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A rush to judgment? The wobbly bridge from judicial standing to intervention in ICJ proceedings

Brian McGarry*

1. Introduction

The present article aims to briefly connect two procedural questions that loomed large at two academic events in May 2023. In the first, the authors in this symposium convened for a warm and friendly discussion at the University of Bologna.¹ Among other stimulating questions, participants debated the relationship between, on the one hand, the procedure of third-State intervention in international legal proceedings, and on the other, the doctrine of obligations *erga omnes* in the invocation of State responsibility.

In the latter (much larger) event, Judge Giorgio Gaja, a highly regarded former Member of the International Court of Justice (ICJ), addressed the centenary conference of the Hague Academy of International Law.² In his prepared remarks, Judge Gaja recalled that an interest in the fulfilment of obligations *erga omnes partes* is sufficient to establish the judicial standing of the applicant State when instituting ICJ proceedings.³ He then observed that he ‘cannot understand’ how the same interest could be insufficient to establish the legal interest required to intervene in those same proceedings. One could infer from Judge Gaja’s statement

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¹ ‘Intervening in International Justice: Third States before Courts and Tribunals’ [book roundtable] University of Bologna (Bologna, 3 May 2023).

² ‘Challenges of International Law at the Time of the Centenary of the Hague Academy of International Law’ [colloquium] Hague Academy of International Law (The Hague, 25 May 2023).

³ 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, 3 para 112.



that our Bologna debate on this very point had been but a dream (or at least exceedingly brief).

Yet with the utmost respect to Judge Gaja and his important contributions to international law, this must instead be considered an unsettled debate – one which the ICJ has thus far not been called upon to resolve. Indeed, as set out below, the author considers that a legal interest in the fulfilment of obligations *erga omnes* or *erga omnes partes* is itself an insufficient basis to admit third States in the Court's contentious proceedings.⁴ The aim of this article is thus to briefly probe and challenge a point that some of the most renowned figures in our field have framed as indisputable.

2. *The statutory requirements for intervening in pending cases*

The ICJ occupies a unique point of tension in the Charter of the United Nations (UN),⁵ which mandates it both to decide the cases placed before the Court, and to serve the stability of an increasingly interconnected community of nations.⁶ Such tension arises when two States request it to resolve a dispute with multilateral implications. The clearest manner in which the Court's constitutive texts address this eventuality is by providing for intervention.

The nomenclature of 'intervention' may encompass significantly distinct forms of participation within different dispute settlement frameworks. Scholarly definitions of intervention reveal the descriptive challenge of encompassing this range of mechanisms, even within the field of inter-State dispute settlement.⁷ In ICJ proceedings, the term generally

⁴ See, eg, B McGarry, 'Mass Intervention? The Joint Statement of 41 States on Ukraine v. Russia' EJIL:Talk! (30 May 2022) <www.ejiltalk.org/mass-intervention-the-joint-statement-of-41-states-on-ukraine-v-russia>; B McGarry, *Intervening in International Justice: Third States before Courts and Tribunals* (CUP forthcoming) ch 5.

⁵ See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 art 92.

⁶ See *ibid* Preamble para 3; arts 1(1), 2(3), 33(1), 36(3), 94(1).

⁷ See, eg, VS Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff 1980) 248 ('[The] interposition of a State not a party to the principal proceeding for the purpose of utilizing the communicative and decisional processes in those proceedings to vindicate its claims'). This motivational criterion ('to vindicate its claims') is difficult to sustain in light of the ICJ's subsequent jurisprudence on the object of intervention. See,

denotes the voluntary participation of a third State in a contentious case already instituted between other States.⁸ This mechanism was established in Articles 62 and 63 of the respective Statutes of the Permanent Court of International Justice (PCIJ)⁹ and its successor institution, the ICJ.¹⁰ Article 62 of the Statute of the Court envisages a third State's intervention on the basis of its 'interest of a legal nature which may be affected by the decision in the case'. The ICJ has construed two different forms of intervention under this provision, whereby a third State may intervene as either a party or a non-party to the proceedings. Article 63 of the Statute provides for intervention by a third State if it is a contracting party to a treaty which the Court is called upon to interpret.

Articles 62 and 63 of the ICJ Statute are terse provisions that leave ambiguous many of the requirements, processes, and effects of intervention. Throughout its history, the Court has attempted to define these contours *reactively* – revising provisions of its supplementary Rules of Court, and developing doctrine through its judgments and orders – in response to attempted interventions. This case law has led to significant and unresolved disagreements among Members of the Court as to the essential character of intervention and its procedural aspects. A common theme among scholars of the Court is that its jurisprudence in this area has been contradictory and suffers from an outmoded tendency to view international dispute settlement in overly bilateral terms.¹¹ This criticism would

eg, *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Application to Intervene) Judgment [1984] ICJ Rep 3 para 37.

⁸ See A Zimmermann, 'International Courts and Tribunals, Intervention in Proceedings' Max Planck Encyclopedia Public Intl L (OUP 2006) para 1.

⁹ Protocol of Signature relating to the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations (Versailles 28 June 1919) 225 CTS 188.

¹⁰ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

¹¹ See, eg, S Rosenne, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff 2006) 1596-597 ('The conceptual underpinning of the Statute is that normally there are only two parties to a given legal dispute, with the intellectual exception of a dispute in which the construction of a multilateral treaty is in issue. That bilateral approach [...] was certainly appropriate in nineteenth century arbitration – and indeed in all arbitration. But the unforeseen expansion in the employment of the multilateral treaty on the one hand itself leading to the doctrine of erga omnes obligations, and the ever-increasing complexity and multilateralization of international relations in general, must give rise to doubt whether a dispute settlement mechanism based on the single assumption that disputes exist only between two parties is adequate or even appropriate



not have surprised the earliest commentator on intervention before the PCIJ, who characterized its envisaged form as '*un monstre presque indéfinissable*' ('an almost indefinable monster').¹²

Because the core requirement of Article 63 of the ICJ Statute is the third State's membership in a convention which the Court is called upon to interpret, the State's motivation or interest in Article 63 intervention is legally irrelevant to the Court's analysis of whether it has met this fairly straightforward requirement. This is clear from the text of the Statute and implicitly affirmed in the Court's current practice. Many of the dozens of Article 63 declarations filed in the most recent case of *Ukraine v. Russian Federation* referred at length to those States' interests in the fulfilment of obligations *erga omnes* or *erga omnes partes*.¹³ The complete absence of reference to this concept in the Court's June 2023 order admitting these interventions makes clear that the nature of a State's interest is superfluous to the question of whether its Article 63 intervention is admissible.¹⁴

It is true that Articles 62 and 63 of the ICJ Statute may be construed as organically intertwined, insofar as an interest in the construction of a convention to which one is party is technically also an 'interest of a legal nature' (in the parlance of Article 62). As Judge Hudson observed in 1946, 'Article 63, read with Article 62, seems to indicate that when a treaty or convention is being construed, every party to the treaty or convention is in the position of having such an interest'.¹⁵ Yet as a practical

for modern needs'). See further C Chinkin, *Third Parties in International Law* (OUP 1993) 355-356; I Brownlie, 'The Rights of Peoples in Modern International Law' in J Crawford (ed), *The Rights of Peoples* (Clarendon 1988) 1, 15; O Garibaldi, 'The Legal Status of General Assembly Resolutions: Some Conceptual Observations' (1979) 73 ASIL Proceedings 324, 324-333.

¹² WM Farag, *L'intervention devant la Cour Permanente de Justice Internationale (Articles 62 et 63 du Statut de la Cour)* (Université de Paris 1927) 59. See reference and translation of the Registry of the Court in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* Application for Permission to Intervene, Judgement, Separate Opinion of Judge Weeramantry [2001] ICJ Rep 630 para 30.

¹³ See ICJ website <www.icj-cij.org/case/182/intervention>.

¹⁴ See *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.

¹⁵ MO Hudson, 'The World Court: America's Declaration Accepting Jurisdiction' (1946) 32 American Bar Association J 832. See further C Chinkin, 'Third-Party Intervention Before the International Court of Justice' (1986) 80 AJIL 495, 531.



matter, the debate regarding the relationship between intervention and obligations *erga omnes* in ICJ proceedings is limited to the more enigmatic requirements of Article 62 intervention.

Arguably, the Court's jurisprudence suggests that a phrase as generic as 'an interest of a legal nature' may be read so as to imply evolutionary intent,¹⁶ warranting a relatively expansive interpretation of Article 62 in light of the growing maturity of international law. Inasmuch as this maturation derives from treaties concluded and resolutions adopted under UN auspices, recourse to 'subsequent agreement' and 'subsequent practice' (per Articles 31(3)(a) and 31(3)(b) of the Vienna Convention on the Law of Treaties, respectively) could also support a broadening interpretation of Article 62 of the Statute.¹⁷ In this light, one might make the case that the Court's tendency to reject applications to intervene under Article 62¹⁸ risks injuring the 'ordinary meaning' of its terms by extending or leaving unresolved disputes with multilateral dimensions.¹⁹

Yet this broad line of inquiry does not itself support the contention that Article 62 must be construed as specifically encompassing obligations *erga omnes*. The present article will thus briefly recall the Court's doctrinal development of community interests, in order to show the conceptual and historical divergence between questions of intervention and *locus standi*.

¹⁶ See *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment [2009] ICJ Rep 213 paras 63-71. See further I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 39; IM Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester UP 1984) 140.

¹⁷ On subsequent practice as a means of treaty interpretation, see generally I Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) ch 2; U Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26 *Eur J Intl L* 169, 171-172.

¹⁸ The ICJ has admitted only 20 percent of interventions requested under art 62.

¹⁹ Finding that the principle of sovereign equality affirmatively requires States to pursue multilateral dispute settlement '[w]hen disputes involve undefined territorial borders or conflicting legal entitlements', see EJ Criddle, E Fox-Decent, 'Mandatory Multilateralism' (2019) 113 *AJIL* 272, 325.

3. *The customary requirements for introducing new cases*

For over a half-century, the ICJ has developed a lineage of case law which recognizes the *locus standi* (ie, standing) of States to institute international litigation over breaches of obligations concerning genocide and aggression, slavery and racial discrimination, and the basic rights of the human person.²⁰ In *East Timor*, the Court confirmed that this list includes breaches of the right of self-determination.²¹ The International Law Commission (ILC) later observed in its Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) that such ‘collective obligations’ may also concern ‘the environment or security of a region [...] or a regional system for the protection of human rights’.²²

While Article 42 of the ARSIWA can in large part be seen as a codification of the traditional requirement of direct interest, such as arises from a unique injury, Article 42(b)(ii) refers instead 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 concerned individually’, such as for the protection of a group of people.²³ In its pursuit of comprehensive-

²⁰ See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Judgment [1970] ICJ Rep 3 para 33.

²¹ *East Timor (Portugal v. Australia)* Judgment [1995] ICJ Rep 90. The Court’s tendency to make such pronouncements in obiter dicta is evident in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) Judgment [1996] ICJ Rep 595 para 31 (recalling that ‘the rights and obligations enshrined by the [Genocide] Convention are rights and obligations erga omnes’, despite the relative clarity of locus standi in a case between neighbouring States engaged in military conflict).

²² (2001) 2(2) YB Intl L Commission 126. 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. ILC, ‘Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur’ UN Doc A/CN.4/517 and Add.1 (2-3 April 2001) para 40.

²³ See J Crawford, *Chance, Order, Change: The Course of International Law* (Martinus Nijhoff 2014) 278. For a typology of such interests in this context, see generally E

ness in regards to the invocation of responsibility, the ARSIWA thus appear to establish redundancy between Articles 42(b)(ii) and 48, which are effectively indistinguishable in all respects other than the nominally ‘injured’ and ‘non-injured’ status of the State. As discussed below, such a distinction is immaterial to the intervention of *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 ICJ’s 21st-century development of *erga omnes partes* doctrine, given the origins of this provision in the law of treaties.²⁴ 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 zone treaty, or any other treaty where each parties’ performance is effectively conditioned upon and requires the performance of each of the others’.²⁵ The Commentary makes particular reference to the Antarctic Treaty in this light as well.²⁶ 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 other States Parties.²⁷

Despite the ARSIWA’s characterization of nuclear treaties as giving rise to collective interests, it is notable that the first intervention request under Article 62 of the ICJ Statute – filed in the *Nuclear Tests* cases – based the State’s ‘interest of a legal nature’ solely on direct injuries, such as ‘radioactive fallout [...] deposited on [its] territory’.²⁸ While both the

Benvenisti, G Nolte, ‘Community Interests Across International Law: Introduction’, in E Benvenisti, 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 CJ Tams, 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) PCIJ Ser B No 17 (1930) 4).

²⁴ See ILC, ‘Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) YB Intl L Commission 117-119 (detailing the influence of art 60 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331).

²⁵ ‘Responsibility of States’ (n 24) 119.

²⁶ *ibid.*

²⁷ *ibid* 117-118.

²⁸ *Nuclear Tests (New Zealand v France)* Application for Permission to Intervene Submitted by the Government of Fiji [1973] ICJ Rep 89; *Nuclear Tests (Australia v*

Article 62 request and the applications instituting proceedings in these cases referred to each State's own specific interest (ie, direct injuries and other interests unique to the State),²⁹ only the parties relied as well upon community interests or general interests in the interpretation of treaty rules.³⁰

The Court's practice has ingrained this particularization of interests into the fabric of Article 62. As discussed above, the first principal element of Article 62(1) is the requirement that the third State possess an 'interest of a legal nature'. The Statute does not define a degree of 'interest' at stake in interventions. The text of Article 62 does not frame the requisite interest beyond its legal character, and does not articulate whether that interest must be unique to the State concerned.³¹ This language suggests a clear variance from, for example, the law of treaties, wherein third States may claim only *rights* established by bilateral treaties between two other States, rather than mere interests.³²

Some Members of the Court have considered that the *interests* of States may possess a purely political character, rather than a 'legal' one.³³ Other interests may concern the protection of values, perhaps including

France) Application for Permission to Intervene Submitted by the Government of Fiji [1973] ICJ Rep 149.

²⁹ See also the applicants' respective requests for provisional measures in these cases.

³⁰ See *Nuclear Tests (Australia v France)* Application Instituting Proceedings (9 May 1973) 4-29; *Nuclear Tests (New Zealand v France)* Application Instituting Proceedings (9 May 1973) 3-9. See further the applicants' respective requests for provisional measures in these cases.

³¹ See further the arguments of Professor Lalive, counsel for Malta, in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* Oral Proceedings (19-23 March and 14 April 1981) 319-354.

³² See, eg, Vienna Convention on the Law of Treaties (n 24) art 36.

³³ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Provisional Measures) Declaration of Judge Oda [2000] ICJ Rep 131 para 4 ('The issues arising from unstable conditions in a disintegrating state could not constitute legal disputes before this court whose main function is to deal with the rights and obligations of states'). But see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion [2004] ICJ Rep 136 para 41. See further E McWhinney, *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (Martinus Nijhoff 1991) 44-45 (characterizing the distinction between the 'legal' and 'political' as 'essentially pragmatic'); L Henkin, *How Nations Behave: Law and Foreign Policy* (Pall Mall 1968) 86; C Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua' (2003) 14 *Eur J Intl L* 867, 879-880.



interests of a moral or religious character.³⁴ Yet as further discussed below, the Court has found that the threshold of Article 62(1) is not met by a third State's mere curiosity or intellectual interest in the development of international law, nor by interests 'of the same kind as the interests of other States within the region'.³⁵

4. *The incongruity of judicial standing and non-party participation*

As noted at the outset, some Members of the Court have characterized obligations *erga omnes* as giving rise not only to *locus standi* to institute proceedings, but also to an 'interest of a legal nature' for purposes of intervention under 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'.³⁶ For his part, Judge Gaja observed in his Hague Academy course on the protection of general interests in the international community 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'.³⁷

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 demonstrated degree is sufficient for the purposes of this criterion. For contrast, one can find an example of a standard of *degree* in the Dispute Settlement

³⁴ See C. Chinkin, *Third Parties in International Law* (OUP 1993) 18, 160-163. Chinkin has adapted to the context of third-party interests the definition of 'interest' advanced by Reisman in a different context (the impartiality of arbitrators), which he framed thusly: "[I]nterest" is meant that the outcome and effects of the decision will have a direct impact on a value cherished by the arbitrator'. WM Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale UP 1971) 480.

³⁵ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Application to Intervene) Judgment [1981] ICJ Rep 3 para 33.

³⁶ *Whaling in the Antarctic (Australia v Japan)* (Declaration of Intervention of New Zealand) Separate Opinion of Judge Cançado Trindade [2013] ICJ Rep 14 para 76.

³⁷ G Gaja, 'The Protection Of General Interests in the International Community' (2011) 364 *Recueil des Cours de l'Académie de Droit International* 9, 119.

Understanding of the World Trade Organization (WTO) – a distinct system characterized by multilateral proceedings regarding member compliance with community obligations, in which intervention is conditioned upon possessing a ‘substantial’ interest in WTO proceedings.³⁸

Most fundamentally, the standing to institute new proceedings, and the statutory requirements for incidental proceedings such as intervention,³⁹ remain juridically distinct concepts with very different practical consequences. Indeed, as Judge Gaja acknowledged, intervention on the basis of an interest in customary obligations *erga omnes* would amount to a ‘new form of participation’.⁴⁰ His work on this point as a rapporteur of the *Institut de Droit international* similarly contained aspirational elements of *lex ferenda* (‘[The ICJ] should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending [before it]’).⁴¹ These framings acknowledge that no such possibility appears to exist under Article 62 of the Statute.⁴²

As observed above, the animating concern of Article 48 of the ARSIWA (as well as Article 42(b)(ii)) is a kind of *horror vacui* – an effort to prevent situations where impunity would reign because, in the absence of direct injury, no State would be permitted to bring the perpetrator

³⁸ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994) 1867 UNTS 154 annex 2 art 10. As with art 62 of the ICJ Statute, this term has been refined in practice.

³⁹ See *Haya de la Torre (Colombia v Peru)* Judgment [1951] ICJ Rep 71, 76 (‘[E]very intervention is incidental to the proceedings in the case’). See further B McGarry, ‘Third-State Intervention in the Rohingya Genocide Case: How, When, and Why? [Part I]’ *Opinio Juris* (11 September 2020) <<http://opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-i>>; McGarry, *Intervening in International Justice* (n 4) ch 4.

⁴⁰ Gaja, ‘The Protection Of General Interests’ (n 37) 121.

⁴¹ Institut de Droit international, ‘Obligations *Erga Omnes* in International Law’ (2005) 71(II) *Annuaire de l’Institut de droit international* 289 art 4.

⁴² See generally F Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (Brill 2018); PYS Chow, ‘On Obligations *Erga Omnes* Partes’ (2021) 52 *Georgetown Journal of International Law* 469; Y Tanaka, ‘The Legal Consequences of Obligations *Erga Omnes* in International Law’ (2021) 68 *Netherlands Intl L Rev* 1; P Urs, ‘Obligations *erga omnes* and the Question of Standing before the International Court of Justice’ (2021) 34 *Leiden J Intl L* 505. Expressing concern that greater third-State participation in contentious cases may diminish the ICJ’s judicial function, see P Wojcikiewicz Almeida, ‘International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and *Amicus Curiae* before the ICJ’ (2019) 18 *The Law and Practice of International Courts and Tribunals* 163, 187.

State to justice. Importantly, this objective is satisfied as soon as one State institutes a justiciable case. In other words, the animating purpose of these rules is not furthered by adding more States to ongoing proceedings. Or as the Court framed it last year in *The Gambia v. Myanmar*, obligations *erga omnes partes* ‘may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim’.⁴³

This is particularly clear in ICJ practice, where all intervening States have joined these proceedings as non-parties. They thus do not raise claims, seek remedies, participate in any agreement to remove the case, or otherwise alter the scope of the merits before the Court. Unlike parties, they cannot appoint judges *ad hoc* to the bench. They need not furnish a jurisdictional link to the parties in the case. Nor do they demonstrate the existence of a dispute with any of the parties according to the Court’s standards for determining the admissibility of newly filed cases. It is not at all apparent why other thresholds applicable to the admissibility of a case, such as *locus standi*, should instead be assimilated into intervention practice.

As has been clear since the Court first admitted an Article 62 request in *El Salvador/Honduras*,⁴⁴ non-party interveners enter the proceedings to inform the Court of their rights – not to allege that those rights have been breached. Accordingly, their position bears little resemblance to the procedural rights of the State which instituted the case. Rather, they are guests who have been admitted to make written and oral submissions on a circumscribed set of issues. Notably, the ICJ remains free to deny their participation even when the information they seek to provide is ‘useful or even necessary’ to the Court, as it observed in *Libya/Malta*.⁴⁵

In this manner, the conceptual difficulty of Judge Gaja’s position is borne out in the Court’s practice. Unsurprisingly, there is no clear basis in the 1920 *travaux préparatoires* of Article 62 of the PCIJ Statute – which

⁴³ *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, 3 para 108.

⁴⁴ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application to Intervene) Judgment [1990] ICJ Rep 92.

⁴⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (n 7) para 40.



was adopted essentially verbatim in the ICJ Statute – for linking the untested mechanism of intervention to the unformed concept of obligations *erga omnes*.

Looking to the ICJ's jurisprudence on *locus standi*, one can identify references to the 'legal' character of interests: in particular, the Court's narrow definition of what it means to be 'clothed in legal form' in *South West Africa*,⁴⁶ and its more open construction of such interests when defining obligations *erga omnes* in *Barcelona Traction*.⁴⁷ Yet we cannot divorce these dicta from the context of the Court's reasoning in such decisions, all of which concerned the admissibility of the case instituted by the applicant party. As Judge Keith observed in *Nicaragua v Colombia*, obligations *erga omnes* relate 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'.⁴⁸ Indeed, the requirements of intervention are not customary but rather *leges speciales*, and thus vary from court to court.

One may also struggle to reconcile Judge Gaja's position with the ICJ's findings in its most comprehensive exegesis on Article 62, *Libya/Tunisia*. In that case, the Court rejected an Article 62 request precisely because the intervenor's stated interest in influencing the judicial development of international law was insufficiently particular to that State.⁴⁹

Nor does the current practice of intervention appear to have resolved the matter in favour of Judge Gaja's proposition. In the most recent case of *Ukraine v. Russian Federation*, dozens of States – each with learned counsel – have unanimously opted to intervene under Article 63. This is notable because Article 62 provides a broader canvas for putting information before the ICJ, beyond the narrow scope of treaty interpretation questions. Many such States sought to achieve a similar result in their respective Article 63 declarations, which the Court noted and expressly restricted in its June 2023 order.⁵⁰ In this light, one might wonder how

⁴⁶ *South West Africa, Second Phase (Ethiopia v South Africa; Liberia v South Africa)* Judgment [1996] ICJ Rep 6 para 51.

⁴⁷ *Barcelona Traction* (n 20).

⁴⁸ *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Application for Permission to Intervene) Declaration of Judge Keith [2011] ICJ Rep 2011 458 para 9.

⁴⁹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 35) paras 19, 33.

⁵⁰ *Allegations of Genocide* (n 14) para 84 ('[I]ntervention under Article 63 of the Statute is limited to the construction of the provisions in question at the relevant stage of

confident the international legal community can be in the admissibility of Article 62 requests based on community interests. There seems to be little appetite among States to test this proposition (and one might reasonably assume as little desire on the part of the Court).

As such, obligations *erga omnes* and *erga omnes partes* are questionable grounds on which to base an ‘interest of a legal nature’ for the purposes of third-State intervention. This conclusion is consistent with the ICJ’s jurisprudence requiring a particularized ‘interest of a legal nature’ to intervene as a non-party under Article 62, and its 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 full 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.⁵¹ It is equally plausible that the Court might instead seize the opportunity to reinforce the incidental character of intervention, and thus assess the request solely in light of the stated requirements of Article 62 and the presence of a jurisdictional link with the parties.

5. Conclusion

This brief article has argued that connections between intervention and *locus standi* should not be lightly presumed. Upon further examination, the author concludes that there is no compelling basis to draw a bridge between the customary requirements for instituting new cases and

the proceedings. The Court is of the view that the declarations of intervention at issue generally concern the construction of the provisions of the Genocide Convention. However, to the extent that some declarations also address other matters, such as the existence of a dispute between the Parties, the evidence, the facts or the application of the Convention in the present case, the Court will not consider them’.

⁵¹ Resolving a ‘vexed question’ in intervention practice by perplexing the practice further, see *Land, Island and Maritime Frontier Dispute* (n 44) paras 94, 99 ([A] State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case’). See further B McGarry, ‘Who Speaks for the Rohingya? Ideals and Realities of Intervention before the World Court’, in M Hasan, S Mansoob Murshed, P Pillai (eds), *The Rohingya Crisis: Humanitarian and Legal Approaches* (Routledge 2023).



the statutory requirements for incidental proceedings such as intervention, which vary from court to court. As set out above, the requirement of an interest of a ‘legal nature’ in Article 62 – a requirement of *kind*, not *degree* – must be understood in the specific context of the ICJ Statute, and does not resemble in origin or practice the requirements of *locus standi*.

The difficulty of this analogy is particularly clear in light of the historical rationale and necessity for construing obligations *erga omnes* as a basis for *locus standi*. Were applicants required in every case to demonstrate a direct and specific injury, States could evade accountability by breaching fundamental obligations to their own people, or to the planet as a whole, so long as they do not injure any other particular State in a unique and concrete manner. This *raison d'être* is satisfied once a State brings a justiciable case against the alleged perpetrator State. Such an objective is not furthered by adding more States to ongoing proceedings. This is particularly true at the ICJ, where all intervening States have participated as non-parties.

Importantly, the stakes of this debate are not merely academic. Nor are they limited to concerns regarding the efficiency of ICJ proceedings. The international community has a shared interest in the predictability and proliferation of judicial settlement before the Court. Formally assimilating the doctrines of *locus standi* and intervention would risk rendering incoherent the ICJ’s already fragile intervention jurisprudence, with unpredictable reverberations throughout the Court’s practice.

Most critically, the autonomy of parties in inter-State cases derives from the consensual nature of such proceedings. An unprincipled approach to intervention may thus be viewed by some States as an intrusion into the peaceful settlement of bilateral disputes, which may in turn encourage the withdrawal or denunciation of instruments that confer jurisdiction upon the ICJ. Legal coherence should be safeguarded, and judicial restraint encouraged, in order to ensure continued resort to the Court – an option which is today more essential than ever to international peace and stability.