aspirational language of the *Institut's* resolution noted above.⁴⁴ No such possibility currently exists under Article 62 of the ICJ Statute.⁴⁵

Despite the ARSIWA's characterization of nuclear treaties as giving rise to collective interests, it is notable that the first Article 62 application before the ICJ – filed by Fiji in *Nuclear Tests* – based its “interest of a legal nature” solely on direct injuries, such as “radioactive fallout [...] deposited on Fiji territory”.⁴⁶ By contrast, the Applicants in *Nuclear Tests* had each pleaded their own unique injuries and, in the alternative, the interests of the international community.⁴⁷ Both Australia and New Zealand showed clear deference to “specific” interests (i.e. direct injury or other unique interest, as seen in Article 62 practice), while also referring to more general interests in the interpretation of treaty rules (as arise in Article 63 practice).⁴⁸

While general interests have not found clear application in Article 62 practice – as seen in the absence of Article 62 applications among the deluge of declarations filed in *Ukraine v. Russia* – nor does this pending case indicate any legal significance to the incantation of shared interests in Article 63 practice.⁴⁹

44 Giorgio Gaja, “The Protection of General Interests in the International Community”, 364 *R.C.A.D.I.* (2011), 121. See further *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Application for Permission to Intervene (Honduras)*, *Declaration of Judge Keith*, *I.C.J. Reports 2011*, p. 458, para. 9 (criticizing reference in intervention practice to *Barcelona Traction's* dictum regarding obligations *erga omnes*, as the latter related to the rights of States to bring claims “rather than to the substantive character of the right or interest, a matter apparently distinct from the ‘interest of a legal nature’ to be assessed in determining a request for intervention”).

45 See, generally, Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (Brill, 2018); Pok Yin Stephenson Chow, “On Obligations Erga Omnes Partes”, 52 *Georgetown Journal of International Law* (2021), 469; Yoshifumi Tanaka, “The Legal Consequences of Obligations *Erga Omnes* in International Law”, 68 *Netherlands International Law Review* (2021), 1; Priya Urs, “Obligations *erga omnes* and the question of standing before the International Court of Justice”, 34 *Leiden Journal of International Law* (2021), 505. Expressing concern that greater third-State participation in contentious cases may diminish the ICJ's judicial function, see Paula Wojcikiewicz Almeida, “International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and *Amicus Curiae* before the ICJ”, 18 *The Law and Practice of International Courts and Tribunals* (2019), 163, 187.

46 *Nuclear Tests (New Zealand v. France)*, Application for Permission to Intervene Submitted by the Government of Fiji, 16 May 1973, 89; *Nuclear Tests (Australia v. France)*, Application for Permission to Intervene Submitted by the Government of Fiji, 16 May 1973, 149.

47 See *Nuclear Tests (Australia v. France)*, *I.C.J. Pleadings 1974*, Vol. 1, pp. 14, 43; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Pleadings 1974*, Vol. 11, pp. 8, 49.

48 *Nuclear Tests (Australia v. France)*, *I.C.J. Pleadings 1973*, Vol. 1, pp. 4–29; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Pleadings 1973*, Vol. 11, pp. 3–9.

49 For the full list of declarations filed in this case, see <https://www.icj-cij.org/en/case/182/intervention>.

Rather, these statements characterize the motivation of the States concerned – or, as framed in Article 62 practice, the “object of intervention” – rather than the requirements or purpose of Article 63. The Article 63 intervener’s right to seek to influence the Court’s interpretations remains unaffected by the State’s political interests in the underlying dispute, and the scope of its participation remains similarly unaffected by the nature of the legal interests reflected in the relevant convention. In principle, it may intervene under Article 63 to offer its interpretation of any convention to which it is party, regardless of whether its treaty obligations bear an *erga omnes partes* character.

As such, the entitlement to invoke State responsibility in accordance with Article 42(b)(ii) or 48 of the ARSIWA does not provide a recognized basis for third-State intervention under the ICJ Statute. Although the *erga omnes partes* character of a treaty obligation may of course influence how such a rule is interpreted, the declarations drafted in *Ukraine v. Russia* – according to an apparently shared template – have illustrated the unrealistic expectation that dozens of States might identify dozens of distinct interpretative angles. Now that the Court has admitted intervention in this case, it will thus be instructive for future practice to closely examine how it limits their observations to questions of treaty interpretation.

3.2 *Relevant Treaty Rules and Subject-Matter*

Even if one accepts the prospect of a third State possessing an “interest of a legal nature” in proceedings concerning obligations *erga omnes* or *erga omnes partes*, the question arises as to which treaty instruments actually contain such obligations. The ILC observed in its ARSIWA Commentary that “collective obligations” may concern, for example, “the environment or security of a region (e.g., a regional nuclear-free zone treaty), or a regional system for the protection of human rights”.⁵⁰ Judge Crawford suggested that even a rule that generally sets forth bilateral obligations could protect a collective interest in the case of a breach of a certain degree of seriousness.⁵¹

A State which has not been injured, but which may invoke the responsibility of the wrongdoing State, may be said to do so essentially in the exercise

50 Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, Vol. 11(2) (2001), 126. See also James Crawford, *Chance, Order, Change: The Course of International Law* (2014), 277. Assessing collective obligations in the context of climate litigation, see further 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).

51 Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, A/CN.4/517 (2001), para. 40.

of collective interest. Judge Gaja found that “this could be the case of a State which, even if its coastal and maritime areas are not affected by the consequences of pollution in the high seas, incurs expenses to combat pollution”.⁵² By conditioning this example on the State having “incur[red] expenses”, however, he thus nevertheless ascribes injury to the invoking State in environmental disputes – a remote injury, but a measurable and compensable injury nonetheless.

Such issues have been discussed in the aftermath of the *Whaling in the Antarctic* case – the most recently admitted ICJ intervention as of January 2023⁵³ – in which Australia alleged Japan’s breaches of the International Convention for the Regulation of Whaling (ICRW). The Court was reluctant to take up Australia’s argument that the primary object and purpose of the ICRW concerned conservation.⁵⁴ For his part, however, Judge Cançado Trindade considered that the legal nature of the ICRW had been transformed into that of an “environmental treaty” over time.⁵⁵

In Crawford’s view, by instituting proceedings under the ICRW, “Australia invoke[d] Japan’s obligations *erga omnes partes* under the [ICRW]”.⁵⁶ Tanaka has similarly observed that “the *Whaling* judgment appears to demonstrate that the *erga omnes partes* character of treaty obligations can be indirectly recognized through the establishment of the [...] admissibility of the Applicant State’s claims”.⁵⁷

52 Giorgio Gaja, “States having an Interest in Compliance with the Obligation Breached”, in James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds.), *The Law of International Responsibility* (2010).

53 While New Zealand intervened under Article 63 of the ICJ Statute, Judge Owada observed that it might have alternatively sought intervention under Article 62. See *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Declaration of Judge Owada, *I.C.J. Reports* 2013, p. 11.

54 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, *I.C.J. Reports* 2014, p. 226, paras. 57–58.

55 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Separate Opinion of Judge Cançado Trindade, *I.C.J. Reports* 2014, p. 375, para. 71.

56 See James Crawford, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts”, in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), 224, 235. See also James Crawford, *State Responsibility: The General Part* (2013), 373.

57 Yoshifumi Tanaka, “Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the *Whaling in the Antarctic* and *South China Sea Cases*”, 17(3) *The Law and Practice of International Courts and Tribunals* (2018), 533, 537–538.

It is thus all the more notable that, after being asked by Judge Bhandari “[w]hat injury, if any, has Australia suffered as a result of Japan’s alleged breach of the ICRW”,⁵⁸ Burmester (arguing for Australia) referred in passing to “the fact that some of the JARPA II take is from waters over which Australia claims sovereign rights and jurisdiction”, while much more emphatically stressing that it “is seeking to uphold its collective interest, an interest it shares with all other parties [to the ICRW]”.⁵⁹ Boisson de Chazournes (arguing for the same) similarly focused her response on Australia’s “*intérêt commun*” in maintaining the integrity of the regime deriving from the ICRW.⁶⁰

Australia and New Zealand had shown greater willingness to assert their status as specially affected States in *Nuclear Tests*. In the applications instituting those proceedings, each State emphasised the right to vindicate general interests, but also stressed the Applicant’s special position,⁶¹ as noted above. As such, Fitzmaurice⁶² and Tams⁶³ have framed *Whaling* as a logical follow-up to the 2011 Judgment in *Belgium v. Senegal*, expanding the doctrine of *erga omnes partes* into environmental disputes.

In the broader context of the law of the sea, we might consider the prospect of a third State raising interests in judicial proceedings concerning environmental obligations under the UN Convention on the Law of the Sea (UNCLOS).⁶⁴ In the light of public interest litigation, it may be particularly salient to determine whether the environmental damage or risk at issue concerns a coastal State’s claimed exclusive economic zone or continental shelf, as opposed to the shared resources of the high seas or the International Seabed Area. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea observed in *Activities in the Area*, obligations to preserve the environment of those common spaces may be owed to the international

58 I.C.J. *Verbatim Record*, CR 2013/13, 3 July 2013, 73.

59 I.C.J. *Verbatim Record*, CR 2013/18, 9 July 2013, 28 (Burmester).

60 *Ibid.*, 33 (Boisson de Chazournes).

61 Cf. *Nuclear Tests (Australia v. France)*, Application Instituting Proceedings, 9 May 1973, para. 49; *Nuclear Tests (New Zealand v. France)*, Application Instituting Proceedings, 9 May 1973, para. 28.

62 See Malgosia Fitzmaurice, *Whaling and International Law* (2015), 110.

63 See Christian Tams, “Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment”, in Malgosia Fitzmaurice and Dai Tamada (eds.), *Whaling in the Antarctic: The Significance and the Implications of the ICJ Judgment* (2016), 193.

64 See UN Convention on the Law of the Sea (Montego Bay, 10 December 1982), Part XII.

community as a whole, or owed “to a group of States [providing] that the obligation is established for the protection of a collective interest of the group”.⁶⁵

If we turn our gaze upwards to treaty frameworks governing the use of airspace, we may note that the phrasing of the 1944 Chicago Convention’s compromissory clause envisages an inclusive, multilateral dispute settlement practice (providing for submission of “any disagreement between two or more contracting States [...] on the application of any State concerned in the disagreement”).⁶⁶ Some have gone so far as to link the Chicago Convention’s safety obligations to fundamental human rights and international humanitarian law.⁶⁷

Drawing inspiration from the ICJ’s pronouncements in *Belgium v. Senegal* (regarding the Convention Against Torture),⁶⁸ commentators on the 2021 diversion of a commercial flight by Belarussian authorities have considered that the 1999 Montreal Convention’s⁶⁹ *erga omnes* character is reflected in Article 7’s “extradite-or-prosecute” obligation.⁷⁰ Affording *erga omnes* character to certain Montreal Convention rules might alternatively find support through analogy between the freedoms of the sea and the skies. Indeed, the Court in *Corfu Channel* likened “the freedom of maritime communication” to “elementary considerations of humanity, even more exacting in peace than in war”.⁷¹

65 *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, *Advisory Opinion*, *ITLOS Reports 2010*, para. 180.

66 Chicago Convention on International Civil Aviation (Chicago, 7 December 1944), Art. 84.

67 Likening the safe and orderly development of international civil aviation to the “high purposes which are the *raison d’être* of the convention”, see Huang Jiefang, *Aviation Safety, ICAO and Obligations Erga Omnes* (2008), 71–77 (citing *Reservations to the Convention on Genocide*, *Advisory Opinion*, *I.C.J. Reports 1951*, p. 15, 23). Framing certain safety obligations in the Chicago Convention as grounded “in an adherence to a normative system”, see further René Provost, “Reciprocity in Human Rights and Humanitarian Law”, 65 *B.Y.I.L.* (1994), 383, 386.

68 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 4 February 1985).

69 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999). Harmonizing the Montreal Convention (as well as the 1929 Warsaw Convention) with obligations *erga omnes* concerning the rights of persons with disabilities, see Lalin Kovudhikulrungsri, *The Right to Travel by Air of Persons with Disabilities*, Doctoral Thesis (2017), 196, 201, <https://scholarlypublications.universiteitileiden.nl/access/item:2949996/view> (citing Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929)).

70 See Miles Jackson and Antonios Tzanakopoulos, “Aerial Incident of 23 May 2021: Belarus and The Ryanair Flight 4978”, *EJIL: Talk!*, 24 May 2021, <https://www.ejiltalk.org/aerial-incident-of-23-may-2021-belarus-and-the-ryanair-flight-4978/>.

71 *Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, *I.C.J. Reports 1949*, p. 4, 22.

The Court has not specifically resolved the question of *locus standi* in disputes concerning nuclear arms, although it was pre-emptively raised by the Marshall Islands as Applicant in the *Nuclear Disarmament* cases, with relatively innovative reference to Article 42(b)(ii) of the ARSIWA.⁷² The United Kingdom, as one of the nuclear-armed Respondents, did not object to the Applicant's arguments in regards to Articles 42(b)(ii) and 48(3) of the ARSIWA. Instead, it persuasively refocused the Court's attention on the continued requirement of a bilateral dispute, even in cases arising from collective interests.⁷³ Yet this question may arise in future proceedings before the ICJ and other inter-State bodies.

3.3 *Cross-Fertilization in Practice*

The Court's emphasis on direct and particular interests in ICJ intervention practice has not yet been clearly adopted by those inter-State courts and tribunals which it has traditionally influenced. For example, there have been zero attempts thus far to intervene in contentious cases before the International Tribunal for the Law of the Sea (ITLOS). Reliance on the ICJ's guidance in any such future practice may seem logical, given that Articles 31 and 32 of the ITLOS Statute import the terms of Articles 62 and 63 of the ICJ Statute nearly verbatim. Yet there has been cause to doubt such cross-fertilization since the Tribunal's establishment in 1996, when it consciously departed from the ICJ's intervention doctrine while drafting its Rules of the Tribunal.⁷⁴

In inter-State arbitration, the closest cousin to intervention thus far has been the granting of "observer" status in the *South China Sea* case administered by the Permanent Court of Arbitration (PCA). In this manner, several coastal States with competing sovereignty claims in the region requested (and received) access to written and oral pleadings – key entitlements of the ICJ

72 On the disuse of this provision in inter-State dispute settlement during the years following the ARSIWA's adoption, see Simon Olleson, "The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Preliminary Draft", British Institute of International and Comparative Law (2007), 249.

73 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections of the United Kingdom, I.C.J. Pleadings 2015*, para. 51 ("[T]he prior notification requirement applies equally to States other than injured States as it does to injured States").

74 See *infra* regarding the 1980s development of the dueling concepts of non-party intervention and intervention as a party under Article 62 of the ICJ Statute; cf. ITLOS Rules of the Tribunal, Arts. 103(4), 104(3) (making clear that interveners do not exercise party autonomy, since they cannot appoint judges ad hoc or object to the discontinuance of the case).

intervener.⁷⁵ Indeed, the tribunal fashioned the role of the observer only after Vietnam tentatively reserved “the right to seek to intervene if it seems appropriate and in accordance with the principles and rules of international law”.⁷⁶

In truth, such requests are not entirely novel. The ICJ has at times received requests to admit and recognize a delegation of observers from a third State, without the possibility of submitting views to the Court.⁷⁷ However, since hearings are generally made open to the public (with places reserved for diplomatic corps), there is no logistical need for this recognition. In practice, an observer State is not entitled to rights or recognition in contentious proceedings akin to those permitted through Articles 62 and 63 of the Statute. Nor does it receive access to documents outside of the general procedure prescribed in the Rules of Court.⁷⁸

Yet the participation of observer States in the inter-State arbitral context appears to be an innovation. Following Vietnam, several neighbouring States submitted requests and received permission from the *South China Sea* tribunal to attend the jurisdictional hearings in the case.⁷⁹ Some of these States had sovereignty claims in the disputed area, while others (such as Singapore) did not. The window between the issuance of the October 2015 award on jurisdiction and the November 2015 hearing on the merits was very tight, and resulted in an influx of eleventh-hour requests from a wider range of States than previously seen.⁸⁰

It is notable that the tribunal granted observer status to the United Kingdom despite the absence of British sovereignty claims in the region, as this suggests a low threshold for the interest required to justify observer status. However, the rejection of the United States’ request on the basis of its status as a non-party to the Convention is far more intriguing. By rejecting the United States’ request, the tribunal may appear to imply that States need an *inter partes* treaty link

75 See *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (2015), paras. 69–85.

76 *Ibid.*, para. 54.

77 See, e.g., the treatment of Iceland’s request in *Fisheries (United Kingdom v. Norway)*, Correspondence, 12–13 September 1951, 671–672. See further Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (Martinus Nijhoff, 2006), 133.

78 See ICJ Rules of Court (1978), Art. 53(1).

79 See *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 80, 84. The Philippines raised no objection to these requests “[i]n light of its oft-stated interest in transparency”. *Ibid.*, para. 82. On the treatment of Taiwan’s interests in this arbitration, see Brian McGarry, “Third Parties and Insular Features after the South China Sea Arbitration”, 35 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2018), 99.

80 See *ibid.*, Press Release No. 9, 30 November 2015, p. 1.

with the parties (i.e., by ratifying UNCLOS).⁸¹ If the tribunal drew here from the requirement of *inter partes* treaty membership underlying Article 63 of the ICJ Statute, however, this was not made explicit. Such an approach would, in any event, appear to obviate the need for the tribunal to have evaluated each of the other States' statements of uniquely held interests in the case, as opposed to simply permitting them to observe on the basis of their status as contracting parties to UNCLOS.⁸²

The most straightforward way to interpret the tribunal's approach is that it construed its ability to grant observer status in terms of its jurisdiction *ratione personae*. In this sense, the tribunal's discretion was guided by an analogy between the admission of third-State participation and the use of similar criteria in the evaluation of applications instituting proceedings. Yet this reflects a departure from ICJ practice, where Applicants instituting proceedings face preliminary questions which States seeking to intervene do not – and where no intervener has yet been required to demonstrate a jurisdictional link to the case at hand. While many of the Court's procedural doctrines have influenced arbitral tribunals, the *South China Sea* arbitration thus illustrates the challenge of importing the intervention practices of courts to institutionalized arbitration.

While any analogy between ICJ intervention and the participation of observer States is itself subject to certain limitations, the considerations noted above remain particularly salient to the possibility of intervention in UNCLOS arbitration. The premise of unilaterally instituted arbitration between States raises the spectre of the Respondent's non-participation in these proceedings. Moreover, the prospect of mass intervention in public interest arbitrations – as evoked in the cascade of observer requests filed in the *South China Sea* case – arguably increases the likelihood of non-appearance in this system.

When the day inevitably comes where a third State seeks to intervene in such proceedings, the tribunal in question may yet turn away from the ICJ's construction of its Statute. For better or worse, it may instead seek guidance in the standards devised by the *South China Sea* tribunal to determine whether to admit an observer application. Yet as explored below, it has at time appeared even less clear how international courts and tribunals should draw guidance

81 See *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award (2016), paras. 65–68.

82 Nor do the awards and orders issued in this PCA-administered arbitration frame the provisions of the PCA's founding 1899 and 1907 Hague Conventions as gap-fillers for this purpose.

from the Court on other questions arising in intervention practice, such as concerning the procedure for determining jurisdiction and admissibility.

4 Preliminary and Procedural Questions Arising in Public Interest Intervention

4.1 *Jurisdictional Determinations and Incidental Proceedings*

The ongoing *Ukraine v. Russia* proceedings under the Genocide Convention have illustrated the challenge of addressing jurisdictional questions in cases that attract third-State intervention. These challenges are visible in the care which some States seeking intervention took in their Article 63 declarations regarding the primacy of jurisdictional questions.⁸³ Such challenges, which became more pronounced once the Respondent filed objections to jurisdiction,⁸⁴ ultimately derive from the non-party character of intervention under Article 63 of the ICJ Statute. Irrespective of the nominally binding character of Article 63 intervention, the absence of triangular consent to the Court's jurisdiction – and thus, the circumscribed nature of the third State's participation – has clearly problematized the who, what, and when of the Court's determination of its jurisdiction.⁸⁵

83 See Declaration of intervention of the United Kingdom, 5 August 2022, para. 16 (creatively hedging on the scope of its declared intervention); Declaration of intervention of Germany, 5 September 2022 (pointedly restricting its declared intervention at present to questions concerning the Court's jurisdiction). Cf. Brian McGarry, "Mass Intervention?: The Joint Statement of 41 States on *Ukraine v. Russia*", *EJIL: Talk!*, 30 May 2022, <https://www.ejiltalk.org/mass-intervention-the-joint-statement-of-41-states-on-ukraine-v-russia/> (suggesting that third States may seek "to frame the Article 62 application or Article 63 declaration as confined exclusively to questions of a jurisdictional nature"). Considering the same question in the context of *The Gambia v. Myanmar*, see Brian McGarry, "Third-State Intervention in the Rohingya Genocide Case: How, When, and Why? [Part II]", *Opinio Juris*, 11 September 2020, <http://opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-ii/>.

84 See Letter of 31 October 2022 from the Registrar of the Court to the Contracting Parties of the Genocide Convention, as quoted in Joint declaration of intervention of Canada and the Netherlands, 7 December 2022, para. 8 ("On October 31, 2022, the Registrar informed the Contracting Parties to the Convention that 'taking into account the number of declarations pursuant to Article 63 of the Statute of the Court that have been filed in this case, the Court considers that the interest of the sound administration of justice and procedural efficiency would be advanced if any State that intends to avail itself of the right of intervention conferred on it by Article 63 would file its declaration not later than Thursday 15 December 2022'").

85 Cf. discussion *supra* regarding the consensual origins of intervention in late nineteenth and early twentieth century instruments governing inter-State arbitration. On the

Yet this question appears even more vexed in the practice of Article 62, a mechanism which the Court has construed as providing two distinct channels of participation. A State may intervene by meeting the express requirements of Article 62, but if it does so with a jurisdictional link to the parties – encompassing the subject-matter of the case – it can intervene as a full party in its own right. This latter channel has been formally (and unsuccessfully) attempted only by Honduras in *Territorial and Maritime Dispute*.⁸⁶ Every State which has actually intervened in a case before the Court has therefore done so in the capacity of a non-party to the case – i.e., as a guest making written and oral submissions on a circumscribed set of issues.

As with the Court's jurisprudence concerning another incidental proceeding, the institution of counter-claims, it remains an open question whether the ICJ may admit Article 62 intervention as a party using a jurisdictional link which is different from the instrument on which the parties have founded the Court's jurisdiction. Such situations may arise when the Court has exercised jurisdiction under a compromissory clause in a convention, while a third State seeks to intervene on the basis of the three States' respective declarations filed pursuant to Article 36(2) of the ICJ Statute (the so-called "Optional Clause").⁸⁷ While it ultimately attracted intervention under Article 63, *Whaling* illustrates the potential for multiplicity in this regard, as such declarations were used to provide the Court with jurisdiction concerning the interpretation of a separate legal instrument, the ICRW.

In such instances where the parties have founded the Court's jurisdiction upon Optional Clause declarations, the question arises as to whether such instruments are capable of conferring jurisdiction over the parties in public interest litigation. The question was not raised before the ICJ in *Belgium v. Senegal*,⁸⁸ where the Court was given both the compromissory clause of the Convention Against Torture and the Optional Clause as potential bases of jurisdiction, and addressed only the former. Some commentators view cases instituted under Article 36(2) of the ICJ Statute as requiring direct injury or

presumption of compulsory jurisdiction under which the Hague Committee of Jurists laboured while drafting Articles 62 and 63 of the PCIJ Statute, see Brian McGarry, *Intervening in International Justice: Third States before Courts and Tribunals* (2023) [forthcoming], Ch. 2.

86 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, Judgment, *I.C.J. Reports* 2011, p. 420.

87 See, generally, Brian McGarry, "Optional Clause", *Max Planck Encyclopedia of International Procedural Law* [forthcoming].

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

other unique interest. Noting that the treaty bodies of human rights treaties had considered that similar clauses in those conventions established *reciprocal* rights, Törber considers that “this must hold true for the [ICJ] Optional Clause, too”.⁸⁹ Others have taken the opposite view,⁹⁰ and may see support in Australia’s framing of its collective interest-based *locus standi* in the oral phase of *Whaling* (a case founded upon Optional Clause declarations).

Whichever approach is eventually adopted by the Court in respect of parties, it may be expected that a third State which intervenes as a full party will be held to the same jurisdictional standard. Yet the question remains interesting for public interest litigation, because key *jus cogens* conventions contain ICJ compromissory clauses (notably, the Genocide Convention⁹¹ and the Convention Against Torture). Given the wide ratification of these jurisdictional bases, a case which is instead instituted under Article 36(2) of the ICJ Statute is unlikely to concern a *jus cogens* such as genocide or torture. This suggests that such questions surrounding Optional Clause practice are likely to arise only in regards to murkier terrain in public interest litigation, concerning certain subject-matter which – unlike *jus cogens* – may possess a less clearly *erga omnes* character (such as those found in the conventions discussed in Section 3.2 above).

When assessing the relationship between intervention and the ICJ’s jurisdictional determinations, it is worth recalling that the Court had never admitted an intervening State during the preliminary objections phase of a case until 2023. Indeed, even the “right to intervene” under Article 63 of the ICJ Statute did not prevent the Court in *Military and Paramilitary Activities* from deferring

89 See Gunnar Törber, *The Contractual Nature of the Optional Clause* (2015), 36–37 (finding that under the European Convention on Human Rights and the Inter-American Convention on Human Rights, judicial review is not “considered as a common good or as a part of the common *ordre public*. All considerations are based on the effectiveness of human rights and the *actio popularis* for the benefit of the individuals. With good reasons the Optional Clause has been considered as something different as it primarily allows states to enforce their own rights only. As far as the [UN Human Rights Committee] considers Article 41 [of the International Covenant on Civil and Political Rights] as establishing reciprocal rights this must hold true for the Optional Clause, too”) (citing Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), Art. 46(1); International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI) (16 December 1966), Art. 41(1); American Convention on Human Rights (San José, 18 July 1978), Arts. 45, 62).

90 See Ignaz Seidl-Hohenveldern, “Der Barcelona Traction Fall”, 22 *Osterr. Zeitschrift F. Off. Recht* (1971), 255; Ignaz Seidl-Hohenveldern, “Actio Popularis im Völkerrecht?”, 14 *Comunicazione e Studi* (1975), 803.

91 Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948).

consideration of El Salvador's Article 63 intervention without a hearing (and dismissing it upon deciding to apply customary international law, rather than the conventions raised in the application instituting proceedings).⁹² This aversion to non-party intervention during jurisdictional phases appeared particularly sensible in light of the merits-oriented assessment of the "interest[s] of a legal nature" proffered by Article 62 interveners,⁹³ and the Court's procedural practice of joining to the merits any objections which lack an "exclusively preliminary character".⁹⁴

In its June 2023 order admitting Article 63 intervention during the preliminary objections phase of *Ukraine v. Russia*, the Court ensured consistency with this prior case law by recalling that El Salvador had "failed to identify the provisions of any convention the interpretation of which, in its view, would be in question at the stage of the proceedings concerning the jurisdiction of the Court and [...] referred to conventions that could only concern the merits of the case". The Court also emphasized the incidental and limited function of Article 63 intervention explained above, circumscribing participation in several key respects.⁹⁵

If a State moreover applies to intervene as a party to the case, the timing of this decision risks exposing a significant lacuna in the ICJ's Rules of Court. In particular, while that State would have until "the closure of the written proceedings" on the merits of the case to apply under Article 62 of the Statute⁹⁶ – and thus to furnish its jurisdictional link with the parties – the Court may well have exercised its jurisdiction under a separate basis by that point, leaving no particularly orderly options for the Court to deal with this eventuality. For this reason, it would be prudent for the ICJ to fill this gap by supplementing its Rules of Court on this point. In this manner, the Court would formally codify

92 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

93 But see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Separate Opinion of President Nagendra Singh, I.C.J. Reports 1986, p. 151 (implying that an intervention confined exclusively to jurisdictional questions could be deemed admissible, since such an application or declaration would permit the Court to transcend this rationale for deferring the consideration of intervention).

94 1978 ICJ Rules of Court, Art. 79ter(4) (as amended 21 October 2019).

95 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 5 June 2023, paras. 65, 84, 95–99.

96 *Ibid.*, Art. 81(1).

its doctrinal distinction between non-party and full-party intervention under Article 62.⁹⁷

What would remain to be determined in practice, however, is whether intervention as a party will invite analysis of the third State's *locus standi* using the same rubric applied to the Applicant in the case. Alternatively, the Court might assess the request solely based on the requirements of Article 62 and the presence of a jurisdictional link, thus reinforcing the "incidental" character of intervention.⁹⁸ In practice, however, this question may be easily resolved in cases concerning obligations *erga omnes partes*, insofar as the third State has asserted the same collective interest pleaded by the Applicant.

4.2 *Locus Standi and Proprio Motu Judicial Power*

It is notable that *Belgium v. Senegal* and *Whaling* were unitary proceedings, meaning that the question never arose as to whether the Court may address *locus standi* – and, in *Whaling*, intervention – at a preliminary phase. The Court has since determined that it has jurisdiction under the Genocide Convention in *The Gambia v. Myanmar*.⁹⁹ While the question of The Gambia's *locus standi* was raised by Myanmar in the form of a Preliminary Objection, it remains unclear whether or when the Court would have determined this question in the absence of any objection on this point.

In this context, a question of particular significance in public interest litigation concerns whether *locus standi* is waivable by a Respondent, or whether an inter-State court or tribunal may nevertheless decide this question *proprio motu*. The question is at once novel and fundamental to one's view of the scope of party autonomy and the judicial function in inter-State dispute settlement. Moreover, one may consider this narrow corner of the case law alongside questions raised above concerning the relative powers of courts and parties in intervention proceedings.

In *Whaling*, Japan focused its objections elsewhere, and did not directly challenge Australia's standing as Applicant in the case. In the present author's view, the case should in this sense be contextualized within the Court's broader procedural rules. As a general matter, parties must raise in the written

97 Affirming this distinction in its intervention practice, see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Order of 28 February 1990*, I.C.J. Reports 1990, p. 3.

98 See *Haya de la Torre (Colombia/Peru), Judgment*, I.C.J. Reports 1951, p. 71, 76 ("[E]very intervention is incidental to the proceedings in a case"). See further 1978 ICJ Rules of Court, Part III(D) (as amended 21 October 2019).

99 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, p. 3.

phase all distinct arguments on which they rely and wish the Court to consider.¹⁰⁰ A response to a question posed from the ICJ bench during the oral phase – regardless of whether the answer itself is written or oral – thus needs to be predicated on arguments asserted in the written phase to serve as a basis for the Court's ruling on a legal question. In *Whaling*, Australia had no strategic reason to pre-emptively defend its *locus standi* in its Memorial, and Japan's Counter-Memorial gave it no basis to assert and rely upon any such defensive arguments during the oral proceedings.¹⁰¹ Indeed, as noted above, Judge Crawford, as well as Professors Fitzmaurice, Tams, and Tanaka have soundly inferred that the Court's decision was not based on any direct and particular interest of Australia, despite passing reference to such interest in its oral pleadings.

This does not necessarily imply that the Court took *locus standi* into account by deciding the merits of the case. Rather, this specific question comes down to whether one considers that *locus standi* is waivable by the Respondent, or else rests with the Court *proprio motu*. As noted above, Judge Crawford and Professors Fitzmaurice, Tams, and Tanaka have each taken the position that the Court in this manner affirmed Australia's *locus standi* on the basis of its collective interest in ensuring respect for obligations *erga omnes partes*. Such scholars thus necessarily presume that the Court may decide this question *proprio motu* – i.e., that it could have dismissed the case as a check against *actio popularis*, and tellingly declined to do so. This view could be said to find some analogical support in the ICJ's 2007 *Genocide*¹⁰² and 2016 *Nicaragua v. Colombia*¹⁰³ doctrine on questions implicitly resolved in jurisdictional decisions (there, questions of *res judicata*).

Yet the present author respectfully disagrees with this particular interpretation of the Court's silence. If, as in *Whaling*, the Respondent does not raise the question of *locus standi*, there is no clear basis to infer a statement on the matter where the Court's Judgment says nothing. *Locus standi* is a doctrine which ultimately serves to safeguard Respondents.¹⁰⁴ A Respondent is free to raise

100 See 1978 ICJ Rules of Court, Arts. 56(1), 60(1).

101 As noted above, *Whaling* included a single round of written pleadings, without determining any of Japan's objections at a preliminary stage.

102 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, paras. 116, 126.

103 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 100, paras. 58–61, 72–84.

104 See *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Separate Opinion of Judge Kreća, I.C.J. Reports 2004, p. 371, para. 2 (“*locus standi* is a

or otherwise waive this objection as a matter of party autonomy (as Japan did here). Through this waiver, a Respondent may “cure” defects which might otherwise prove fatal to a case.¹⁰⁵ There may be good reasons – litigation strategy, political optics – why a Respondent chooses not to raise every potentially successful objection. The present author’s view defers to this sovereign prerogative, respects the parties’ commitments to dispute settlement under the UN Charter,¹⁰⁶ and poses no threat to the Court’s judicial function or the rights of third States.

Indeed, the *a contrario* position that this objection was not Japan’s to waive in *Whaling* can give rise to perverse judicial policy consequences. If a Respondent appears in contentious proceedings and does not object to an Applicant’s lack of direct injury or unique interest in its claims, a more judicially conservative international tribunal than the current composition of the ICJ might rely upon the scholarly authorities noted above to nevertheless dismiss the case on this very basis.

In *South West Africa*, the ICJ, in a single operative clause, found in 1962 that it had jurisdiction to adjudicate upon the merits of the dispute.¹⁰⁷ In its infamous Second Phase, the Court in 1966 dismissed the case by finely slicing a distinction between *locus standi ratione personae* – a question it acknowledged as decided in the preliminary objections phase – and *locus standi ratione materiae*, a fatal defect in the Applicants’ case (in the opinion of an equally finely sliced majority of the Court).¹⁰⁸ In Rosenne’s view, the absence of argumentation on

condition which has to do with parties, whereas jurisdiction *ratione personae* – as an element of the jurisdiction of the Court – is a condition which has to do with the Court itself”). See also *Oil Platforms (Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, paras. 28–30 (appearing to endorse Iran’s argument that, “as far as State-to-State claims are concerned [...] *locus standing in judicio*” is a question requiring full argumentation by the parties).

105 Waiver by omission is in this sense distinguishable from waiver through non-participation. The full non-appearance of a Respondent in an ICJ case – such as France in *Nuclear Tests*, discussed above – will trigger Article 53 of the Statute. This tasks the Court with a more active guardianship of its jurisdiction and, arguably, the admissibility of proceedings. For cross-fertilization, see UN Convention on the Law of the Sea (Montego Bay, 10 December 1982), Annex VII, Art. 9; *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure, Art. 25.

106 See, e.g., Charter of the United Nations (San Francisco, 26 June 1945), Art. 33(1).

107 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319.

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

locus standi in the parties' pleadings on the merits indicates that the question was "raised by the Court *proprio motu*".¹⁰⁹

In the present author's view, however, the Court's actions in *South West Africa* do not support this finding of *proprio motu* power to raise questions of *locus standi*. Such questions were clearly argued by the parties during the preliminary objections phase.¹¹⁰ South Africa cannot be seriously deemed to have deliberately restricted its objection during that phase to *locus standi ratione personae*, as this extraordinary juridical distinction was created by the Court from whole cloth years later, in its 1966 Judgment.

The decision is better understood as the ICJ itself frames it: a question undecided in its Judgment on preliminary objections. The Court did not find that *locus standi* had not been effectively argued by the Respondent. Rather, the Court considered that it had implicitly bifurcated this question, joining the substantive question of *locus standi ratione materiae* to the merits of the case.

Like Rosenne's view, this interpretation may have the whiff of legal fiction, but it gains credence in light of the still-primordial state of the ICJ's procedural law prior to the comprehensive 1978 revision of its Rules of Court (its first major advance over the PCIJ's 1936 Rules of Court).¹¹¹ It also bears the virtue of caution, as opposed to relying upon the most maligned Judgment in the Court's history to assert a general power of international courts and tribunals to determine *locus standi* questions *proprio motu*, in the absence of any express findings of the Court on this point in the half-century since.

5 Conclusion

The *raison d'être* of Article 48 of the ARSIWA (as well as Article 42(b)(ii)) serves to prevent a *horror vacui* – situations where impunity would reign because, in the absence of direct injury, no State would be permitted to bring the perpetrator State to justice. Importantly, this objective is satisfied as soon as one State brings a justiciable case. In other words, the object and purpose of these rules are not furthered by adding more States to ongoing proceedings.

As such, these rules provide questionable grounds for pursuing third-State intervention. This is consistent with the ICJ's jurisprudence requiring a

109 Shabtai Rosenne, *Law and Practice of the International Court* (2006), 823.

110 See the second objection raised by South Africa in *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections Filed by the Government of the Republic of South Africa, *I.C.J. Pleadings 1961*, p. 212.

111 See *P.C.I.J. Series D*, Third Addendum to No. 2 (1936); *P.C.I.J. Series D*, Fourth Addendum to No. 2 (1936).

particularized “interest of a legal nature” to intervene as a non-party under Article 62, the relative inconsequentiality of State interests to Article 63 intervention, and the Court’s general distinction between incidental proceedings and the admissibility considerations which attach to applications instituting new cases. It remains less clear whether an application to intervene “as a party” under Article 62 should lead the Court to scrutinize the third State’s *locus standi* using the same rubric applied to the Applicant in the case. As discussed above, this question could be easily resolved in cases concerning obligations *erga omnes partes*, insofar as the third State has asserted the same collective interest pleaded by the Applicant.

While the standing of parties and third States are distinct judicial constructs, the ICJ’s doctrinal development of *locus standi* in cases arising from obligations *erga omnes partes* is not on its face dissimilar to the *inter partes* character of Article 63 intervention. The collective nature of States’ interest in such cases does not necessarily problematize the core requirement of Article 63: shared membership in a convention which the Court is called upon to interpret. Article 63 intervention – on the basis of this limited “interest” in the construction of the relevant convention – thus remains available to each concerned State in such cases. On the other hand, the ARSIWA Commentary’s reference to “legal interest[s]” arising under both Articles 42 and 48 thereof¹¹² does not invite us to equate this basic term with an “interest of a legal nature” under Article 62 of the ICJ Statute – a *lex specialis* mechanism governing incidental proceedings.

When a State has already instituted proceedings in respect of a collective interest recognized under either Article 42(b)(ii) or 48 of the ARSIWA, the residual interest possessed by other States is thus in informing the Court’s interpretation of the obligation *erga omnes partes*. This recalls the propriety of Article 63 intervention in such cases, as well as the present article’s repeated distinction between the collective interest and the Article 62 interest of a “legal” nature.

Contemporary proceedings such as the currently pending Genocide Convention cases of *The Gambia v. Myanmar* and *Ukraine v. Russia* may further clarify the possibilities and confines of third-State participation in public interest litigation. Yet *The Gambia v. Myanmar* in particular might also illustrate a need for a treaty-based mechanism which confers each Member with judicial

112 Cf. Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, Vol. 11(2) (2001), 117, 126–127.

standing to raise claims or complaints on behalf of stateless peoples.¹¹³ More broadly, the legal and practical challenges of intervention in such cases – as seen in the ad hoc managerial techniques adopted by the Court in response to the unprecedented flood of Article 63 declarations filed in *Ukraine v. Russia* – should lead States to consider developing new institutional forums for the multilateral settlement of disputes arising from obligations *erga omnes*.

In conclusion, the premise of intervention in respect of interests held by all States reflects twenty-first century conceptions of international justice and accountability. Articles 62 and 63 of the ICJ Statute, however, have in general remained statutorily and doctrinally anchored in a twentieth century vision of international adjudication. While Article 63 is currently enjoying a period of relative rediscovery, it offers a fairly limited form of participation. The bolder possibilities of Article 62 intervention in public interest litigation, on the other hand, may require the third State to navigate unique conceptual and practical challenges.

Acknowledgements

An earlier draft of this article benefited from feedback received at the 2021 Annual Meeting of the European Society of International Law, during a workshop convened by the ESIL Interest Group on International Courts and Tribunals. The author wishes to thank Ms. Beril Söğüt for her research assistance, the S.J. Visser Fund of Leiden University's Praesidium Libertatis I Foundation for its support of the *Tracing Inherent Powers* research program, and this article's peer reviewers for their engagement with the submitted manuscript. Any errors remain the author's alone.

¹¹³ See further Maria Jose Recalde-Vela, "Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities", 24 *Tilburg Law Review* (2019), 182.