

Article 62 Intervention Before the ICJ Based on Common Interests and Obligations Erga Omnes

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This Article argues third states ought to be allowed to rely on common interests underpinning rights and obligations erga omnes and erga omnes partes in order to successfully intervene in disputes before the International Court of Justice in which those same norms are being litigated. Using Nicaragua's since withdrawn application to intervene in Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) as a demonstrative, this Article discusses the extent to which states can satisfy the constituent criteria for admission prescribed under Article 62 of the Statute of the International Court of Justice.

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INTRODUCTION

It is often postulated that the majority of interstate rights and obligations are constructed bilaterally.¹ Bilateralism denotes the notion that said rules exist in a closed deontic configuration operating, in any given instance, reciprocally as between only two states—the duty-bearing state and the corresponding rights-holder state.² In practical terms, where a treaty issues a command, State A owes it to only State B to fulfill that directive (and vice versa).³ When that same command is decreed in a multilateral treaty, State A is beholden also to State C (and vice versa) to perform the same directive. However, this second manifestation of the obligation exists in an instance disjunctive from the separate instance joining State A to State B.⁴ Consequently, where State A does not satisfy the command as it pertains to State B, this is of no import to State C.⁵ State C is not included

1. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 217, 229–33 (1994).

2. NATAŠA NEDESKI, *SHARED OBLIGATIONS IN INTERNATIONAL LAW* 66 (2022) (“A bilateral legal relation is a legal relation between two legal persons, and thus has only two parties . . . [A] bilateral right–duty relation encompasses one obligation with one duty-bearer on the one end and one correlative right with one right-holder on the other end.”).

3. James Crawford, *Multilateral Rights and Obligations in International Law*, 319 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 329, 344 (2006) (“[W]e are led to define bilateral rights or obligations as those which obtain only as between two persons, and to which all others in the world are, in principle, strangers.”).

4. Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127, 1133 (2002) (“[O]bligations which, even if taken on in a multilateral framework, can be considered as a bundle of interwoven bilateral relationships . . . [T]he great majority of relations of responsibility are ‘bilateralizable’, in the sense that they take shape between the state which committed the wrongful act and the state(s) directly injured. . . .”); see also NEDESKI, *supra* note 2, at 63.

5. Sicilianos, *supra* note 4, at 1133–34 (“One could not, for instance, maintain that the fact of a state’s preventing innocent passage through its territorial waters by the merchant ships of another state would empower a third state to invoke the responsibility of the defaulting state”); see also NEDESKI, *supra* note 2, at 68–69; Crawford, *supra* note 3, at 343.

in the closed deontic framework configured between State A and State B and therefore cannot claim to have been trespassed against.⁶

Obligations *erga omnes* and *erga omnes partes* stand as exceptions to the paradigm detailed above. Such rules are said to operate multilaterally. A rule qualifying as such creates a deontic instance inside of which more than two states are grouped. Where a treaty prescribes an obligation *erga omnes partes*, the obligation-bearer (State A) is beholden to multiple rights-holders (States B–Z) jointly and collectively.⁷ This means one cannot normatively divide the fulfillment of that command vis-à-vis State B from its satisfaction vis-à-vis State C, E, or Z.⁸ It can never be said that State A failed to satisfy the command in respect of States (M–Z) but not all rights-holders.⁹ This is because the rights are shared by all the instanced parties.¹⁰

The notion of such obligations was conceived by the International Court of Justice (“ICJ”) in its landmark *Barcelona Traction* judgment. The court, admittedly in dicta, announced that international law must distinguish between:

6. Crawford, *supra* note 3, at 343–44 (“In short, the mere fact that A owes the same obligation to B and C, or even to B and C and every other State, does not make that obligation a ‘multilateral’ one; nor does the circumstance that B and C may have the same right as against A mean that the right is multilateral. Apart from the case of rights or obligations arising under bilateral treaties, the content of many rights and obligations in international law is the same vis-à-vis many other entities or persons. That State A’s rights or obligations have the same *content* so far as States B, C, D . . . are concerned does not necessarily make those rights or obligations multilateral.”).

7. NEDESKI, *supra* note 2, at 67.

8. *Id.* at 70. For an exemplification, see Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 423, 584, ¶ 10 (July 20) (declaration by Donoghue, J.). It does not follow therefrom that non-compliance may not affect State B differently from States C–Z. Indeed, non-performance may inflict harm to the subjects, territory or property of only State B—in which case State B is designated as the “specially affected” state. Although non-compliance constitutes a breach of the right held collectively by States B and C–Z, State B as the “specially affected” state is afforded to certain privileged rights stemming from that breach. For example, the “specially affected” State B accrues a right to be made reparations from the wrongdoer. In contradistinction thereto, States C–Z, because and insofar as they are not “specially affected,” enjoy no right to be compensated (or to be awarded any other form of reparation) in their own right or for their own benefit. Instead, they enjoy a limited right to demand that the wrongdoer perform its obligation of reparation to, and in the interest of, the injured State. See Obligations of States in Respect of Climate Change, Advisory Opinion, ¶ 443 (July 23), <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf> [<https://perma.cc/ZRSS-RM9Z>]; *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2 Y.B. Int’l L. Comm’n 31, 127, ¶ 11, U.N. Doc. A/56/10 (2001) [hereinafter *DARSIWA Commentaries*]; see also Giorgio Gaja, *The Concept of an Injured State*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 941, 946–47 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

9. NEDESKI, *supra* note 2, at 70.

10. For a discussion on the convergence between notions of interdependent obligations and obligations *erga omnes* and *erga omnes partes*, see generally Priya Urs, *The Elusiveness of ‘Interdependent Obligations’ and the Invocation of Responsibility for their Breach*, BRITISH Y.B. INT’L L., 2024, at 1.

[T]he obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹¹

As alluded to in the quoted excerpt, the rationale underpinning the existence of such rules is that they protect common interests. Common interests are certain fundamental values, objectives, benefits, or goods, the actualization or protection of which, on any given occasion, can never be in the interest of only one state.¹² In its recent *Climate Change* advisory opinion, the court aptly relied on this same rationale to justify its conclusion that certain climate change-related obligations enjoy *erga omnes* status:

In the present context, the Court considers that all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas. Consequently, States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes* . . . They seek to protect the essential interest of all States in the safeguarding of the climate system, which benefits the international community as a whole. As such, the Court considers that the obligations of States under these treaties are obligations *erga omnes partes*.¹³

The atmosphere is unique because it is a physical component of the Earth's climate system that envelops the whole planet.¹⁴ Damage to the atmosphere entails the degradation of a natural global space belonging to no single state but which is instead shared by the international community as a whole.¹⁵ However, it is not when only common resources, spaces or systems are degraded that

11. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase Judgment, 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5).

12. The court speaking on the nature of the obligations *erga omnes partes* enshrined in the Genocide Convention observed, "In such a convention the contracting States *do not have any interests of their own; they merely have, one and all, a common interest*, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention." Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (emphasis added).

13. Obligations of States in Respect of Climate Change, *supra* note 8, ¶ 440.

14. For a definition of "atmosphere" and commentary thereto, see Int'l L. Comm'n, Rep. of the Comm'n to the G.A. on the Work of Its Seventy-Second Session, at 26–27, U.N. Doc. A/CN.4/SER.A/2021/Add.1 (Part 2) (2021).

15. On the *erga omnes* and *erga omnes partes* nature of obligations pertaining to shared natural spaces and so-called "global commons," see Gaetano Arangio-Ruiz (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, ¶ 135, U.N. Doc. A/CN.4/444 (June 17, 1992); *see also* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10, ¶ 180; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian

common interests are susceptible to impairment. State A may undermine the common interests of States C–Z by inflicting harm to the territory, subjects, or property belonging to only one particular state (say, State B). This notion can be illustrated by reference to the prevention of torture and adjacent obligations which are widely recognized as enjoying an *erga omnes* and *erga omnes partes* quality.¹⁶ Where State A tortures or fails to prevent the torture of the nationals of State B, the latter state is said to incur an injury because one of its subjects has been made to suffer physical and psychological harm. Although it was not

Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. 753, 1026, ¶ 31 (July 19) (declaration by Tladi, J.).

16. The court has repeatedly recognized the *erga omnes partes* status of rights and obligation enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 423, ¶¶ 68–69 (July 20); Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syrian Arab Republic), Order, 2023 I.C.J. 587, ¶¶ 50, 57 (Nov. 16). UNCAT does not specifically outlaw the commission of torture. Nonetheless, such practices are prohibited under customary international law as well as regional and universal human rights treaties. In those capacities, the prohibition is said to be concurrently of *erga omnes* and *erga omnes partes* qualities. Comm’n on Human Rights, Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, ¶ 73, U.N. Doc. E/CN.4/1987/35 (Dec. 24, 1986); see also Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, ¶ 151 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). As a corollary to its *jus cogens* status, see Int’l L. Comm’n, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with commentaries, 65, ¶ 1, U.N. Doc. A/77/10 (2022). On the *erga omnes partes* nature of all rights enshrined in the International Covenant on Civil and Political Rights including those offering protection from torture and assimilative acts (Article 7), see Human Rights Comm., General Comment No. 31 (80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). In the context of the American Convention on Human Rights, see Report on Terrorism and Human Rights, ¶ 155, Inter-Am. Ct. H.R., (OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), <https://hrlibrary.umn.edu/iachr/terrorism-ch3C.html#389> [<https://perma.cc/T6NQ-JS2R>]; Caesar v. Trinidad and Tobago, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 70 (Mar. 11, 2005). On the *erga omnes partes* nature of all rights enshrined in the European Convention on Human Rights, which includes protection from torture and cognate acts, see WILLIAM A SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 725–26 (2015). For tacit recognition in the jurisprudence of the European Court of Human Rights, see Al-Adsani v. United Kingdom, App. No. 35763/97, Concurring Opinion of Judge Pellonpää, Joined by Judge Sir Nicholas Bratza, ¶ 5 (Nov. 11, 2001), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2235763%2F97%22%2C%22itemid%22%3A%22001-59885%22%7D> [<https://perma.cc/AAC8-THSK>]. It can be rationalized that incidental obligations—those as to the prevention and punishment of torture—have an *erga omnes (partes)* status because the principal obligation of which they are derivative—namely, to not commit torture—itself has an *erga omnes* and *erga omnes partes* quality. On the derivative nature, see Etienne Henry, Article 5 – The Prohibition of Torture, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 104, 131 (Humberto Cantu Rivera ed., 2023).

perpetrated against the subjects of States C–Z, the impugned act nonetheless undermines the common interest of these remaining states also. The prohibition on torture and incidental obligations are premised on states’ shared conviction that no individual, whatever their nationality, should be made to incur “direct and deliberate attack[s] against the dignity of the human person.”¹⁷ The torture of any national of State B is invariably an affront to States C–Z’s commitment to eliminate the practice of such trespasses that forcibly deprive individuals of their dignity.¹⁸

Such multilateralized rights and obligations exist under customary international law, and they are also given expression in international treaties.¹⁹ For purposes of this Article, the term *erga omnes partes* refers to conventional obligations and rights opposable collectively, in the common interests of, and between parties to a specific international treaty.²⁰ The term *erga omnes* shall refer to obligations and rights belonging to the international community as a whole under customary international law.²¹ When referring to both types collectively, the Article shall deploy the expression *erga omnes (partes)*. In addition to the obligations mentioned above the court has expressly acknowledged the *erga omnes (partes)* status of:²² “the outlawing of acts of aggression,²³ and of genocide,²⁴ . . . principles and rules concerning the basic rights of the human

17. MANFRED NOWAK, MORITZ BIRK & GIULIANA MONINA, *THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY* 19 (2d ed. 2019).

18. Hum. Rts. Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 2, U.N. Doc. INT/CCPR_GEC_6621_E, (Mar. 10, 1992); *see also* *Filartiga v. Pena-Irana*, 630 F.2d 976, 883–84, 890 (2d Cir. 1980). For poignant testimony detailing how torture forcibly infiltrates and decays a victim’s bodily and mental agency, *see* JEAN AMÉRY, *AT THE MIND’S LIMITS* 21–40 (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1986).

19. *See* *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Second Phase Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5) (“Such obligations derive, for example, in contemporary international law . . . [O]thers are conferred by international instruments of a universal or quasi-universal character.”).

20. *DARSIWA Commentaries*, *supra* note 8, at 126–28.

21. *Id.*

22. *See* *Belg. v. Spain*, 1970 I.C.J. ¶ 34.

23. *See* *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 2024 I.C.J. 753, ¶ 274 (July 19).

24. *See* *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 1996 I.C.J. 595, ¶ 31 (July 11); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)* (New Application: 2002), Judgment, 2006 I.C.J. 6, ¶ 64, (Feb. 3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 87 (Feb. 3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.)*, Judgment, 2022 I.C.J. 478, ¶¶ 106–14 (July 22).

person, including protection from slavery and racial discrimination;²⁵ and the right to “self-determination.”²⁶

The court has expressly recognized that a common interest underpinning an obligation *erga omnes* (*partes*) vests any beneficiary state with the standing to invoke the responsibility of the duty-bearer before the court. Standing is a condition of admissibility.²⁷ It denotes an “entity’s entitlement to submit a claim relating to a certain subject matter.”²⁸ A state is sufficiently entitled to adjudicate a particular claim where it possesses a corresponding interest in the subject matter of that specific claim.²⁹ Typically, an applicant has standing because it possesses a “special interest,” meaning the respondent’s purported non-compliance with a rule of international law, applicable between applicant and respondent, affects the claimant’s territory,³⁰ subjects,³¹ or property.³² Where a state invokes a breach of an *erga omnes* (*partes*) obligation, the court has

25. See Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. 753, 991–92, ¶ 6 (July 19) (declaration by Brant, J.).

26. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 155 (July 9); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 180 (Feb. 25); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. 753, ¶ 274 (July 19); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. 753, 1009, 1018, ¶ 34 (July 19) (separate opinion by Cleveland, J.).

27. See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Judgment, 2022 I.C.J. 478, ¶ 33 (July 22) (“Finally, the Court will deal with the preliminary objection pertaining to the standing of The Gambia (second preliminary objection), which presents a question of admissibility only.”).

28. Angela Del Vecchio, *International Courts and Tribunals, Standing*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, ¶ 1 (Anne Peters & Rüdiger Wolfrum eds., 2010).

29. See, e.g., South West Africa (*Eth. v. S. Afr.*; *Liber. v. S. Afr.*), Second Phase Judgment, 1996 I.C.J. 6, ¶¶ 4, 48 (July 18).

30. On injury to states for harm incurred by their nationals, see generally Hiram Abtahi, *Types of Injury in Inter-States Claims: Direct Injury to the State*, in THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES 199, 209–10 (James Crawford, Abdul Koroma, Said Mahmoudi & Alain Pellet eds., 2017).

31. On injury to states for harm caused to their territory, see *DARSIWA Commentaries, supra* note 8, at 119, ¶ 12.

32. In a decision predating *The Gambia v. Myanmar*, the court had briefly contemplated—without ever furnishing a corresponding answer—whether Bosnia & Herzegovina could claim to have an interest in the commission of genocide against non-Bosnians and whether such a lack of interest might not deprive it of standing to invoke the responsibility of Serbia. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 47, ¶ 185 (Feb. 26) (“In its final submissions the Applicant requests the Court to make rulings about acts of

confirmed the claimant's standing is not contingent on proving possession of a "special interest." Pursuant thereto, any rights-holder, even if it (its nationals, territory, and property) is not the immediate and direct target of the impugned conduct, can nevertheless bring a claim with a view to enforcing an obligation *erga omnes (partes)*.³³ In recent years, there has been a number of cases initiated in reliance on such common interest by non-directly injured states,³⁴ and as the court continues to recognize new categories of *erga omnes (partes)* rules,³⁵ this trend is likely to grow.

genocide and other unlawful acts allegedly committed against 'non-Serbs' outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.".

33. Application of the Covenant on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Preliminary Objections, Judgment, 2022 I.C.J. 478, ¶¶ 106–114 (July 22); Questions Relating to the Obligation to Prosecute or Extradite (*Bel. v. Sen.*), Judgment, 2012 I.C.J. 423, ¶¶ 68–69.

34. In the case of Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Can. and Neth. v. Syrian Arab Republic*), see Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Can. and Neth. v. Syrian Arab Republic*), Joint Application, ¶ 7 (June 8, 2023), <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-app-01-00-en.pdf> [<https://perma.cc/S642-7HA4>]; Memorial of the Netherlands, Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Can. & Neth. v. Syrian Arab Republic*), ¶ 29 (Oct. 10, 2023), <https://icj-web.leman.un-icc.cloud/sites/default/files/case-related/188/188-20231010-ora-01-00-bi.pdf> [<https://perma.cc/UEM3-JUD8>]. In the case of Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (*Nicar. v. Ger.*), see Memorial of Germany, Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (*Nic. v. Ger.*), 38–39 (Apr. 8, 2024), <https://www.icj-cij.org/sites/default/files/case-related/193/193-20240408-ora-01-00-bi.pdf> [<https://perma.cc/R75Z-YQ3Y>].

35. In the *Climate Change* opinion, the court not only attached the *erga omnes (partes)* label to various conventional and customary rules related to climate change but also likely laid down the schematics for the similar recognition of other environmental obligations which have long been theorized in doctrine as enjoying an *erga omnes (partes)* status. For discussions on environmental obligations believed to be opposable *erga omnes (partes)*, see, for example, Jutta Brunnée, *International Environmental Law: Rising to the Challenge of Common Concern?*, 100 A.S.I.L. PROCEEDINGS 307, 307 (2006); PATRICIA W. BIRNIE ET AL., *INTERNATIONAL LAW AND THE ENVIRONMENT* 145, 234, 253–54 (2009); see also Case Concerning the Gabčíkovo-Nagymaros Project (*Hung./Slovk.*), 1997 I.C.J. 7, 88, 117–18 (separate opinion by Weeramantry, J.); Whaling in the Antarctic (*Austl. v. Japan; N.Z. Intervening*), Verbatim Record, ¶¶ 14–22 CR 2013/16, <https://api.icj-cij.org/sites/default/files/case-related/148/148-20130626-ORA-01-00-BI.pdf> [<https://perma.cc/W57U-M8CU>] (July 9, 2013 at 10:00 CET). Currently before the court is the case of *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Islamic Republic of Iran v. Canada, Sweden, Ukraine and United Kingdom)*, where the court will likely pronounce on whether the prohibition on the use of weapons against

An emerging judicial trend concerning multilateralized rights is that states are relying on common interests to participate as third state intervenors in ongoing cases involving adjudication of corresponding obligations *erga omnes (partes)*. Thus far, three states have filed applications to intervene under Article 62 of the Statute of the International Court of Justice (“ICJ Statute”) relying on cognate interests.³⁶ All three invoke the common interests underlying the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).³⁷ The court has never pronounced on whether an application to intervene in reliance on a common interest of any kind is capable of satisfying the conditions for admission under Article 62. It is precisely the purpose of this Article to fill that lacuna by analyzing the arguments pleaded in Nicaragua’s request to intervene in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. Out of the three abovementioned applications, Nicaragua’s was the most comprehensively argued and presented questions with the widest degree of general significance. Owing to the former feature, Nicaragua’s application is conducive to producing the most exhaustive study of the prospects of successfully relying on common interests animating the Genocide Convention specifically. The latter feature ensures that, despite the specialized subject matter of the application, the findings presented in this Article will be relevant to determining the viability of relying on other common interests for the purpose of intervening similarly in any future case involving a different type of obligation *erga omnes (partes)*.

civil aircraft under Article 3*bis* of the Chicago Convention enjoys *erga omnes* status. See Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Islamic Republic of Iran v. Can., Swed., Ukr. & U.K.), Application Instituting Proceedings, ¶¶ 11, 19, 25(b) (Apr. 17, 2025), <https://www.icj-cij.org/sites/default/files/case-related/198/198-20250417-app-01-00-en.pdf> [<https://perma.cc/A8UP-SVUP>].

36. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application for Permission to Intervene Submitted by Nicaragua, ¶¶ 14–15 (Jan. 23, 2024) [hereinafter Nicaragua’s Application to Intervene], <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240123-int-01-00-en.pdf> [<https://perma.cc/3H3C-Y373>]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application for Permission to Intervene and Declaration of Intervention of Belize, ¶ 36 (Jan. 30, 2025) <https://www.icj-cij.org/sites/default/files/case-related/192/192-20250131-int-01-00-en.pdf> [<https://perma.cc/Z78R-J9FW>]; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Application for Permission to Intervene by the Government of the Republic of Poland, ¶¶ 10–15 (July, 23, 2024), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240723-int-01-00-en.pdf> [<https://perma.cc/226L-KVEJ>].

37. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

I. SOUTH AFRICA'S CASE AGAINST ISRAEL AT THE ICJ AND NICARAGUA'S INTERVENTION UNDER ARTICLE 62 OF THE ICJ STATUTE

On December 29, 2023, South Africa instituted proceedings against Israel before the court for alleged violations of the Genocide Convention.³⁸ In particular, South Africa avers that Israel is internationally responsible for certain genocidal acts and omissions “calculated to bring about the destruction of the Palestinian group in Gaza.”³⁹

A. *South Africa's Claim and Erga Omnes Partes Standing*

South Africa's case consists of nine claims.⁴⁰ Each claim concerns a separate alleged treaty violation and can be categorized under one of two headings. First, South Africa submits these alleged genocidal acts and omissions are attributable to Israel, and therefore, Israel itself is internationally responsible for: (i) the attempted or actual commission of genocide; (ii) incitement of, or complicity in, genocide; and (iii) conspiring to commit genocide.⁴¹ Second, to the extent any alleged genocidal acts are deemed non-attributable to Israel, South Africa pleads Israel has nevertheless defaulted on its obligation to prevent these genocidal acts and to punish their perpetrators.⁴²

South Africa must prove it has standing for its claims to be admissible.⁴³ As mentioned previously, a state has “standing” where it possesses an interest in the subject matter of its claim.⁴⁴ However, in the present case, South African subjects are not the ones harmed by Israel's purported violations of the Genocide Convention. Thus, South Africa cannot possess—nor does it purport to possess—a *special* interest with respect to Israel's alleged non-compliance with the Genocide Convention.⁴⁵ South Africa instead relies on the *erga omnes*

38. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application Instituting Proceedings and Request for the Indication of Provisional Measures, ¶ 1 (Dec. 29, 2023) [hereinafter South Africa's Application], <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> [<https://perma.cc/Z5XG-QY3K>].

39. *Id.*

40. *Id.* ¶¶ 110–11.

41. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, 118–19, ¶ 179 (Feb. 26) (recognizing that a state can itself commit and be held responsible for the commission of genocide).

42. S. Afr. v. Isr., South Africa's Application, *supra* note 38, ¶ 110.

43. See Giorgio Gaja, *Standing: International Court of Justice (ICJ)*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., ¶ 2 (Hélène R. Fabri ed., 2018).

44. See South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase Judgment, 1966 I.C.J. 6, ¶¶ 4, 48 (July 18).

45. S. Afr. v. Isr., South Africa's Application, *supra* note 38, ¶¶ 130–33.

partes nature of these obligations as the basis of its standing.⁴⁶ South Africa claims that, owing to their *erga omnes partes* nature, every contracting party to the Genocide Convention has a collective, shared, or common interest in every other contracting party's compliance with these conventional obligations, and correspondingly has standing to invoke the international responsibility of any other contracting party for violations of the Genocide Convention.⁴⁷ This proposition aligns with the court's contemporary jurisprudence. Indeed, in *The Gambia v. Myanmar*, the court affirmed that standing for a claim under the Genocide Convention is not conditional on a claimant's demonstration of a special interest.⁴⁸ The contracting parties' "common interest in compliance with the relevant obligation under the Genocide Convention" imbues any one of them, "without distinction," with the requisite standing to invoke the responsibility of another before the court.⁴⁹ Thus, the court is likely to uphold South Africa's standing to pursue its claim.

B. *Nicaragua's Application to Intervene*

On January 23, 2024, Nicaragua applied for permission to intervene in the abovementioned proceedings under Article 62 of the ICJ Statute.⁵⁰

1. *Intervention Under Article 62 of the ICJ Statute*

Pursuant to Article 62, a "third state" may be permitted to participate in contentious proceedings if it proves it "has an interest of a legal nature which may be affected by the decision in the case."⁵¹ Admission is contingent also on the object of the intervention (such as the motive behind the third state's participation; the manner in which that state shall seek to engage with the court; or what that state shall request from the court)⁵² being deemed "proper."⁵³

Thus, three prongs must be satisfied for a state to be admitted to intervene. The state must show: (1) it has an interest of a legal nature (2) which may be affected by the decision in the case; and (3) the object of its intervention is proper.

46. *Id.* ¶¶ 5, 13, 16.

47. *See id.* ¶ 16.

48. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Judgment, 2022 I.C.J. 478, ¶ 108 (July 22).

49. *Id.*

50. *See generally* *S. Afr. v. Isr.*, Nicaragua's Application to Intervene, *supra* note 36.

51. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 25 [hereinafter ICJ Statute]; *see also* Alina Miron & Christine Chinkin, *Article 62*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY*, *supra* note 51, ¶ 44 (Andreas Zimmermann et al. eds., 2019) [hereinafter COMMENTARY].

52. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 148, ¶ 14 (Mar. 21) (dissenting opinion by Jennings, J.).

53. *See* Miron & Chinkin, *supra* note 51, ¶¶ 75–90.

C. Nicaragua's Purported Interests of a Legal Nature

Nicaragua sought to satisfy the “interest of a legal nature” criterion by relying on its own common interest in the *erga omnes partes* provisions of the Convention.⁵⁴ It did so in two ways. First, Nicaragua claimed that it has an interest as a “beneficiary” of the obligations and rights *erga omnes partes* enshrined in the Genocide Convention, which legally entitle it to see that genocide is never committed and that all perpetrators of genocide are duly punished.⁵⁵ Second, Nicaragua argued it is the “debtor”⁵⁶ of an obligation, owed collectively to all the other contracting parties, to itself prevent and punish genocide,⁵⁷ which is triggered when genocidal acts are suspected to have occurred.⁵⁸ The findings of the court bear on the question of Nicaragua’s own compliance with these obligations (that is to say, if the Court finds genocide is being committed, Nicaragua believes that its adherence to its own duty to prevent and punish genocide under the Convention could be called into serious question), and to that end, Nicaragua possesses a second interest in the case, so says Nicaragua.

D. Outstanding Questions Presented by Nicaragua's Intervention

Nicaragua’s application to intervene presented certain, previously unanswered, questions to the court. For example, the first prong compels one to reconsider the normative nature of common interests. Do they afford merely a procedural right to enforce the underlying obligation, or does the commission of genocide against the Palestinian people affect Nicaragua’s interests substantively, and if so, how? Moreover, it has been suggested that only “individualized” interests are capable of satisfying “the interest of a legal nature” requirement.⁵⁹ Nicaragua’s application to intervene compels one to define the parameters of this criterion and determine whether the common, collective, and shared nature of states’ interests underpinning obligations *erga omnes (partes)* runs counter to the normative content of this purported condition.

The second prong requires considering the scope of the term “affected.” In the past, states have justified their intervention under Article 62 largely on the premise that their interests risked being negatively affected.⁶⁰ However, could a state justify its intervention on the premise that the judgment could positively

54. S. Afr. v. Isr., Nicaragua’s Application to Intervene, *supra* note 36, ¶¶ 13–16.

55. *Id.*

56. The author uses “debtor” to signify Nicaragua itself is prescribed an obligation to prevent and punish the commission of genocide.

57. S. Afr. v. Isr., Nicaragua’s Application to Intervene, *supra* note 36, ¶¶ 13–16.

58. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, 221, ¶ 431 (Feb. 26).

59. See *infra* Part III.

60. See Miron & Chinkin, *supra* note 51, ¶¶ 58–71.

affect that interest? That is to say, assuming Nicaragua does have a substantive interest in protecting Palestinians from genocide, is the prospect that the court could render a judgment ordering Israel to cease its genocidal acts, thereby vindicating Nicaragua's interest, sufficient to satisfy this criterion?

The third and fourth prongs present various interrelated questions. Nicaragua had posited that one of the purposes of its intervention was to defend its interest in seeing to it that Palestinians are not subjected to genocide.⁶¹ The court has recognized that intervening for the purpose of engaging with and pleading before it substantively on the merits of the case, with a view to protecting one's interests, is proper.⁶² However, the interest which Nicaragua seeks to protect is the same as the common interest which South Africa has invoked as the basis of its standing to bring the claim against Israel.⁶³ In other words, South Africa is already defending the very interest which Nicaragua sought to protect by engaging with the court. This duplication begs the question of whether Nicaragua's participation might be considered redundant, and whether that redundancy ought not to have compelled the court to dismiss the request on the grounds that South Africa is already defending Nicaragua's common interest and therefore the object of Nicaragua's intervention was devoid of any utility or meaning.

Another purpose of Nicaragua's intervention was to align itself with South Africa and lend support to it in successfully making out its claims against Israel.⁶⁴ The court has never pronounced on whether intervention for the specific purpose of lending aid or support to one side in invoking the responsibility of the other side is proper. The *travaux préparatoires* of the ICJ Statute indicate not only that this ought to be proper but that it is among the reasons why the possibility of intervening was made available to states in the first place.⁶⁵ However, by admitting an intervention on such grounds, the court would have set a precedent which carved a path for future intervention under Article 62 by similarly minded *erga omnes partes* rightsholders under the Genocide Convention. The prospect of an influx of intervenors joining the case, and seeking to align themselves with South Africa, would have likely raised concerns about the preservation of the equality of the (principal) parties before the court.⁶⁶ This Article

61. See *infra* subsection V(A)(1).

62. *Id.*

63. See *infra* subsection V(A)(2).

64. S. Afr. v. Isr, Nicaragua's Application to Intervene, *supra* note 36, ¶ 21(d).

65. See *infra* subsection V(B)(2).

66. Similar concerns manifested in the context of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, wherein thirty-two states, seemingly all aligned with Ukraine, intervened under Article 63 with a view to aligning themselves with Ukraine. See Juliette McIntyre, *Less a Wave Than a Tsunami: Procedural Implications for the ICJ of the Article 63 Interventions in Ukraine v. Russia*, VÖLKERRECHTSBLOG (Oct. 11, 2022), <https://perma.cc/89V8-8MWM>; Ton Nu Thanh Binh, *Article 63 Intervention Before*

will therefore discuss the prospects of such a risk materializing and whether this could have compelled the court to dismiss Nicaragua's application.⁶⁷

Finally, Nicaragua posited that it sought to participate in the proceedings to comply with its own obligation to prevent and punish the commission of genocide.⁶⁸ This claim requires inspecting the normative contents of the obligations enshrined in the Genocide Convention to determine whether it obliges one State to prevent and punish the commission of genocide by another State. This query spawns derivative sub-questions, including: Can one State ever punish another State for a violation of an international obligation? Is recourse to the ICJ, either in the capacity of a principal claimant or an incidental intervenor, a means for State A to satisfy any obligation to prevent or suppress the commission of genocide by State B? And, would it be aligned with the functional purpose of Article 62 to permit a third state intervenor to participate in a case solely so that this third party can thereby discharge its own international obligations?

E. Purpose, Thesis, Scope, and Relevance of This Article

This Article seeks to further elaborate on, critically analyze, and, where possible, provide answers to the questions tabulated above. The findings presented here are particularly relevant given that on April 1, 2025, Nicaragua withdrew its application,⁶⁹ thereby depriving the court of the opportunity to pronounce on these questions itself. This Article takes the view that Nicaragua's intervention should have been deemed admissible. To that end, it shall demonstrate how, why, and to what extent Nicaragua's application satisfies the conditions prescribed by Article 62.

Naturally, this Article focuses principally on the *erga omnes partes* provisions enshrined in the Genocide Convention. Nevertheless, the analysis should prove equally instructive when appraising the admissibility of any prospective interventions, in future cases, made in reliance on other obligations *erga omnes (partes)*. This is because the majority of conclusions are premised on substantive and normative features common to all obligations *erga omnes (partes)*.

the International Court of Justice: New Developments and the Way Forward, OPINIO JURIS (July 26, 2024), <https://perma.cc/9KUZ-D3MT>.

67. See *infra* subsections V(B)(3)–(4).

68. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶ 21(b), (c).

69. Press Release, I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.): Declarations of Intervention in the Proceedings Filed on 12 March 2026 by Namibia, the United States of America, Hungary and Fiji Under Article 63 of the Statute of the Court, Press Release No. 2025/15 (Apr. 3, 2025), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20260312-pre-01-00-en.pdf> [<https://perma.cc/9R4W-L4Y2>].

Finally, it should be borne in mind that Nicaragua sought to intervene in these proceedings specifically in the capacity of a party.⁷⁰ Nicaragua's decision to intervene as a party is considered and addressed to the extent that it proves to be a relevant variable vis-à-vis determining whether Nicaragua possesses a qualifying "interest of a legal nature," and appraising the propriety of the "objects" of its interventions. Conditions that must be satisfied for a third state to be admitted as a party, but whose fulfilment do not appear to be dynamically modulated by the *erga omnes* (*partes*) nature of the interests, rights, and obligations invoked, are outside the scope of this Article.⁷¹ This includes, inter alia, whether a "jurisdictional link" exists between Nicaragua and the principal parties, and whether Nicaragua would have been required to prove the existence of a dispute between itself and any one or both of the disputants.⁷²

II. COMMON INTERESTS QUALIFY AS "INTERESTS OF A LEGAL NATURE"

This Part will discuss Nicaragua's interest only as a beneficiary of the obligations in the Genocide Convention. It shall not address its interest as a debtor of those obligations. This is because, for the reasons articulated in Part V, the latter interest does not attract a corresponding proper "object."⁷³ Consequently, Nicaragua could never rely on that interest, irrespective of whether or not it qualifies as an "interest of a legal nature," to intervene in the present case (thereby rendering the question moot ab initio).⁷⁴

A. *Historical Treatment of this Question*

To date, the court has yet to rule on whether the common interest underlying *erga omnes* (*partes*) obligations can be invoked to satisfy the "interest of a legal nature" criterion enshrined in Article 62.⁷⁵

70. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶¶ 20–22.

71. On the topic of the capacity of the intervenor, see Miron & Chinkin, *supra* note 51, ¶¶ 121–128; JUAN JOSÉ QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE 873–88, 905–11 (2015).

72. For discussions of this question, see Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 148, ¶ 15 (Mar. 21) (dissenting opinion by Jennings, J.); Juliette McIntyre, *Why Nicaragua's Article 62 Intervention in South Africa v. Israel is Potentially Unhelpful*, VERFASSUNGSBLOG (Feb. 11, 2024), <https://verfassungsblog.de/why-nicaraguas-article-62-intervention-in-south-africa-v-israel-is-potentially-unhelpful/> [<https://perma.cc/YZN8-FJZ8>]. The author reserves no formal position on this particular matter.

73. See *infra* Part V.

74. The court has rejected applications to intervene where, despite the State possessing a qualifying interest of a legal nature, there was no proper object to the intervention. See Miron & Chinkin, *supra* note 51, ¶¶ 77–83.

75. Giorgio Gaja, *The Protection of General Interests in the International Community*, 364 HAGUE ACAD. COLLECTED COURSES ONLINE 19, 119 (2011).

However, this is not to say that the question has never been put to the court. The question did emerge in 1995, in *Request for an Examination*. Four Small Island Developing States each submitted virtually identically worded applications for intervention where they sought to satisfy Article 62 by invoking the common interest allegedly underlying Article 4(6) of the 1986 Noumea Convention. They expressly characterized Article 4(6) as possessing an *erga omnes partes* quality in its capacity as a conventional obligation, and also as being of an *erga omnes* nature in its concurrent capacity as a rule of customary international law.⁷⁶ The request of the applicant (New Zealand) for examination was ultimately dismissed by the court, bringing to an end the principal proceedings.⁷⁷ As such, the applications for intervention, insofar as they were ancillary to the principal proceedings, were inevitably dismissed without consideration of their merits.

The interplay between common interests and Article 62 has attracted limited scholarly attention. In 1993, Chinkin theorized, it “does not appear that the Court will regard intervention to uphold what can be termed ‘public rights’ as appropriate.”⁷⁸ However, this was reasoned on the basis that the court had yet to afford an applicant State standing to invoke the responsibility of another State in reliance on its common interest in obligations and rights *erga omnes (partes)*.⁷⁹ In 2005, the interplay was briefly addressed by the *Institut de Droit International* (“IDI”). They concluded the court “should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court,” but caveated that “specific rules should govern this

76. 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 (N.Z. v. Fr.), Application for Permission to Intervene under Article 62/Declaration of Intervention under Article 63 submitted by the Government of the Marshall Islands, 1995 I.C.J. 288, ¶¶ 4, 13–14, 20, 25 (Aug. 24, 1995) [hereinafter Marshall Islands’ Application to Intervene]; see also 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 (N.Z. v. Fr.), Application for Permission to Intervene Under Article 62/Declaration of Intervention Under Article 63 submitted by the Government of the Solomon Islands, 1995 I.C.J. 288, ¶¶ 4, 13–14, 16, 19–20, 25 (Aug. 24, 1995); 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 (N.Z. v. Fr.), Application for Permission to Intervene Under Article 62/Declaration of Intervention Under Article 63 submitted by the Government of the Federated States of Micronesia, 1995 I.C.J. 288, ¶¶ 4, 14, 16, 19–20 (Aug. 24, 1995); 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 (N.Z. v. Fr.), Application for Permission to Intervene Under Article 62/Declaration of Intervention Under Article 63 submitted by the Government of Samoa, 1995 I.C.J. 288, ¶¶ 4, 19–20 (Aug. 24, 1995).

77. 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 (N.Z. v. Fr.), Order, 1995 I.C.J. 288, 307, ¶ 68 (Sept. 22); see also Gaja, *supra* note 75, at 120.

78. CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 288 (1993).

79. *Id.*

participation.”⁸⁰ However, they expressed trepidation as to whether Article 62 was the appropriate vehicle for facilitating such intervention.⁸¹

B. *Meaning, Threshold, and Contents*

An interest of a legal nature has proven to be an elusive concept,⁸² with the court opting to define this criterion in the negative.⁸³ An oft-cited definition is that “this interest has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature.”⁸⁴

Where the intervenor seeks to participate in the capacity only of a non-party,⁸⁵ the prevailing view is that the threshold for satisfying this criterion is lower than that of a legal “right” proper.⁸⁶ Nonetheless, various judges have contested this proposition. Referring to the historical development of Article 62, some observe, etymologically, the interest of a legal nature was adopted as a compromise.⁸⁷ It reconciled discordant opinions as to whether intervention should be contingent on the presence of concrete “rights” or, instead, on the possibility that a state’s mere “interest” could be affected.⁸⁸ Consequently, any

80. Giorgio Gaja, *Les Obligations et Les Droits Erga Omnes*, 1 ANNULAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 119, 145 (2005).

81. *Id.*

82. See, e.g., Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 421, 458, 458–59, ¶¶ 3–8 (May 4) (declaration by Keith, J.) (“Until today, the Court has not attempted to provide a definition or an elaboration of the expression ‘an interest of a legal nature’ as it appears in Article 62 of the Statute.”).

83. QUINTANA, *supra* note 71, at 860–67.

84. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 358, ¶ 26 (May 4).

85. A party intervenor can be distinguished from a non-party intervenor in two principal ways. First, a party intervenor can ask the court to pass judgment on claims of its own. Secondly, the party intervenor becomes bound by the judgment and acquires rights and obligations thereunder. See Miron & Chinkin, *supra* note 51, ¶ 99; Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. Rep. 421, ¶ 47 (May 4) [hereinafter Honduras’s Application to Intervene].

86. See Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 358, ¶ 26 (May 4).

87. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 374, ¶¶ 21–23 (May 4) (dissenting opinion by Al-Khasawneh, J.); see also Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 401, ¶ 10 (May 4) (joint dissenting opinion by Trindade, J., and Yusuf, J.); Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 115, ¶ 16 (March 21) (dissenting opinion by Ago, J.).

88. Advisory Comm. of Jurists, *Procès-verbaux of the Proceedings of the Committee: June 16th–July 24th 1920 with Annexes* 592–94, 642–43 (1920); see also I.C.J., *Preparation of the Rules of Court*, 1922 P.C.I.J. (ser. D) No. 2, at 86 (1922) (“Lord Finlay based his suggestion on the argument that States might be interested in a case not only because their *actual rights were affected* . . .”) (emphasis added).

purported line of demarcation separating legal rights from interests of a legal nature cannot be readily delineated. Scholars have also conceptualized legal rights as nothing more than legally protected interests.⁸⁹

Moreover, the court has, with respect to its procedural jurisprudence, coupled both concepts as substantive bases for imbuing applicant states with standing to claim. Indeed, in *South West Africa*, the court observed that to determine whether the applicants had standing, it had to ascertain whether they possessed a “legal right or interest regarding the subject-matter of their claim.”⁹⁰ In doing so, the court has possibly alluded, at least for procedural purposes, to the normative equivalence, interchangeable nature, or, at the very least, the symbiotic relationship between the notion of legal rights and legal interests.

The *Oxford Commentary* to the ICJ Statute adopts a functional definition by proposing that a qualifying interest for the purposes of Article 62 intervention should be one “protected under international law,”⁹¹ say, by way of a conventional or customary rule. Judge Mbaye, writing extrajudicially, agrees that legal interests are those which can be justified through reference to a particular rule of international law.⁹² Likewise, Judge Gaja concurs that “it has to be assumed that the interest in question must exist according to international law.”⁹³ These interpretations suggest that one way to satisfy the criterion is for the intervenor to prove the interest it invokes receives protection from, or is otherwise imbued in, an international right or obligation.⁹⁴

To accommodate the possibility that there might be a difference between a legal interest and a legal right, this Article will discuss satisfaction of both thresholds. It will distinguish legal rights from legally protected interests along the following margins. A legal right shall refer to a state’s lawful entitlement to the performance, or observance, of a particular conduct.⁹⁵ Legal interests will

89. CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 34 (2009).

90. *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase Judgment, 1966 I.C.J. 6, ¶¶ 4, 48 (July 18).

91. Miron & Chinkin, *supra* note 51, ¶ 47.

92. Kéba Mbaye, *L'intérêt pour agir devant la Cour internationale de Justice*, 209 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE 227, 263 (1988).

93. *Jurisdictional Immunities of the State* (Ger. v. It.), Application by the Hellenic Republic for Permission to Intervene, Order, 2011 I.C.J. 531, ¶ 2 (July 4) (declaration by Gaja, ad hoc J.).

94. On acknowledgement of the relationship between legal interests and rights generally, see Written Statement of the United Kingdom, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Pleadings 48, 71 (May 28, 1951) (“This important right must clearly be confined to States having a legitimate interest in the matter; and this, from the point of view of the Court, must mean a legal interest derived from the possession of a legal right.”).

95. See Beatrice I. Bonafé, *Interests of a Legal Nature Justifying Intervention Before the ICJ*, 25 LEIDEN J. INT’L L. 739, 742 (2012).

be taken to connote values, objectives, benefits, or goods,⁹⁶ which are afforded legal protection by way of rights or obligations under international law of which the intervenor is a beneficiary.

It is prudent to consider both thresholds because it is not expressly clear whether the threshold is intended to covary with, and depend on, the capacity in which a state seeks to intervene. Admittedly, in its judgment concerning Honduras's intervention in *Nicaragua v. Colombia*, the court specified that:

The Court observes that, whereas the parties to the main proceedings are asking it to recognize certain of their rights in the case at hand, a State seeking to intervene is, by contrast, contending, on the basis of Article 62 of the Statute, that the decision on the merits could affect its interests of a legal nature. The State seeking to *intervene as a non-party therefore* [indicating a causal link] does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected.⁹⁷

This excerpt warrants two observations. First, the court expressly refers to the state “seeking to intervene as a non-party.” The Court chose to make this specification knowing Honduras’ application was principally for admission as a party and that Honduras was only in the alternative applying to be admitted as a non-party. Viewed against this backdrop, one might extrapolate from the putative distinction drawn above that only non-party intervenors are absolved from establishing that their rights may be affected. That, conversely, those seeking to intervene as a party, *qua* Nicaragua in *South Africa v. Israel*, must furnish a right proper.

Second, the qualifying statement at the beginning of the paragraph lends further support to this reading. The court appears to rationalize that a threshold lower than a right proper is applicable on the premise that the non-party intervenor’s position is dissimilar to the principal disputants because the non-party intervenor is not asking the court to pass judgment on its rights. Read in conjunction with the court’s acknowledgement that a “State which has been permitted to intervene as a party may submit claims of its own to the Court for decision,”⁹⁸ one could perhaps infer that the court perceives the position of a state seeking to intervene as a party as being assimilable with that of the principal disputants, which might in turn suggest the lower threshold of an (as opposed to a right proper) does not apply to this party intervenor.

96. See André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT’L L. 769, 776–77 (2012).

97. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. Rep. 421, ¶ 37 (May 4) (emphasis added).

98. *Id.* ¶ 47.

However, the conceptualization above is not the most credible reading. The court's acknowledgement of the distinction between a right proper and an "interest of a legal nature" was preceded by a specification that:

If it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute . . . The fact remains that, *whatever the capacity in which a State is seeking to intervene*, it must fulfil the condition laid down by Article 62 of the Statute and demonstrate that it has an interest of a legal nature which may be affected by the future decision of the Court.⁹⁹

The court acknowledged that whereas a party intervenor can request that the court pass judgment on its "rights" proper it must first satisfy the "interest of a legal nature" criterion. By referring to "rights" in describing the object upon which the court can pass judgment when a state participates as a party and using a different expression, namely "interest of a legal nature," when identifying the object which a state must possess to be admitted to participate as a party, the court creates the impression that it takes these terms to denote non-synonymous variables in the context of party interventions as well. In addition, the court's specification that interests of a legal nature criterion must be fulfilled "whatever the capacity in which a State is seeking to intervene," suggests that the threshold is an unchanging one which remains constant irrespective of the intervenor's desired status. The non-dynamic nature of the threshold would in turn suggest that, in the context of party intervention, the applicable threshold should be consistent with the court's existing body of jurisprudence on non-party intervention wherein it has been repeatedly underscored that a right proper is not necessary.

Judges Trindade and Yusuf too appear to support the idea that the "interest of a legal nature" criterion is an unfluctuating one. In their Joint Declaration appended to the majority judgment, they endorse the distinction drawn by the court between legal rights and "interests of a legal nature," and explicitly state that the capacity in which a party desires to intervene is to be treated as an apathetic variable at the stage of appraising the existence of a qualifying interest:

In the *cas d'espèce*, the applicant State has not demonstrated that it has an "interest of a legal nature" that may be affected by the decision in the case. As we noted in our joint dissenting opinion in the other case concerning Costa Rica's Application for permission to intervene, a State seeking to intervene needs to demonstrate that it has an "interest of a legal nature that may be affected by the decision in the case." *In this regard, it seems irrelevant at this stage, for the purpose of assessing the criteria for intervention laid down in*

99. *Id.* ¶¶ 29–30 (emphasis added).

*Article 62 of the Statute, whether the applicant third-State wishes to intervene as a party or a non-party in the main proceedings.*¹⁰⁰

If the question of capacity is thus apathetic, it ought to follow that a state's desire to intervene as a party can have no bearing on the threshold prescribed by the criterion of an "interest of a legal nature."¹⁰¹

Finally, the court has never expressly indicated that the admission of an applicant seeking to intervene as a party is conditional on the furnishing of rights proper. Thus, the latter reading presented above is the more credible one and is the one which this Article espouses.

C. *Reliance on Common Interests Ought to be Sufficient to Satisfy the "Interest of a Legal Nature" Criterion*

This Section shows that reliance on common interests ought to be sufficient to satisfy the "interest of a legal nature" criterion.

1. *Acknowledging the Views of Proponents and Opponents*

Proponents of admitting interventions in reliance on common interests, such as Ben Juratowitch, invoke deductive reasoning to justify their stance.¹⁰² They argue that if such provisions are capable of imbuing all relevant states with the requisite legal interests or rights to invoke the responsibility of another before the court "in any given case," then they should be equally qualified to satisfy the requirement of an "interest of a legal nature" as prescribed by Article 62.¹⁰³ This Article concurs with these views for reasons it will deconstruct in the subsequent subsection.

However, before doing so, it is paramount to first acknowledge and rebuke countervailing voices. Brian McGarry has argued that any reference to legal interests underpinning obligations *erga omnes* (*partes*) denotes only a *procedural* right to bring an international claim without necessarily imbuing the state with a legal interest in the characteristics, elements, or values legally protected

100. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 401, ¶ 4 (May 4) (joint dissenting opinion by Trindade, J., and Yusuf, J.) (emphasis added).

101. This is not however to say that an aspiring party intervenor might not need to prove existence, and possession, of rights to satisfy the jurisdictional link requirement.

102. ASIL1906, *Whose Dispute is it Anyway? Multilateral Litigation Before International Courts*, at 30:49–32:00, 47:10–50:00 (YouTube, Mar. 31, 2023), https://www.youtube.com/watch?v=JK_LllgcKnc&list=PLYp0ZUypbrnfnyterQhI77jzWN8nuExuh [<https://perma.cc/6VXT-C4CB>].

103. *Id.*; see also Gaja, *supra* note 75, at 119 ("Whatever 'interest of a legal nature' is required in Article 62 of the Statute, it cannot be higher than the one that justifies bringing a claim before the Court.").

by such obligations, *substantively*.¹⁰⁴ According to McGarry, absent this substantive component, reliance on *erga omnes* (*partes*) provisions can never satisfy the interest of a legal nature criterion.¹⁰⁵ To justify his conceptualization,¹⁰⁶ he cites an excerpt from Judge Keith’s Declaration in *Nicaragua v. Colombia* (Honduras), which sought to artificially divorce the notion of “standing,” (the capacity to bring a claim) from the possession of a substantive legal interest:

reference to “legal interest” from *Barcelona Traction* may be noted—a reference relating to the capacity of a State to bring a claim 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.¹⁰⁷

Beyond this, Judge Keith’s conceptualization is unsubstantiated. Standing, as a normative concept,¹⁰⁸ refers to the entitlement of a prospective applicant “to submit a claim relating to a certain subject matter.”¹⁰⁹ Although standing may be characterized as a procedural right, it appears to be correlative to, and dependent on, the prospective applicant’s legally protected interests, or rights, in the specific subject matter of its application.¹¹⁰ It is this legally protected interest, or right, possessed by the state, which gives rise to standing. The latter procedural aspect cannot exist without the former substantive aspect. This formula was expressly endorsed in the dissenting opinion of Judge Jessup in *South West Africa*, wherein the learned judge advocated in favor of a system of *actio popularis* in international law four years before *Barcelona Traction*. Quoting Professor Jaffe, who had endorsed the formula in a domestic law context, Judge Jessup espoused the view that the same applied under public international law:

[T]he very recognition of the plaintiff’s right to sue is the law’s best testimony to the existence of a substantive right. To put it another way: the quest for a legal right on which to ground standing is a tautology, since the grant of standing itself manifests a legal right . . . the grant of the procedural right of standing confers *ipso facto* substantive rights so that in all cases where there is standing there is also a legal right.

104. Brian McGarry, *Decoding Nicaragua’s Historic Request to Intervene in South Africa v Israel*, EJIL:TALK! (Feb. 21, 2024), <https://www.ejiltalk.org/decoding-nicaraguas-historic-request-to-intervene-in-south-africa-v-israel/> [<https://perma.cc/U5WQ-SNFS>].

105. *Id.*

106. *Id.*

107. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 421, 458, 462 (May 4) (declaration by Keith, J.).

108. TAMS, *supra* note 89, at 28–31.

109. Gaja, *supra* note 43, ¶ 1.

110. TAMS, *supra* note 89, at 29.

Where the legislature has recognized a certain 'interest' as one which must be heeded, it is such a 'legally protected interest' as warrants standing to complain of its disregard.¹¹¹

As mentioned earlier, the court itself has confirmed that standing (a procedural condition) is dependent on possession by the applicant of a "legal right or interest regarding the *subject-matter* of their claim."¹¹² That is to say, standing is contingent on the applicant having an interest in the substance of the matters being litigated.

For all these reasons, the fact that a common interest gives rise to a procedural right to bring a claim presupposes that the common interest itself is substantive in nature. Consequently, there is no reason why a common interest that would entitle a state to initiate a claim as an applicant should not also satisfy the "interest of a legal nature" criterion for the purposes of intervention under Article 62.

2. *Common Interests as Substantive Interests*

The ICJ has recognized that a treaty can contain rights which do not serve to vindicate any tangible interest.¹¹³ Such is not the case for the Genocide Convention. The obligations *erga omnes (partes)* codified in the Genocide Convention afford legal protection to readily identifiable values, objectives, benefits, and goods. Looking to the court's jurisprudence and the Genocide Convention's historical development, one can inductively conclude that the Genocide Convention affords protection to two categories of interrelated substantive interests.

First, the contracting parties are collectively and substantively interested in conserving human plurality. As acknowledged by the court in *Reservations*, the obligations enshrined in the Genocide Convention "safeguard the very existence of certain human groups."¹¹⁴ Protecting different human groups from extinction ensures that human diversity is not depleted. Therefore, by "safeguard[ing]

111. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase Judgment, 1966 I.C.J. 6, 325, 387 (dissenting opinion by Jessup, J.) (July 18).

112. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase Judgment, 1966 I.C.J. 6, ¶¶ 4, 48 (July 18) (emphasis added).

113. *Id.* ¶ 44 ("a legal right or interest need not necessarily relate to anything material or 'tangible', and can be infringed even though no prejudice of a material kind has been suffered. In this connection the provisions of certain treaties and other international instruments of a humanitarian character . . . are cited as indicating that, for instance, States may be entitled to uphold some general principle even though the particular contravention of it alleged has not affected their own material interests;—that again, States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages.").

114. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

the very existence of certain human groups,” the Genocide Convention seeks to realize the parties’ interest to maintain variety within the wider human race.

There exists an inherent value which attaches to conservation.¹¹⁵ This can be traced back to the fact that divisions of humans have identified, associated, and governed themselves on the basis of a shared race, religion, ethnicity, or nationality “for millennia.”¹¹⁶ Variation in communalities has thus been a historical constant of our “human existence” so much so that that plurality can be assimilated into an intrinsic feature of what it means to be human.¹¹⁷ By protecting the continued existence of human groups, states are invariably enriched because they guarantee that a fundamental, if not virtually innate, quality of our shared human organization and co-existence endures. This all in turn manifests in a concrete desire to see human groups spared from actions that would lead to their physical destruction.

To this end, whereas membership to the Genocide Convention is certainly not motivated by any financial or other purely self-serving material incentives,¹¹⁸ the burden falls on those who would deny the machinery of intervention to those seeking to safeguard such common interest, to demonstrate why a state’s interest in protecting entire human groups from extinction is somehow less deserving of effectuation, less concretized, or even less legitimate than that state’s exclusively self-oriented interests.

In any event, states’ interest in preserving plurality does not exist purely in the immanent. States acknowledge that “groups of people united through national, racial or cultural characteristics”¹¹⁹ provide “cultural and other contributions”¹²⁰ that enrich human civilization. This was first underscored by the General Assembly in Resolution 96 (I), the instrument accredited as the progenitor of the Genocide Convention.¹²¹ The United Nations General Assembly (“UNGA”) explained in the rationale for outlawing genocide that the eradication of human groups deprives humankind of “cultural and other contributions” provided, represented, or otherwise made by that group,¹²² which

115. DAVID NERSESSIAN, *Human Groups and Genocide*, in GENOCIDE AND POLITICAL GROUPS 47, 48–49 (2010).

116. *Id.*

117. *Id.*

118. See Written Statement of the United Kingdom, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Pleadings 48, 68 (May 28, 1951).

119. Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT’L L. 145, 147 (1947).

120. *Id.* at 149.

121. Yuval Shany, *The Road to the Genocide Convention and Beyond*, in THE UN GENOCIDE CONVENTION: A COMMENTARY 7–10 (Paola Gaeta ed., 2009).

122. G.A. Res. 96 (I), The Crime of Genocide, at 188–89 (Dec. 11, 1946); see also HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 162, 235, 476, 589, 691, 728, 730–31 (2008).

likely refers to contributions to humanity's tangible and intangible cultural heritage through customs, traditions, languages, practices, crafts and monuments. This rationale was echoed by the International Criminal Tribunal for Yugoslavia ("ICTY") in *Krstić*, where the Appeals Chamber expressed:

[I]ts perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.¹²³

Most recently, citing Resolution 96 (I), the ICJ classified the preservation of said "cultural and other contributions" as being among the "fundamental values sought to be protected by the Genocide Convention."¹²⁴

Noncompliance with the Genocide Convention actively undermines this interest. By exterminating a protected group, or by taking steps to do so, perpetrators of genocide risk erasing that group's contributions to human society and depriving humankind as a whole of the benefit of receiving any future contributions therefrom.¹²⁵ The Genocide Convention, *inter alia*, by outlawing genocide, operates to thwart such prospective losses, thereby conserving humanity's (existing) collective cultural and other wealth, and ensuring the continued enrichment of these valuable assets.

Secondly, states acknowledge that the desire to destroy a human group (the *dolus specialis* of genocide) and the means of accomplishing that goal (acts comprising the *actus reus* of genocide) are especially heinous. This notion was seminally reflected in Resolution 96 (I), wherein the UNGA characterized genocide as shocking the "conscience of mankind" and being "contrary to moral law and to the spirit and aims of the United Nations."¹²⁶ Since then, international tribunals have characterized these acts and intentions as "particularly revolting"¹²⁷ and "horrific"¹²⁸ to the conscience of mankind. It follows that each contracting party is collectively and substantively interested in suppressing, and eventually phasing out, these practices—irrespective of whether or not they are directed against a group which they claim as their own—because they consider these

123. Prosecutor v. Krstić, IT-98-33-A, Appeal Judgment, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

124. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures Order, 2024 I.C.J. 3, ¶¶ 65–66 (Jan. 24).

125. See Prosecutor v. Stakić, IT-97-24-A, Appeal Judgment, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

126. G.A. Res 96 (I), *supra* note 122, at 189.

127. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 33 (Int'l Crim. Trib. for Rwanda, Sept. 4, 1998).

128. Prosecutor v. Krstić, IT-98-33-A, Appeal Judgment, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

practices as being uncivilized and antithetical to the contemporary values held in common by the international community.¹²⁹

In light of the above, it would be artificial to restrictively characterize Nicaragua's interest in Israel's compliance with the Genocide Convention as purely procedural. The commission of genocide against any of the protected human groups offends and undermines substantive values and outcomes collectively held and desired by each contracting party. It follows that states must have an interest in seeing these obligations *positively* fulfilled and executed without the need to invoke state responsibility by initiating legal proceedings aimed at securing compliance therewith.

3. *Obligations Erga Omnes (Partes) Create Corresponding Substantive Rights for Beneficiaries*

Obligations *erga omnes (partes)* produce substantive legal rights for the beneficiaries to which they are owed. This includes states.¹³⁰ In *Furundžija*, the ICTY characterized obligations *erga omnes* as “obligations owed towards all the other members of the international community, each of which then has a correlative right.”¹³¹ It clarified that this “correlative right” is a substantive right which then produces a procedural right to bring a claim:

[T]he violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member . . .¹³²

Judge Donoghue has conceptualized the provisions of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”), which the court characterized as being of an *erga omnes partes* nature, in a similar way.¹³³ She notes that for “each of these provisions [of the UNCAT], . . . it can be said that the State in the territory of which the offender is found has duties that correspond to rights on the part of all other States parties.”¹³⁴ Thus, according to Judge Donoghue, the treaty prescribes duties (a requirement by law to do something) which are mirrored by rights (a legal entitlement to see that thing done). This configuration aligns with Belgium's (the applicant's) own understanding of the UNCAT:

129. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

130. See discussion *infra* subsection IV(B)(4).

131. Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, ¶ 151 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

132. *Id.*

133. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 423, ¶¶ 68–69 (July 20).

134. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 423, 584, ¶ 10 (July 20) (declaration by Donoghue, J.).

[I]t bears recalling that where there is an obligation of one State to other States, those States have a corresponding right to performance of that obligation . . .

All the States Parties to the Convention are entitled to obtain compliance with these rights in accordance with the rule *pacta sunt servanda* . . . This is a treaty obligation of Senegal in relation to all other States Parties to the Convention, naturally including Belgium . . .

All the States Parties to the 1984 Convention can therefore be regarded as possessing the rights deriving from that Convention.¹³⁵

Recognition of corresponding rights, in the context of the Genocide Convention, was also alluded to in *Bosnian Genocide*. The court acknowledged that “the *rights* and obligations enshrined by the Convention are *rights* and obligations *erga omnes*”.¹³⁶ Judge ad hoc Lauterpacht in a separate opinion expressly observed that the obligation to prevent genocide is mirrored by a correlative right: “The duty to ‘prevent’ genocide is a duty that rests upon all parties and is a duty owed by each party to every other. This network of duties is matched by a network of correlative rights.”¹³⁷

In *South Africa v. Israel*, South Africa, Belize (also intervening under Article 62), and Nicaragua all pleaded that the Convention’s *erga omnes partes* obligations correspond to substantive *erga omnes partes* rights owned by them:

South Africa also seeks to protect the *erga omnes partes* rights it has under the Genocide Convention as well as the *erga omnes* obligations it has to prevent genocide, which mirror the *erga omnes* obligations of the Convention with which it is entitled to seek compliance by Israel, including Israel’s obligations not to commit genocide, to prevent genocide, and to punish genocide, including acts of genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide against Palestinians . . .¹³⁸

As a Chamber of the Court has stated: ‘In order to be permitted to intervene, a State does not have to show that it has rights which need to be

135. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, Belgium’s Response to Judge Cañado Trindade, 2012 I.C.J. 423, ¶¶ 2–4, 5, 11 (Apr. 9, 2009).

136. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Preliminary Objections Judgment, 1996 I.C.J. Rep. 595, ¶ 31 (July 11) (emphasis added).

137. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Provisional Measures, 1993 I.C.J. 325, 407, ¶ 86 (Sept. 13) (separate opinion of Lauterpacht, J. ad hoc).

138. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Request for the Indication of Provisional Measures, ¶ 133 (Dec. 29), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> [<https://perma.cc/XSQ7-SEUV>].

protected, but merely an interest of a legal nature which may be affected by the decision in the case'. . . [A]lthough not strictly required, Belize does have relevant rights in the present circumstances: Israel's obligations under the Genocide Convention in respect of Gaza are obligations *owed to Belize*, as a State party to that convention, and thus Belize has correlative *rights* to performance by Israel of those obligations . . .¹³⁹

As the beneficiary of the *erga omnes* rights embodied in the Genocide Convention and the debtor of the mirror *erga omnes* obligations to prevent and punish violations of those rights, Nicaragua's interests of a legal nature will necessarily be affected by the Court's decision. Because of the *erga omnes* character of the norms at issue in this case, judicial determinations by the Court will affect Nicaragua's rights and obligations stemming from the 1948 Genocide Convention . . .¹⁴⁰

In a similar vein, seventy-five years ago, the British agent had told the court during the written phase of the *Reservations* advisory opinion that states enjoy a "right" to see the Genocide Convention executed by all other member states.¹⁴¹

The notion of corresponding substantive rights was alluded to in *Barcelona Traction* when introducing the notion of *erga omnes (partes)*.¹⁴² The court cautioned:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the *importance of the rights involved*, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹⁴³

In this excerpt, the court notes that obligations *erga omnes (partes)* achieve that status on account of the significance of the "rights involved." The court refers to rights as the object of desired protection. In doing so, it differentiates the "rights" in question from the notion of protection itself. Whereas "protection"

139. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application for Permission to Intervene and Declaration of Intervention of Belize, ¶ 37 (Jan. 30, 2025), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20250131-int-01-00-en.pdf> [<https://perma.cc/E53N-DB5R>].

140. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶ 15.

141. Written Statement of the United Kingdom, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. Pleadings 48, 68 (May 28, 1951).

142. This contention was vehemently rejected by Crawford in his 1997 Hague Academy Lecture. See Crawford, *supra* note 3, at 424–25, 434–35; see also James Crawford, *Responsibility for Breaches of Communitarian Norms*, in STATE RESPONSIBILITY: THE GENERAL PART 367, 366–67 (2013).

143. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Second Phase Judgment, 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5).

could perhaps be understood to mean enforcement via recourse to the court,¹⁴⁴ the “rights” which are described as the object of that protection can only mean substantive rights.¹⁴⁵ The natural and immediate subject of states’ desired protection would logically be the material treatment standards to which they are entitled to under treaty or custom. It would be incongruous to suggest an obligation “protects” (safeguards, shields from harm, renders impregnable from outside influence, etc.) a right to enforce that obligation. Indeed, a mandate commanding one state to perform or abstain from an act (say, an obligation not to commit genocide) does not, strictly speaking, operate to preserve or safeguard the prerogative of another state to enforce compliance with that commitment by way of international litigation. The mandate instead is aimed at protecting the entitlement to the benefits produced by that act or abstention. It is this substantive entitlement that then animates the rights-bearing state’s prerogative to enforce performance of the corresponding command.

This exact deontic logic was endorsed by Judge Weeramantry in the context of the *erga omnes* right to self-determination in his dissenting opinion appended to the *East Timor* judgment:

(v) The rights to self-determination and permanent sovereignty over natural resources are recognized as rights *erga omnes*, under well-established principles of international law, and are recognized as such by the Respondent.

(vi) An *erga omnes* right generates a corresponding duty in all States, which duty, in case of non-compliance or breach, can be the subject of a claim for redress against the State so acting.

(vii) The duty thus generated in all States includes the duty to recognize and respect those rights. Implicit in such recognition and respect is the duty not to act in any manner that will in effect deny those rights or impair their exercise.¹⁴⁶

These formulations are normatively meritorious. Legal obligations do not exist in a vacuum.¹⁴⁷ For each debtor of a legal obligation, there must be a corresponding beneficiary, or beneficiaries, of a legal right.¹⁴⁸ However, correlation should not be confused with reciprocity: The former does not invariably entail reducing international law to purely bilateral relations¹⁴⁹ nor does it render an

144. TAMS, *supra* note 89, at 287 (both seem to understand “rights of protection” to mean enforcement related rights).

145. *Id.* at 137; *see also id.* at 34.

146. *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 139, 221 (June 30) (dissenting opinion by Weeramantry, J.).

147. James Crawford (Special Rapporteur on State Responsibility), *First Rep. on State Responsibility*, ¶ 123, U.N. Doc. A/CN.4/490 (1998).

148. *Id.*

149. NEDESKI, *supra* note 2, at 65–66 (“In the case of a right–duty relation, there will be an obligation on the one end and a correlative right on the other end. *However, this does not necessarily*

obligation synallagmatic.¹⁵⁰ An international obligation owed by a single state may correlate to an international right held collectively, plurally, and multilaterally by multiple states.¹⁵¹

With respect to an obligation *erga omnes partes*, these rights holders are, in their plurality, the member states of the relevant treaty, albeit in a collective capacity.¹⁵² In the case of obligations *erga omnes*, the rights holder is the international community as a whole.¹⁵³ The “international community as a whole” is not a single entity with a distinct international legal personality.¹⁵⁴ Instead, it refers collectively to states (and perhaps even non-state actors),¹⁵⁵ each of which maintain their own international legal personality and capacities to hold rights.¹⁵⁶ Thus, all states, as constituents of the international community, are each, collectively and multilaterally, the rights holders vis-à-vis the performance or observance of any obligation *erga omnes*.¹⁵⁷ The International Law Commission (“ILC”) has endorsed this formulation, noting, “there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole).”¹⁵⁸

entail that each and every legal relation is necessarily bilateral, with one subject that bears the obligation and one subject that holds the corresponding right. As noted earlier, even Hohfeld explicitly acknowledged that it is possible for an obligation or a right in one and the same legal relation to be held by multiple legal persons. Thus, accepting the correlation between obligations and rights in international law does not preclude that there may be a plurality of bearers of an obligation or a plurality of holders of a right, which is what would make a legal relation multilateral.” (emphasis added); see also TAMS, *supra* note 89, at 34–36.

150. The ICTY concluded that obligations *erga omnes (partes)* are non-synallagmatic. See Prosecutor v. Kupreskc, IT-95-16-T, Judgment, ¶ 519 (Int’l Crim. Trib for the Former Yugoslavia Jan. 14, 2000). Their non-synallagmatic nature simply means that one state’s observance of its obligation is not conditional on other states’ performance of their own obligations. It does not follow that just because States B–Z cannot withhold performance of their own obligations that they do not enjoy a right to State A’s performance of its obligation. This notion is reflected in the very citation used by the ICTY to support its conclusion on the non-synallagmatic nature of obligations. The court cited to Judge Riphagen’s (who was the third special rapporteur on the ILC work on state responsibility) report to the International Law Commission, wherein it was recognized that rules and obligations principally for the benefit of non-state actors “are still rules creating rights for and imposing obligations on States.” Willem Riphagen (Special Rapporteur on State Responsibility), *Second Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc. A/CN.4/344 (May 1, 1981).

151. NEDESKI, *supra* note 2, at 63, 67–68, 79, 81–82.

152. *Id.* at 72; DARSIIWA Commentaries, *supra* note 8, at 126–27.

153. NEDESKI, *supra* note 2, at 72; DARSIIWA Commentaries, *supra* note 8, at 126–27.

154. Anne-Laure Vaurs-Chaumette, *The International Community as a Whole*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 1023, 1025 (James Crawford et al. eds., 2010).

155. James Crawford (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, ¶ 36, U.N. Doc. A/CN.4/517 (Apr. 2 and 3, 2001).

156. *Id.* ¶ 37.

157. Vaurs-Chaumette, *supra* note 154, at 1025.

158. DARSIIWA Commentaries, *supra* note 8, at 35, ¶8. Judge Simma, writing on *erga omnes (partes)* provisions in human rights treaties, also observed, “They, too, create rights and

Finally, even if it were the case that obligations *erga omnes (partes)* were not mirrored by substantive rights, this distinction seems apathetic insofar as satisfaction of Article 62 is concerned. Even proponents of the theory that *erga omnes (partes)* obligations create purely procedural rights do not dispute that these obligations are owed to states.¹⁵⁹ An international obligation owed to a state involves some conduct, performance, treatment, etc., which that state is entitled by law to see executed or maintained.¹⁶⁰ In the present context, it is thus difficult to identify a meaningful, normative difference between the failure to execute an act one state is mandated to perform vis-à-vis another state (such as a failure to satisfy an obligation) and the process of one state encroaching upon or preventing the enjoyment of a legal entitlement belonging to a state (impeding upon a substantive right). As Special Rapporteur Ago once observed, “it seems perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others.”¹⁶¹ Crawford describes this statement as embodying the rationale justifying the viability of the procedural right to enforce violations of *erga omnes (partes)* obligations.¹⁶² These contentions would suggest that the normative impropriety associated with a failure to fulfil *erga omnes (partes)* obligations is equally as imperative as a breach of substantive right. Against this backdrop, it is difficult to identify a compelling reason why the “interest of a legal nature” criterion can be satisfied where a state’s substantive rights are implicated but not when an obligation owed to a state is similarly at play.

III. COMMON INTERESTS DO SATISFY THE CRITERION OF “INDIVIDUALIZATION”

This Part demonstrates that common interests do satisfy the criterion of “individualization.”

obligations between their parties to the effect that any State party is obliged as against any other State party to perform its obligations and that, conversely, any party has a correlative right to integral performance by all the other contracting States.” Simma, *supra* note 1, at 370.

159. See Crawford, *supra* note 142, at 367 (“In short, rather than reducing everything to the level of individually held substantive rights, Article 48 recognizes that certain communitarian norms are owed either to the other states parties (sometimes referred to as obligations *erga omnes partes*) or to ‘the international community as a whole’ (obligations *erga omnes*).”); see also Simma, *supra* note 1, at 300 (“obligations *erga omnes* flow from a certain class of norms the performance of which is owed to the international community as a whole”).

160. RUTSEL SILVESTRE J. MARTHA, *THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW* 19–21 (2015).

161. Robert Ago (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, ¶ 46, U.N. Doc. A/CN.4/233 (Apr. 20, 1970).

162. Crawford, *supra* note 142, at 490.

A. *Academic Formulations of the Criterion Fail to Precisely Identify Its Normative Content*

Some commentators have expressed doubt as to whether intervention in reliance on common interests is compatible with the purported requirement that the “interest of a legal nature” must be individualized or particularized.¹⁶³ Brian McGarry sweepingly asserts, “Article 62 requires a unique legal interest in the court’s decision, as distinguished from States’ shared interest in the fulfilment of Genocide Convention obligations.”¹⁶⁴ This statement suggests that the criterion of individualization ought to preclude a state from being admitted to intervene where it invokes a common interest instead of a special or specific interest. Linguistically, the proposition appears palatable. The word “individualization,” read plainly, could imply that the interest should belong to the intervenor exclusively. This reading can be juxtaposed with the language used by international law when describing the particularities of interests underpinning *erga omnes* (*partes*) rights and obligations. Those rights and obligations are said to be communal or shared,¹⁶⁵ and they therefore cannot, per se, be deemed individualized or even unique. Indeed, with respect to the Genocide Convention, the court has underscored, “States do not have any interests of their own; they merely have, one and all, a common interest . . .”¹⁶⁶

However, one cannot determine whether Article 62 is satisfied by relying exclusively on linguistic juxtapositions without appraising the historical development of Article 62 and the jurisprudence of the court on this requirement. Etymologically and taxonomically, the terms “individualization,” “unique,” and “individualized interest” all appear to be constructs of academic neologism.¹⁶⁷ They do not feature in the language of Article 62. Moreover, it does not appear that they have ever been employed in the court’s lexicon in characterizing the criteria necessary to satisfy Article 62,¹⁶⁸ save for one separate opinion by Judge Mbaye, which argued that the provision requires an “individual direct and specific interest” (this is distinguished in the Section below).¹⁶⁹

The historical development of Article 62 and the subsequent jurisprudence of the court indicate that there are two prongs to the so-called criterion of individualization. First, the interest must belong to the intervenor. Second, the interest must not be general.

163. ASIL1906, *supra* note 102, at 24:43-25:00.

164. McGarry, *supra* note 104.

165. See Sicilianos, *supra* note 4, at 1133–1136.

166. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

167. Miron & Chinkin, *supra* note 51, ¶¶ 52–57.

168. See QUINTANA, *supra* note 71, at 838–926.

169. *Id.* at 860.

B. First Prong—The Interest Must Belong to the Intervenor

This Section assesses the first prong of individualization—that the interest must belong to the intervenor.

1. Ordinary Meaning

The first limb of individualization dictates that the intervenor must itself be the custodian of the interest upon which its intervention is constructed. This is plainly evident from the ordinary meaning of Article 62(1). The intervenor may intervene only if “*it has an interest of a legal nature.*”¹⁷⁰ This reading is corroborated by the court in *Sovereignty over the Sapodilla Cayes/Cayos Zapotillos*, wherein it said, “a State seeking to intervene must demonstrate that it has a legal interest of *its own.*”¹⁷¹ However, there is nothing within the ordinary language of Article 62 to indicate that the interest State A invokes must belong *exclusively* to State A.

2. ICJ Jurisprudence Confirms Only that One State Cannot Satisfy the Criterion by Relying on Interests Belonging Exclusively to Another State

Judges Mbaye and Schwebel have discussed, albeit sparingly, issues related to multiplicity in ownership of interests, but not in a context that applies to the assessment of *erga omnes (partes)* principles. Judge Mbaye in *Libya/Malta* hypothesized that to satisfy Article 62, “the interest in question must not affect Italy and ‘other States of the Mediterranean region’ (para. 41). It must be an individual, direct and specific interest.”¹⁷² He expressly withheld from expatiating further on what he meant.¹⁷³ Therefore, the precise effect of this excerpt is not clear. However, read in the context of the affair as a whole, there is nothing to indicate that this excerpt bars reliance on shared interests.

Judge Mbaye’s observation is self-evidently aroused by a short and peculiar excerpt in the majority judgment, where the court expressed that, despite dismissing Italy’s application, it could not “wholly put aside the question of the legal interest of Italy as well as of other States of the Mediterranean region.”¹⁷⁴ This case concerned Italy’s own claims of “sovereign rights over certain areas of continental shelf” situated in the undelimited maritime area at the crux of the

170. ICJ Statute, *supra* note 51, art. 62(1).

171. ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE 708–709* (2013) (emphasis added).

172. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 35 (Mar. 21) (separate opinion by Mbaye, J.).

173. *Id.*

174. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, ¶ 41 (Mar. 21).

dispute between Libya and Malta.¹⁷⁵ Unlike interests related to obligations *erga omnes* (*partes*), Italy's interests in relation to such maritime zones would be special and specific to Italy. Indeed, designation of an area as falling within Italy's continental shelf would mean that Italy enjoys certain exclusively sovereign rights in and over that area (to the exclusion of any overlapping claims to the same made by other states). It follows, because such rights would vest in Italy alone, the interests which they protect or vindicate can belong to no one other than Italy itself.¹⁷⁶ Consequently, any reference to the "same in kind" interests of "other States of the Mediterranean" likely encapsulates those other states' own special interests. Content-wise, these interests may be the same as Italy's, but each Mediterranean state's interest belongs exclusively to itself. Such is the case because, as illustrated with reference to Italy above, any one state's interest would derive from that state's (claimed) exclusive sovereign rights over the same disputed maritime area, which, if recognised, would permeate to the exclusion of all others' claims to the same. Therefore, the interests alluded to by the Court are substantively distinguishable from a single shared interest held collectively by several beneficiaries.

For all these reasons, the excerpt from Judge Mbaye should be read as indicating that Italy cannot invoke as the basis of its intervention its own special interest in conjunction with the special interests of other states. This has no bearing on the viability of intervention in reliance on *erga omnes* (*partes*) principles. In the latter instance, the intervenor is employing a single interest, one over which it has ownership, but one which it owns commonly with other states. Whereas in Judge Mbaye's example, Italy would be invoking (in addition to its own interest) interests over which it has no ownership, since they belong exclusively to those other states. This is not to say that the existence of special interests belonging to these other states will disqualify Italy's own intervention.¹⁷⁷ It simply means that Italy can satisfy the "interest of a legal nature" criterion by relying on interests over which it has ownership. Interests over which it does not have ownership cannot assist Italy in satisfying the criterion.

3. *Each Contracting Party to the Genocide Convention Retains Ownership Over the Common Interest*

The interests underlying the provisions of the Genocide Convention are "common" insofar as they are equally opposable to every other contracting party to the Genocide Convention. However, the mere plurality of assignees to this interest should not deprive any one assignee of its own retention, ownership,

175. *Id.* ¶ 15.

176. U.N. Convention on the Law of the Sea art. 77, Dec. 10, 1982, 1833 U.N.T.S. 397.

177. Continental Shelf (Tunis./Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment, 1981 I.C.J. 3, ¶ 33 (Apr. 14).

enjoyment, or possession of that interest. The plurality simply indicates that there are multiple states which *share* ownership over the same interest not to see the eradication of particular human groups.¹⁷⁸ This conceptualization was endorsed by the prospective intervenors in *Request for an Examination*. They submitted the fact that “all States *share* this legal interest does not prevent it from being a genuine legal interest of *each* of those States.”¹⁷⁹

Not all agree with this formulation. Judge Sicilianos argues extrajudicially that when a state invokes the responsibility *erga omnes (partes)* of another, that state does “not essentially act on their own account but rather act much more on behalf of and in the interests of the subjects that have been directly injured.”¹⁸⁰ This is an unmeritorious argument. Were it to prevail, it would follow that when a state invokes the responsibility *erga omnes (partes)* of another, the cessation of any wrongful acts is of no significance or concern for that invoker and that the invoker is seeking to protect the interests of only the direct victim of the breach (the so-called “directly injured state”). Accepting this premise would result in a triumph of form over substance.

Consider this proposition in the context of the alleged persecution of the Rohingya group, at the heart of the dispute in *The Gambia v. Myanmar*. The Rohingya are a Muslim ethnic and religious group with historic ties to, and origins within, Myanmar.¹⁸¹ This group has “no ties to anywhere but Myanmar.”¹⁸² Consequently, there can be no state whose interests on behalf of which The Gambia can be said to be acting when invoking Myanmar’s responsibility. Perhaps one could argue that, despite there being no interested state there is nonetheless an interested group—the Rohingya themselves. However, this would not change the fact that the threat of the eradication of the Rohingya is of import to The Gambia. Indeed, the eradication of the Rohingya is, in and of itself, a violation of The Gambia’s own rights under the Convention and an act which undermines The Gambia’s interest in preserving human plurality and suppressing acts considered heinous to the human conscience. This sentiment is embodied in representations made to the court by two different agents, each representing The Gambia in different stages of the proceedings, who told the

178. KOLB, *supra* note 171, at 709 (“[I]n relation to the collective obligations of members of the international community, each State is considered to have a legal interest in seeing to it that such *erga omnes* norms are complied with. An interest of a legal nature therefore also exists for the intervening State.”).

179. N.Z. v. Fr., Marshall Islands’ Application to Intervene, *supra* note 76, ¶ 14.

180. Sicilianos, *supra* note 4, at 1140.

181. Human Rights Council Res. S-27/1, U.N. Doc. A/HRC/RES/S-27/1, at 2 (Dec. 5, 2017).

182. *Id.*

court, “We seek to protect not only the rights of the Rohingya, *but our own rights as a state party to the Genocide Convention.*”¹⁸³

The individualization of states’ interests is further reflected in the fact that every single state has the right to invoke the responsibility of another for breaches of obligations *erga omnes (partes)* without the need to act collectively or collaborate with, seek the permission of, consult, or even simply provide notification to any other member of the *omnes*.¹⁸⁴ The ILC has expressly acknowledged that such is the case because a breach of an obligation *erga omnes (partes)* is deemed to affect each member of its corresponding *omnes*, and therefore each member ought to retain independent agency over the decision to enforce the violation.¹⁸⁵ Had the right to invoke the responsibility of an offending state been made conditional on collective or collaborative legal action, this would have rendered the argument against the individualization of interests more compelling. However, it was not, and intentionally so.

4. *Each Contracting Party to the Genocide Convention Has Ownership Over the Common Right*

Thus far, this Section has appraised the satisfaction of the individualization requirement insofar as it pertains to *interests* proper. There remains the question of whether the criterion would be satisfied equally if the “interest of a legal nature” required the possession of a legal right (*quad-non*). The question of ownership over *rights* proper seems salient particularly in the context of *erga omnes partes* human rights treaties. It is said instruments of the foregoing kind are normatively configured so as to vest rights foremostly in individuals themselves.¹⁸⁶ This begs the question as to whether vestiture of rights in natural persons deprives states of possession over the rights in question, thereby rendering satisfaction of the individualization precondition, in relation to these treaties, impossible.

183. HITOMI TAKEMURA, *THE ROHINGYA CRISIS AND THE INTERNATIONAL CRIMINAL COURT* 69 (2023) (emphasis added).

184. James Crawford (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility*, ¶ 375, U.N. Doc. A/CN.4/507 (Mar. 15, June 15, July 10 and 18, and Aug. 4, 2000).

185. *DARSIWA Commentaries*, *supra* note 8, at 126.

186. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Azerb. v. Arm.*), Preliminary Objections, Judgment, 2024 I.C.J. 1116, 1198, 1214 (Nov. 12) (dissenting opinion by Cleveland, J.). In the context of the ICCPR recognizing both a state–individual relationship but also a state–state “contractual dimension,” see Human Rights Council, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004). For quite a radical position in the context of the Genocide Convention, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 1996 I.C.J. 595, 625, 626 (July 11) (declaration by Oda, J.).

It will be demonstrated below that this question must be answered in the negative. The court has addressed the issue of ownership over rights in its jurisprudence on provisional measures. Article 41(1) of the Statute provides the ICJ “shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve *the respective rights of either party*.”¹⁸⁷ The court has read into Article 41(1) a criterion that provisional measures may be granted only in respect of those rights “which may subsequently be adjudged by the Court to *belong* either to the Applicant or to the Respondent.”¹⁸⁷ In adjudging the fulfillment of this condition, the court has inevitably discussed whether the rights a party seeks to protect are those in respect of which it is the proprietor.

Jurisprudence in respect of a constituent element of Article 41 is apposite to one’s understanding of the first prong of the individualization requirement situated in a different provision of the Statute (namely, Article 62) for two reasons. First, content-wise, the object of both assessments are one and the same. They are concerned with the state’s possession of a right. Secondly, Articles 41 and 62 serve a common purpose—namely, the protection of rights. In respect of Article 41, a party lobbies the court to grant some interim measure to ensure, pending adjudication of the affair, the subject of its rights is not impaired or even destroyed.¹⁸⁸ In the context of Article 62, a third state is afforded the opportunity to engage the court so as to ensure that the latter’s final judgment respects the intervenor’s rights and does not produce an outcome which would encroach upon, or undermine the enjoyment of, those rights.¹⁸⁹ For these reasons if the court has, in the course of appraising an application under Article 41, determined that a particular rights vests in a state, there is no reason why that same conclusion should not prevail in the context of Article 62 as well.

As it pertains to Article 41, the question of states’ ownership statuses in the context human rights treaties was first addressed in *Georgia v. Russia*—a dispute concerning the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”).¹⁹⁰ It ought to be borne in mind that: (i) rights concerning “protection from . . . racial discrimination” were amongst those seminally characterized, in *Barcelona Traction*, as being of an *erga omnes* (*partes*) nature; and (ii) both the court (in a majority opinion) and its individual judges (via their individually appended opinions) have on repeated occasions

187. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, Order, 2008 I.C.J. 353, 388, ¶ 118 (Oct. 15) (emphasis added).

188. Karin Oellers-Frahm & Andreas Zimmermann, *Article 41*, in COMMENTARY, *supra* note 51, at 1035, ¶¶ 20–21.

189. Miron & Chinkin, *supra* note 51, ¶ 1.

190. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

recognized the *erga omnes partes* character of those provisions codified in the CERD specifically.¹⁹¹

In *Georgia v. Russia*, the court recapitulated that in order to satisfy Article 41 the measures requested must be aimed at preservation of “rights which may subsequently be adjudged by the Court to *belong either to the Applicant or to the Respondent*.”¹⁹² In that instance the court found that this criterion had been made out,¹⁹³ and on that point, articulated that:

Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein . . . *States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention* . . . [T]here is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.¹⁹⁴

This Article understands the italicized phrase to mean whereas the CERD (and cognate instruments) vest rights principally in individuals, the contracting parties’ substantive obligations thereunder are mirrored also by correlative substantive rights held by other states.¹⁹⁵ It is underscored that what the court in

191. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3, 32, ¶ 34 (Feb. 5); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Preliminary Objections, Judgment, 2024 I.C.J. 1116, ¶¶ 41, 48 (Nov. 12); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Preliminary Objections, Judgment, 2024 I.C.J. 1216, ¶¶ 21–25 (Nov. 12) (dissenting opinion by Tladi, J.); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Preliminary Objections, Judgment, 2024 I.C.J. 1116, 1164, ¶ 11 (Nov. 12) (declaration by Yusuf, J.); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Preliminary Objections, Judgment, 2024 I.C.J. 1116, 1186, ¶ 19 (Nov. 12) (concurring opinion by Charlesworth, J.); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Preliminary Objections, Judgment, 2024 I.C.J. 1116, 1198, ¶¶ 3–8 (Nov. 12) (dissenting opinion by Cleveland, J.).

192. *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.)*, Provisional Measures, Order, 2008 I.C.J. 353, 388, ¶ 118 (Oct. 15) (emphasis added).

193. *Id.* ¶ 126.

194. *Id.*

195. This conceptualization was confirmed by Judges Tladi and Cleveland in their dissenting opinions appended to the court’s preliminary objections judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*. Judge Tladi observed, “The Convention is not a purely State-centric and bilateralist treaty which seeks to maintain a perfect contractual balance between the rights and duties of States parties.” Instead, the obligations were directed towards two groups of rights holders, including “other States that are party to the Convention and ‘persons, groups of persons or institutions’ within the meaning of Article 2 of the Convention.” *Azer. v. Arm.*, 2024 I.C.J. ¶¶ 22–23 (Tladi, J., dissenting). Judge Cleveland, in emphasizing that states were not the only rights holders, recognized *a fortiori* that states did nonetheless comprise one group of rights holders

all likelihood envisaged were *substantive rights* and not states' *procedural right* to enforce CERD obligations by instituting proceedings before the court through the convention's compromissory clause (Article 22). There are four reasons in support of this conclusion.

First, the court has specified on a number of occasions that provisional measures cannot be issued "for the protection of any disputed rights other than those which might ultimately form the basis of a judgment *in the exercise of that jurisdiction*."¹⁹⁶ The consequence of this specification is that only those rights which would remain in issue after the court has upheld both its jurisdiction and the admissibility of the claim (including matters of standing) qualify for protection under Article 41. Whereas the court does not expressly refer to admissibility, the notion of being precluded from exercising jurisdiction, or acting on jurisdiction, has been used by the court to denote both a failure to establish a valid basis of jurisdiction (a jurisdictional issue proper),¹⁹⁷ or the presence of some other variable which prevents the court from adjudicating the claim despite there being a proper jurisdictional title tethering the dispute and disputants to the court (an admissibility issue proper).¹⁹⁸ Read in light of the caveat quoted at the beginning of this paragraph, the court's recognition that "States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention," and its finding that these rights qualify for protection via provisional measures, Georgia's "right to demand compliance" cannot be read to mean procedural rights either in the form of entitlements under the compromissory clause of the CERD or any right to invoke the responsibility of Russia. The court must be understood to have been referring to *substantive* rights, which it will determine and pronounce upon in the exercise of the jurisdiction vested in it by the compromissory clause.

Second, in a subsequent CERD case, namely that of *Ukraine v. Russia*, the court expressly referred to rights prescribed under Articles 2 and 5, which

under the CERD: "CERD addresses obligations that are not *only, or even primarily*, owed reciprocally between States. The Court has long recognized that these conventions create rights for individuals to be protected from certain acts. This makes treaties such as CERD different from treaty provisions that *only, or even primarily*, create obligations between States." *Azer v. Arm.*, 2024 I.C.J. ¶ 54. (Cleveland, J., dissenting) (emphasis added).

196. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Geor. v. Russ.*), Provisional Measures, Order, 2008 I.C.J. 353, ¶ 127 (Oct. 15); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Provisional Measures, Order, 2002 I.C.J. 219, ¶ 58 (July 10); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Provisional Measures, Order, 1993 I.C.J. 3, ¶¶ 35, 38 (Apr. 8).

197. *Legality of Use of Force (Serb. & Montenegro v. Fr.)*, Preliminary Objections, Judgment, 2004 I.C.J. 575, ¶ 44 (Dec. 15).

198. *Oil Platforms (Islamic Republic of Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 29 (Nov. 6).

expressly prescribe substantive treatment standards, as rights belonging to Ukraine:

As the Court has already recalled, there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice. In the current proceedings, this is the case with respect to the measures aimed at safeguarding *the rights of Ukraine under Articles 2 and 5 of CERD* with regard to the ability of the Crimean Tatar community to conserve its representative institutions and with regard to the need to ensure the availability of Ukrainian-language education in schools in Crimea.¹⁹⁹

Third, the court refers specifically to the “right to demand compliance” and not to enforcement. In law the notion of a right to performance, compliance, fulfillment, etc., on the one hand and that of the enforcement of rights on the other hand are distinct concepts. The former comprises entitlements to see a promise fulfilled or legally mandated undertaking performed.²⁰⁰ The latter, enforcement, is a mechanism for vindicating those entitlements by petitioning a body with the prerogative to compel performance thereof or effect some other redress.²⁰¹

When a promisee believes an obligation has not been respected, it can raise, invoke, or assert its corresponding claim²⁰² to that promised conduct by petitioning an adjudicatory body. That tribunal will in turn assess whether the undertaking has been delivered (that is, the obligation has been discharged and

199. On this occasion, the French version of the text of the order was authoritative. The diction of the French text in no way detracts from the court’s recognition of Ukraine as the proprietor of the rights in question. The court uses a literal translation of the expression “rights of Ukraine”—namely, “*les droits de l’Ukraine, au titre des articles 2 et 5 de la CIEDR*.” Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, Order, 2017 I.C.J. 105, ¶ 86 (Apr. 19).

200. Here one can rely on domestic law analogies. See Hein Kötz, *Claims for Performance, in EUROPEAN CONTRACT LAW* 195, 198, 202 (Hein Kötz ed., 2017) (“All continental legal systems in Europe today observe the principle that each party to a contract has the right to have that contract fulfilled . . . The Common Law does assume in principle that the creditor acquires a ‘primary right’ upon concluding the contract that the debtor will perform its contractual promise *in natura*”); see also Simon Whittaker, *Performance of another’s obligation: French and English law contrasted*, in UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE 433, 434 (David Johnston & Reinhard Zimmermann eds., 2009) (“In French discussions, the term *obligation* itself may bear two significances; it may describe the totality of the relationship between the two parties, the duty-bearer (known as *débiteur*, whether or not the obligation concerns a sum of money) and the right-holder (known as *créancier*, equally generally). However, *obligation* may also bear the significance which is most common to the English word obligation, i.e. to describe the duty itself, *la dette*, the correlative of which is the creditor’s personal right, the *droit de créance*.”); Andrew Botterell, *Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract*, 16 LEGAL THEORY 135, 143–46.

201. See Kötz, *supra* note 201, at 199.

202. *Id.*

the corresponding right respected) and, if not, order appropriate redress. However, the right to demand that one's counterpart abide by its legal commitment is a material entitlement which exists autonomously from the opportunity to avail oneself of adjudicatory vehicles capable of effectuating that right (such as enforcing it). It is therefore substantive. Indeed, a promisee is entitled to ask and see that something promised is executed, without resorting to adjudication, by reason of having been issued a promise; and the corresponding promisor is obliged to consummate that promise without being ordered by an adjudicatory body to do so by reason of having made the promise.²⁰³

The ICJ itself appears to be cognizant of this distinction in three ways. One, in *Obligation to Prosecute and Extradite* the court formulates the notion of an *erga omnes partes* provision along similar lines. It notes an obligation *erga omnes partes* is "owed by any State party to all the other States parties to the Convention;" that obligation is mirrored by an "entitlement . . . to make a claim concerning the cessation of an alleged breach;" and that "it follows" from that entitlement that states "may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*."²⁰⁴ The court thus identifies the opportunity to petition the court not as the right to claim compliance in and of itself, but rather an opportunity which "follows" from that right.

Two, the court's provisional measures order in *The Gambia v. Myanmar* reveals that when referring to the process of attempting to vindicate a claim by instituting proceedings through the compromissory clause of a treaty, it prefers to use an expression distinguishable from that of the "right to demand compliance." In its order, the court granted The Gambia's request for provisional measures and acknowledged that the "right of any State party to seek compliance"²⁰⁵ with the Genocide Convention was a right deserving of preservation.²⁰⁶ In that very same decision the court referred to a state's ability to litigate a dispute concerning compliance through the ambivalent expression that a state "may invoke the responsibility of another State party with a *view to ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end*."²⁰⁷ The court thus made it clear that when referring to an attempt to enforce a right via the institution of proceedings, it will

203. This axiom is embodied in the very notion of the maxim of *pacta sunt servanda*. See Jean Salmon & Agatha Verdebout, *1969 Vienna Convention*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 740, ¶¶ 20–23; Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 *AM. J. INT'L L.* 180, 181 (1945).

204. *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment, 2012 *I.C.J.* 423, ¶¶ 68–69 (July 20).

205. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.)*, Provisional Measures, Order, 2020 *I.C.J.* 3, ¶ 52 (Jan. 23).

206. *Id.* ¶¶ 56, 75.

207. *Id.* ¶ 41 (emphasis added).

deploy an expression that more accurately depicts the particularities of that process. In particular, the latter expression acknowledges that the institution of proceeding is about determining whether there has been non-compliance and providing redress therefore.

Three, the authoritative French text to paragraph 126 of the *Georgia v. Russia* provisional measures order, indicates the “right to demand compliance” is something leveled against another state and not requested per se of the court itself:

Les Etats parties à la CIEDR ont le droit d'exiger d'un Etat partie qu'il exécute les obligations spécifiques lui incombant en vertu des articles 2 et 5 de la Convention.
[States parties to the CERD have the right to demand of a State Party that it fulfill the specific obligations incumbent upon it under Articles 2 and 5 of the Convention].²⁰⁸

Later iterations, be they in English or French, do not identify the recipient of the demand, referring instead unqualifiedly to “*le droit qu'ont ceux-ci de demander l'exécution de ces obligations*”²⁰⁹ or “the right of States parties to seek compliance.”²¹⁰ These are not fatal to this third point. Strictly speaking, compliance is not something which can ever be demanded of the court. Instead, states request the court to determine whether there has been non-compliance and to award remedies which may take the form of an order for cessation of the wrongful act. Thus, what is issued to the court is not a demand for compliance but rather a request to declare there has been non-compliance and in response thereto to order cessation of that non-compliance.

Fourth, in *Georgia v. Russia*, Georgia had expressly framed its right to the performance of the obligations in those provisions as a right secured by those provisions themselves and not by compromissory clause of the CERD.²¹¹ As quoted in the order itself, Georgia told the court that:

208. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, Order, 2008 I.C.J. 353, ¶ 126 (Oct. 15).

209. Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arm. v. Azer.), Mesures onservatoires, Ordonnance, 2021 C.I.J. Recueil 361, ¶ 57 (Dec. 7) [French version].

210. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2021 I.C.J. 361, ¶ 57 (Dec. 7).

211. In its written and oral submission alike, Georgia repeatedly emphasized the rights under CERD belonged both to Georgian individuals and to the Republic of Georgia itself. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Georgia, 2008 I.C.J. 353, ¶¶ 1–2, 17 (Aug. 14, 2008), <https://www.icj-cij.org/node/104789> [<https://perma.cc/DKK6-X3S6>] (“an urgent Request that the Court indicate provisional measures to preserve the rights of the Republic of Georgia under the International Convention on the Elimination of All Forms of Racial Discrimination . . . The continuation of these violent discriminatory acts constitutes an extremely urgent threat of irreparable harm to Georgia’s rights under CERD in dispute in this

Under Article 2, paragraph 1 (a) and (b), *Georgia has a right* to have Russia, as a State party to the Convention, ‘engage in no act or practice of racial discrimination against persons, groups of persons or institutions’ and to undertake ‘not to sponsor, defend or support racial discrimination by any persons or organizations’. Under paragraph 1 (d) of Article 2, *Georgia also has the right* to have Russia ‘prohibit and bring to an end, by all appropriate means . . . racial discrimination by any persons, group or organization’. The specific rights protected by Article 5 are: first, the right under Article 5 (b) ‘to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution’; second, the right under Article 5 (d) (i) ‘to freedom of movement and residence within the border of the State’; third, the right under Article 5 (d) (ii) ‘to return’; fourth, the right under Article 5 (d) (iii) ‘to nationality’; and fifth, the right under Article 5 (d) (v) ‘to own property.’²¹²

Against this backdrop, the court’s recognition of states’ “right to demand compliance” without: (i) reference to the compromissory clause of the CERD; (ii) or qualifying, caveating, tinkering, etc., Georgia’s conceptualization of its ownership status vis-à-vis these rights, could be understood as an endorsement of Georgia’s chosen framing.

Furthermore, with respect to the Genocide Convention, the court has *expressly* recognized that the rights in question belong both to individuals and states themselves.²¹³ In *The Gambia v. Myanmar*, the court underscored that the rights which The Gambia sought to preserve were those belonging to The

case . . . On the basis of the facts set forth above, and in order to prevent irreparable prejudice to the rights of Georgia and its citizens under CERD, Georgia respectfully requests the Court as a matter of utmost urgency to order the following measures to protect its rights pending the determination of this case on the merits’); see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Verbatim Record, at 13, 22, 54, 2009 I.C.J. (Sept. 8, 2008, at 10:00 CET), <https://www.icj-cij.org/sites/default/files/case-related/140/140-20080908-ORA-01-00-BI.pdf> [<https://perma.cc/5XMK-ZB4S>].

212. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, Order, 2008 I.C.J. 353, ¶ 123 (Oct. 15).

213. Moreover, in its first *Bosn. & Herz. v. Serb. & Montenegro* Provisional Measures Order, the court can be taken to have *impliedly* recognized states’ ownership over rights in the Genocide Convention. In that case, the court did not explicitly distinguish between the vestiture of rights in individuals versus states. Nonetheless, it satisfied itself that “taking into account the obligation imposed by Article I of the Genocide Convention, that the indication of measures is required for the protection of such *rights*” and granted corresponding provisional measures accordingly (emphasis added). Bosnia and Herzegovina had framed the relevant rights, for the protection of which measures were ordered, as rights belonging to both itself and its people: “*the right of the People and State of Bosnia and Herzegovina* to be free at all times from acts of genocide and other genocidal acts perpetrated upon Them by Yugoslavia (Serbia and Montenegro), acting together with its agents and surrogates in Bosnia and elsewhere” (emphasis added). It might be possible to infer from the outcome that the court was satisfied the rights vested in Bosnia and Herzegovina. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Provisional Measures, Order, 1993 I.C.J. 3, ¶¶ 46, 36 (Apr. 8).

Gambia to see Myanmar discharge its corresponding obligation to prevent and punish genocide under Articles II and III of the Convention:

The Court considers that, by their very nature, the first three provisional measures sought by The Gambia . . . are aimed at preserving the rights it asserts on the basis of the Genocide Convention in the present case, namely . . . *the right of The Gambia to have Myanmar comply with its obligations under the Convention to prevent and punish acts identified and prohibited under Articles II and III of the Convention, including by ensuring the preservation of evidence.*²¹⁴

The French version of the judgment confirms the verb “comply” is not intended to serve as an allusion to enforcement. Indeed, in the French text, the court uses the verb “*s’acquitte*,”²¹⁵ to acquit. In the excerpt above, the term is not used in the context of paying a debt or the exoneration of an accused. Therefore, the most apposite definition, appreciating the context in which the transitive verb is used, would be its general meaning, namely “[t]o perform (a duty for which one has personal responsibility); to fulfill (an office or its functions); to carry out or successfully discharge (a role, task, or commission).”²¹⁶ Thus, the most credible reading of the above quoted excerpt is that The Gambia itself enjoys a right to the performance of Articles II or III, by Myanmar, through the adoption of whatever acts necessary to realize the legally mandated command therein.

Similarly, in *Canada and Netherlands v. Syrian Arab Republic*, the court appears to expressly clarify that the “right of States parties to seek compliance” with the UNCAT is a substantive one.²¹⁷ The court expatiates that it is the *material* act of subjecting individuals “to torture and other acts of cruel, inhuman or degrading treatment or punishment, which entail bodily harm and psychological distress” which is capable of “irreparably prejudic[ing]” the aforementioned rights of states.²¹⁸ This specification would be impossible to reconcile with a reading which synonymizes the notion of “seek[ing] compliance” with that of enforcement because it is difficult to envisage how Syria could, by subjecting its own nationals to torture and cognate acts, impede Canada and the Netherlands’

214. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order, 2020 I.C.J. 3, ¶ 61 (Jan. 23).

215. “[A]insi que le droit du demandeur à ce que le Myanmar s’acquitte des obligations de prévenir et de punir les actes définis et prohibés par les articles II et III, y compris en veillant à la conservation des éléments de preuve.” Application de la Convention pour la Prévention et la Répression du Crime de Génocide [Application of the Convention on the Prevention and Punishment of the Crime of Genocide] (The Gam. v. Myan.), Demande en Indication de Mesures Conservatoires, Ordinance, 2020 C.I.J. Recueil 4, ¶ 61 (Jan. 23).

216. *Acquit*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/acquit_v?tl=true [<https://perma.cc/72GS-JBW6>].

217. Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syrian Arab Republic), Provisional Measures, Order, 2023 I.C.J. 587, ¶ 57 (Nov. 16).

218. *Id.* ¶ 71.

ability to petition and seize the court with a view to litigating their claim; or violate any procedural right upon which such action is premised. Instead, the more credible reading is that if Syria subjects or allows its nationals to be subjected to torture and assimilated acts, this will undermine the legal entitlement of all state parties to the UNCAT to see that such acts never materialize, are averted, etc.

C. *Second Prong—The Interest Must Not Be “General”*

The notion of individualization has also been associated with the court’s requirement that an interest must be “real and concrete”²¹⁹ as opposed to “*general in nature*.”²²⁰ The content and scope of these concepts, too, proves elusive.

1. *Identifying the Precise Contents of This Prong*

Indeed, the threshold between generality and sufficient concreteness has yet to be delineated. Nevertheless, it has become trite law that the exclusion of “general” interests prohibits a state from basing its intervention on “an interest in the general development of the law,” or “an interest in the Court’s pronouncements in the case regarding the applicable general principles and rules of international law.”²²¹ The historical development of the provision confirms that the drafters of the ICJ Statute intended to limit Article 62 to the protection of so-called “special interests.” Judge Hudson extrajudicially writes that “it seems a special interest is required.”²²² However, he used this term to juxtapose specifically a “general interest in the development of international law,”²²³ and to preclude intervention by a state seeking to ensure solely that “opinions contrary to its own should not prevail as regards the rules to be applied.”²²⁴ It is against this background that one must assess the satisfaction of the individualization requirement. The critical question is whether the court’s rationale for disqualifying intervention in reliance on a general interest in the development

219. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 421, ¶ 37 (May 4).

220. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application by the Philippines for Permission to Intervene, Judgment, 2001 I.C.J. 575, ¶ 55 (Oct. 23) (emphasis added).

221. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application by the Philippines for Permission to Intervene, Judgment, 2001 I.C.J. 575, 630, ¶ 30 (Oct. 23) (separate opinion by Weeramantry, J.).

222. MANLEY OTTMER HUDSON, LA COUR PERMANENTE DE JUSTICE INTERNATIONALE [THE PERMANENT COURT OF INTERNATIONAL JUSTICE] 433 (1936) (translation by author).

223. MANLEY OTTMER HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920 – 1942: A TREATISE 420 (1943).

224. SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 46 (1993).

of international law deductively applies vis-à-vis, and equally justifies disqualifying, common interests underlying *erga omnes (partes)* obligations.

2. Preventing Excessive Interventions

Judge Fitzmaurice, writing extrajudicially, reveals that the *raison d'être* of the restriction is to limit excessive interventions.²²⁵ It seeks to exclude interests that are so widespread that “there could never be a case in which a third State (whatever its identity) would not possess a potential legal interest in the result.”²²⁶ This is a well-corroborated concern.²²⁷ The IDI has similarly cautioned that in the context of obligations and interests *erga omnes (partes)*, “intervention under Article 62 of the Statute may seem an inappropriate instrument in view of the fact that many States would be entitled to make use of it. There could be the risk of overcrowding the proceedings.”²²⁸

In disputes involving obligations *erga omnes partes* found in instruments with quasi-universal membership,²²⁹ the number of prospective intervening states could certainly prove to be endless.²³⁰ However, this should not be sufficient to disqualify such intervention under Judge Fitzmaurice’s litmus test. The above-quoted excerpt does not refer solely to a preclusion against an interest that is widely possessed. Rather, the interest also needs to be of such a type that it would grant any third state uninhibited access to virtually any case adjudicated before the court, no matter the subject matter. To this end, a common interest can be readily distinguished from a general interest in the development of international law. A state relying on the common interest in the Genocide Convention could invoke this interest to intervene in only those disputes involving that particular instrument. In contradistinction thereto, any third state could indiscriminately invoke its general interest in the development of international law to intervene in virtually any dispute adjudicated before the court—presumably insofar as that dispute concerns a rule of customary or treaty law by which the state seeking to intervene is bound. Therefore, whereas, owing to the Genocide Convention’s quasi-universal status, the number of states possessing a common interest is virtually unlimited, the interest itself is not of such a nature that any one of these states could invoke it to gain access to virtually any and every case before the court. The absence of the latter characteristic

225. GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 552–553 (1986).

226. *Id.*

227. Paolo Palchetti, *Opening the International Court of Justice to Third States: Intervention and Beyond*, 6 MAX PLANCK Y.B. OF UNITED NATIONS LAW 139, 179 (2002).

228. Gaja, *supra* note 80, at 145.

229. NINA H. B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 94–95 (2000).

230. Palchetti, *supra* note 228, at 179.

distinguishes common interests from the type of interest that the individualization criterion was devised to disqualify, and it therefore absolves “common interests” from running afoul of Judge Fitzmaurice’s test.

3. *Risk of “Opening the Floodgates” May be Exaggerated*

Furthermore, in practice, the risk of overcrowding may not actually prove to be as pronounced. Indeed, there is nothing to guarantee that by admitting Nicaragua’s intervention, the court would have motivated other states to follow in suit and present Article 62 interventions of their own.

First, instead of taking direct action themselves, states may prefer to mobilize around a figurehead state tasked with conducting any such proceedings. They may support this state indirectly (diplomatically, financially, and morally) because it is defending a position reconcilable with their own views without involving themselves in the adjudicative process directly. Second, in the absence of certain cultural, political, or economic alignments with the victim state or injured group, certain states may be reluctant to react to even the most gross violations of international law.²³¹ So far, states that avail themselves of the right to invoke the *erga omnes partes* responsibility of another before the court, and to a lesser extent, those who have sought to intervene in such cases, tend to possess one or more of these *liens* with the victim state or group. Thirdly, in the absence of extraneous internal or external political pressures on states not all violations of *erga omnes (partes)* norms appear to attract the same degree of attention. Certainly, there may be more nuanced reasons underpinning why a particular state reacts while others do not. Nonetheless, these patterns (and sometimes lack thereof) should temper concerns about overcrowding.

a. *Supporting a Figurehead*

Coordinated mobilization in support of a figurehead can be observed in the cooperation between The Gambia and the other member states of the Organization for Islamic Cooperation (“OIC”) in the former’s case against Myanmar. The Gambia has confirmed before the UNGA²³² and in its pleadings to the court that it was “ready to lead concerted efforts to take the Rohingya issue to the International court of Justice *on behalf of the Organization of Islamic Cooperation*,”²³³ that it is acting “to hold Myanmar accountable for its genocidal crimes against

231. Simma, *supra* note 1, at 247–248.

232. U.N. GAOR, 74th Sess., 8th plen. mtg. at 31, *Address by Mrs. Isatou Touray, Vice-President of the Republic of the Gambia*, U.N. Doc. A/74/PV.8 (Nov. 26, 2019).

233. *Id.*; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Written Observations of The Gambia on the Preliminary Objections Raised by Myanmar, 2021 I.C.J. Pleadings, ¶¶ 5.14, 5.17 (Apr. 20, 2021), <https://www.icj-cij.org/node/106111> [<https://perma.cc/2HRF-2MEG>] (emphasis added).

the Rohingya;²³⁴ and that all OIC Member states endorse the pleadings presented thus far.²³⁵ The other fifty-six member states, save one, have refrained from intervening in the case. Instead, the OIC contributes indirectly to this venture by formally calling on all its member states to “provide all necessary support, including financial assistance for the Legal case, in accordance with the principle of burden-sharing and shared responsibility.”²³⁶

b. Reluctance to Intervene in the Absence of Certain Alignments with the Victim State or Injured Group

The Gambia’s mobilization might be attributed principally to its kinship with the Rohingya based on a shared religion. This sentiment is aptly curated in various OIC resolutions, which The Gambia has presented as declaratory of its formal position and views.²³⁷ For example, in OIC Res No 4/46-MM, it was “acknowledged” that aiding the Rohingya advances a core objective of the OIC Charter, namely, safeguarding the religious identity and dignity of Muslim minorities in non-OIC member states.²³⁸ Slovenia has expressly attributed its decision to intervene in this case, *inter alia*,²³⁹ to “its experience as a former Yugoslav republic in a region scarred by the Srebrenica genocide.”²⁴⁰

234. *Id.* ¶ 2.22 (emphasis added).

235. *Id.* ¶¶ 2.20, 2.23, 5.13.

236. Org. of Islamic Cooperation [OIC], Res. No. 4/47-MM, at 42, OIC Doc. OIC/CFM-47/0220/MM/RES/FINAL (Jan. 27–28, 2020).

237. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Written Observations of The Gambia on the Preliminary Objections Raised by Myanmar, 2021 I.C.J. Pleadings, ¶¶ 2.16–2.17, 5.16 (Apr. 20, 2021), <https://www.icj-cij.org/node/106111> [<https://perma.cc/2HRF-2MEG>].

238. OIC, Res. No. 4/46-MM, at 14, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL (Mar. 1–2, 2019).

239. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Declaration of Intervention of Slovenia, 2024 I.C.J. Pleadings, ¶¶ 22–32 (Nov. 29, 2024), <https://www.icj-cij.org/node/204545> [<https://perma.cc/8LVY-7NTD>].

240. *Id.* ¶ 32. In this quote, Slovenia is referring to the “the largest and most horrific mass execution of civilians [Bosniak Muslims] in Europe in the second half of the twentieth century.” See *Stichting Mothers of Srebrenica and Others v. Netherlands*, App. No. 65542/12, ¶ 48 (Nov. 11, 2013), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22002-7604%22%7D> [<https://perma.cc/X4PY-KY6A>]. It bears remembering Slovenia’s historical proximity to this incident. Slovenes and Bosnians were countrymen and ethnic minority groups under the former Yugoslavia. Moreover, the systematic persecution and massacre of Bosnians was perpetrated by the ethnic majority Serbs in the context of war catalyzed by the former’s desire to secede from the Yugoslavia and establish their own country. Slovenia had itself, some years earlier, undergone an armed conflict against Serbian and Croat forces in the process of securing its own independence from Yugoslavia. Slovenia has historically portrayed itself a steadfast advocate in the condemnation of the Bosnian Genocide and a staunch advocate against the practice of Bosnian genocide denialism. Slovenia is also one of five states which spearheaded the so-called “Mutual Legal Assistance Initiative” culminating in the adoption of the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes. On all these points, see also Sergej Flere, *Explaining Ethnic Antagonism in Yugoslavia*, 7

South Africa expatiates that its decision to bring a case against Israel was motivated by its own history with apartheid.²⁴¹ Ireland has credited its decision to intervene in those same proceedings to the perceived parallels it draws between Ireland's own onerous path to statehood and the "plight" of the Palestinian people.²⁴² Egypt, Libya, the Maldives, and Turkey are OIC Member states that share a common dominant religion with the Palestinians. Cuba's intervention might be said to represent the other side of the coin. Namely, it was motivated to intervene owing to its political opposition to the respondent (or its perceived associates). In particular, Cuba's intervention appears to have been catalyzed by its tumultuous foreign relations with the United States. Before multilateral fora, Cuba has accused the United States of being "complicit" in or an accomplice to Israel's genocide of the Palestinians. It has also posited that Israel enjoys impunity from its crimes by reason of this alleged complicity.²⁴³ Thus, Cuba's intervention is arguably in part a political protest against the United States. Chile, for its part, is believed to host "the largest Palestinian population outside the Middle East,"²⁴⁴ and it is reported that the Palestinian-Chilean diaspora has been historically active and successful in lobbying the Chilean government in favor of pro-Palestinian foreign policy initiatives.²⁴⁵

The record-breaking coalition of intervenors in *Ukraine v. Russian Federation* invariably comprises Ukraine's "Western allies" who have politically condemned

EUR. SOCIOLOGICAL REV. 183, 189 (1991); *MLA (Mutual Legal Assistance and Extradition) Initiative*, REPUBLIC OF SLOVN., <https://www.gov.si/en/registries/projects/mla-initiative/> [https://perma.cc/29J9-GSVT]; *Slovenian President pays tribute to victims of Srebrenica genocide in Potočari*, PRESIDENT OF THE REPUBLIC OF SLOVN., (July 11, 2025), <https://www.predsednica-slo.si/en/news/predsednica-republike-se-je-v-potocarih-poklonila-zrtvam-genocida-v-srebrenici> [https://perma.cc/3FSW-M3SL]; Press Release, Off. of the President of the Republic of Slovenia, Slovenian President on the 15th Anniversary of the Srebrenica Genocide (July 11, 2010), <https://www.bivsi-predsednik.si/up-rs/2007-2012/turk-ang-arhiv.nsf/dokumentiweb/51E59D84F17D61B7C1257761004D1A6E?OpenDocument> [https://perma.cc/UE84-YG44]; Stefan Oeter, *Yugoslavia, Dissolution of*, MAX PLANCK ENCYCLOPEDIA OF INT'L L., ¶¶ 6, 12–29 (May 2011), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1370> [https://perma.cc/7KLA-B8GN].

241. *S. Afr. v. Isr.*, South Africa's Application, *supra* note 38, ¶ 2.

242. *Ireland's Recognition of the State of Palestine: Statements*, 1054 DÁIL ÉIREANN OFFICIAL REPORT 763, 771–772 (Mar. 28, 2024), <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2024-05-28/debate/mul@/main.pdf> [https://perma.cc/62GV-V4QQ].

243. *Cuba Joins South Africa's Genocide Case Against Israel at Top UN Court*, ALGEMEINER (Jan. 14, 2025), <https://www.algemeiner.com/2025/01/14/cuba-joins-south-africas-genocide-case-against-israel-top-un-court/> [https://perma.cc/EF3W-AZMY].

244. Heba El Attar, *Chile*, in OXFORD HANDBOOK OF ARAB NOVELISTIC TRADITIONS 590 (W.S. Hassan ed., 2017).

245. Patricia Luna, *Chile: Palestinians gather to forge unified diaspora*, AL JAZEERA (Jan. 15, 2017), <https://www.aljazeera.com/features/2017/1/15/chile-palestinians-gather-to-forge-unified-diaspora> [https://perma.cc/7NAR-RATN].

Russia for engaging in a campaign of unlawful aggression.²⁴⁶ Noticeably absent from the coalition were any states in the continents of Africa, Asia, or South America.²⁴⁷

However, even where such liens are present, states may nonetheless refrain from intervening. Alignments do not guarantee consistent behavior. Poland, which intervened in *Ukraine v. Russian Federation*, rationalized its decision based on its “long history of supporting efforts to prevent and punish genocide,”²⁴⁸ and especially as a consequence of “the genocide perpetrated on Polish nationals during World War II.”²⁴⁹ Nevertheless, Poland’s wide-reaching special position vis-à-vis the crime of genocide by reason of its historical victimhood has not elicited similar interventive action on its part with respect to the cases of *The Gambia v. Myanmar* or *South Africa v. Israel*. This illustrates how states may not consistently intervene despite their anecdotal alignments. Such inconsistencies should further quell concerns regarding overcrowding.

c. Comments on Current Trends

As of March 2026, twenty-two states have issued declarations of intervention in *South Africa v. Israel*.²⁵⁰ Whereas the number draws closer to the record-breaking number of intervenors in *Ukraine v. Russia*, this development is not fatal to the thesis of this subsection.

First, not all cases involving the adjudication of *erga omnes (partes)* obligations have attracted commensurate levels of participation. For example, only eleven states have intervened in *The Gambia v. Myanmar*, which is much further ahead than *South Africa v. Israel* in terms of the stage of the proceeding, with the hearings on the merits having recently concluded on January 29, 2026.²⁵¹

246. See generally CL Lim and Ryan Martínez Mitchell, *Neutral Rights and Collective Countermeasures for Erga Omnes Violations*, 72 INT’L & COMP. L.Q. 361 (2023).

247. *Id.* at 361; see also ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*)—Intervention (Aug. 2, 2024), <https://www.icj-cij.org/case/182/intervention> [https://perma.cc/NVT8-TC43] (for a list of intervenors).

248. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Russ.*), Declaration of Intervention of Poland, 2024 I.C.J. Pleadings, ¶ 14 (Sept. 15, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220915-WRI-01-00-EN.pdf> [https://perma.cc/VTN8-9RGP].

249. *Id.*

250. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Intervention*, INT’L CT. JUST. [ICJ], <https://www.icj-cij.org/case/192/intervention> [https://perma.cc/Y39C-YJVB].

251. *Id.*; see also Application on the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gam. v. Myan.*), Verbatim Record (Jan. 26, 2026), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20260129-ora-02-00-bic.pdf> [https://perma.cc/Y726-CEXF].

Admittedly short lived,²⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. United Arab Emirates)* attracted only one single intervenor.²⁵³ Moreover, as of yet, not a single state has opted to intervene in *Canada and Netherlands v. Syrian Arab Republic*—despite the case being listed on court’s docket now for nearly three years.²⁵⁴ The same observation can be made in respect of the twin CERD cases between Azerbaijan and Armenia which have been pending now for approximately five years.²⁵⁵

The practices above suggest that whereas the obligations in the UNCAT, CERD, and Genocide Convention all protect fundamental human values, not all prospective encroachments thereof attract the same degree of reaction. Against this backdrop, this Article invites reflection on the unique features of the alleged genocide in Gaza. Today a government’s stance on question of genocide against Palestinians, and adjacent matters such as the question of Palestine’s statehood proper, are defining and mainstream features of its foreign policy. It is reported that a political party’s stance on such issues can considerably sway public support for or against that party by influencing constituents’ voting direction.²⁵⁶ Likewise, official statements by states on cognate issues

252. The Court, controversially, ordered the case be removed from the general list in its one and only provisional measures order. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. U.A.E.)*, Request for the Indication of Provisional Measures, Order, ¶ 35 (May 5), <https://www.icj-cij.org/sites/default/files/case-related/197/197-20250505-ord-01-00-en.pdf> [<https://perma.cc/9SGX-J7J5>].

253. See generally *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. U.A.E.)*, Declaration of Intervention of Serbia (Apr. 16, 2025), <https://icj-web.lemman.un-icc.cloud/sites/default/files/case-related/197/198-20250424-int-01-00-en.pdf> [<https://perma.cc/7GFU-49GD>].

254. See generally *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syrian Arab Republic)*, Joint Application Instituting Proceedings (June 8, 2023), <https://icj-web.lemman.un-icc.cloud/sites/default/files/case-related/188/188-20230608-app-01-00-en.pdf> [<https://perma.cc/3XG6-UU9A>]; See also *Contentious cases*, ICJ (last visited Apr. 6, 2026), <https://www.icj-cij.org/contentious-cases?da-teorder=introduction&order=desc> [<https://perma.cc/JB3M-MWYF>].

255. See generally *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures (Sept. 16, 2021), <https://www.icj-cij.org/case/180/institution-proceedings> [<https://perma.cc/3RT4-UDK6>]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azer. v. Arm.)*, Application Instituting Proceedings (Sept. 23, 2021), <https://www.icj-cij.org/sites/default/files/case-related/181/181-20210923-APP-01-00-EN.pdf> [<https://perma.cc/7D34-F23A>].

256. See Robert Booth, *Labour ‘Working to Get Support Back’ After Losing Votes over Gaza Stance*, GUARDIAN (May 5, 2024), <https://www.theguardian.com/politics/article/2024/may/05/labour-working-to-get-support-back-after-losing-votes-over-gaza-stance> [<https://perma.cc/9NAQ-GQ4S>]; Megan Specia, *Labour Loses Votes in Muslim Area Over Its Gaza Policy*, N.Y. TIMES (May 7, 2024), <https://www.nytimes.com/2024/07/05/world/europe/uk-labour-party-israel-gaza-war-starmer.html> [<https://perma.cc/Y294-K5VH>]; Kiran Stacey, *Senior Labour Figures Admit Stance on Gaza Cost Party Seats*, GUARDIAN (July 5, 2024), <https://www.theguardian.com/politics/article/2024/jul/05/labour-loses-three-seats-to-pro-palestinian-candidates> [<https://perma.cc/>].

often elicit widespread reactions of condemnation or approval from other states and in turn may bear on the general status and quality of that country's foreign relation with its contemporaries.²⁵⁷ Thus, states may be moved to intervene in *South Africa v. Israel* because of political (internal and external) pressures that do not feature as pronouncedly in every other case involving allegations of infringements of elementary human values. It would be most unwelcome if these extrajudicial motivators served as determinants for satisfaction of a legal test as to whether an interest can qualify for protection under Article 62.

Second, the presence of Article 63 in the ICJ Statute suggests it was never intended that third state participation in reliance of widely dispersed interests should, as a matter of principle, be precluded. Article 63 permits states to intervene in any case involving the "construction" of any treaty to which that intervenor is a party.²⁵⁸ Participation thereunder is not contingent on the intervenor furnishing proof of an extraneous "interest of a legal nature."²⁵⁹ Instead, the right to intimate the court is premised on a presumption that any party to a treaty has an interest in its proper construction by the court.²⁶⁰ In respect of the Genocide Convention, or any other universally ratified *erga omnes partes* instrument, the number of interest holders in the proper interpretation of the treaty and the number of states subscribed to the common interest animating that instrument are virtually one in the same and therefore equally vast. Both interests exist *ipso facto* by reason of a state's membership to the instrument. The two interests are similar also in the fact that they are distinguishable, in the same way, from a general interest in the development of the law. Namely, an interest

cc/4Q6A-K2BG] (discussing reports tying United Kingdom ("U.K.") Labour Government's loss of votes to its Palestine-related stances prior to paradigm shift brought about by recognizing Palestinian statehood).

257. See, e.g., *Israel Orders Recall of Ambassadors to Ireland and Norway*, REUTERS (May 22, 2024), <https://www.reuters.com/world/europe/israel-orders-recall-ambassadors-ireland-norway-2024-05-22/> [https://perma.cc/YZ88-WE9N]; *'Double Standards': World Reacts to US Veto on Gaza Truce Resolution at UN*, AL JAZEERA (Dec. 9, 2023), <https://www.aljazeera.com/news/2023/12/9/double-standards-world-reacts-to-us-vetoing-unc-gaza-resolution> [https://perma.cc/47MB-EF4H]; Statement, David Lammy, United Kingdom Foreign Secretary, Israel and the Occupied Palestinian Territories: Foreign Secretary Statement, 20 May 2025 (May 20, 2025), <https://www.gov.uk/government/speeches/israel-and-the-occupied-palestinian-territories-foreign-secretary-statement-20-may-2025> [https://perma.cc/PD2Q-FRHN]; Robert Mackey et al., *Trump Announces Sweeping New Levies for Scores of Countries—As It Happened*, GUARDIAN (July 31, 2025), <https://www.theguardian.com/us-news/live/2025/jul/31/donald-trump-tariffs-trade-canada-palestine-us-politics-live-news-updates> [https://perma.cc/ES7A-Q8WX]; Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Application Instituting Proceedings and Request for the Indication of Provisional Measures, ¶¶ 18, 27 (Mar. 1, 2024), <https://icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf> [https://perma.cc/7QLY-SSHN].

258. ICJ Statute, *supra* note 51, art. 63.

259. See Alina Miron & Christine Chinkin, *Article 63*, in COMMENTARY, *supra* note 51, ¶¶ 14–22 (detailing the differences between intervention under Articles 62 and 63).

260. *Id.* ¶ 12.

in the construction of a convention can, similarly, be employed to intervene in only those cases where that particular treaty is being interpreted. It does not grant a state access to any and all cases before the court. A state cannot claim to have interest in the interpretation of a treaty of which it is not a member, or even a clause in respect of which it has entered a reservation.²⁶¹ In light of all the foregoing, it is difficult to justify disqualifying common interests on account of their widely held nature.

4. *The Second Prong Prohibits Intervention in Reliance on Remote and Hypothetical Interests*

Furthermore, Judge Fitzmaurice specifies that the purpose of the generality barrier is not to arbitrarily and indiscriminately exclude all widely dispersed interests. It instead disqualifies interventions predicated on “interests which, even if technically satisfying the requisite conditions, are of a remote or hypothetical character.”²⁶² States’ common interest in the Genocide Convention’s obligations is neither remote nor hypothetical. The non-hypothetical nature is best represented in its tangible component to prevent the extinction of human groups, whereas the non-remote nature manifests most profoundly in the “moral component” to suppress the practice of unconscionable acts.²⁶³

a. *The Common Interest is Not Hypothetical*

One could hardly argue that an interest in “safeguard[ing] the *very existence* of certain human groups”²⁶⁴ is insufficiently concrete. This interest concerns not only the erasure of the group but equally the life and physical integrity of each member of that group. For example, as applied to the Rohingya, this interest manifests in The Gambia’s desire to prevent the potential annihilation of the group through the systemic “rape, killings in thousands including of babies and children, burning people alive, brutal beatings, disappearances, eviction and forced expulsion of inhabitants, arbitrary arrests, detentions, torture.”²⁶⁵

Whether or not the threshold for genocide is eventually made out on the merits, these concerns relate to tangible harms which pose a genuine (as opposed to purely hypothetical) threat to the well-being of the group’s individual members, and, in turn, the existence of the group as a whole. Thus,

261. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v Russ.), Admissibility of the Declarations of Intervention, Order, 2023 I.C.J. 354, ¶¶ 93–98 (June 5).

262. FITZMAURICE, *supra* note 226, at 553.

263. *See* Section II.C.

264. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (emphasis added).

265. OIC, Res. No. 4/48-MM, at 19, ¶¶ 1–2, OIC Doc. OIC/CFM-48/0222/MM/RES/FINAL (Mar. 22–23, 2022).

compared to the types of interests the second prong seeks to disqualify, the interest underlying the *erga omnes partes* provisions of the Genocide Convention is sufficiently concrete.

b. The Common Interest is Not Remote

Scholars such as Palchetti have cautioned that because the interest is shared among a voluminous group of beneficiaries, it “could be considered by the Court as too general in nature.”²⁶⁶ This appraisal fails to appreciate the precise impropriety against which the generality barrier seeks to protect.

An interest ought to be considered too remote if a state’s conviction in that interest is sufficiently diluted to be virtually devoid of any real substance. For example, any state can claim to have an interest in the development of international law purely because it is regulated by international law. This interest exists by reason alone of a state’s status as a subject of international law. States apply international law every day, be that when exploiting shared natural resources, housing consular premises on their territory, or using the seas. They could therefore always claim to have some interest in the court’s identification, interpretation, and application of the laws which regulate these activities.

In contradistinction, the common interest enshrined in the Genocide Convention is not widespread by reason of it being so generic that it happens to be loosely, or coincidentally, relevant to each contracting party in any given instance. Instead, the interest is quasi-universal because its obligations were devised to protect the most fundamental morals to which each state subscribes.²⁶⁷ Indeed, in *Reservations*, the court observed that the Convention’s purpose was to “confirm and endorse the most elementary principles of morality” as shared by all states.²⁶⁸ Some judges characterized it as the manifestation of the international community’s consensus in assigning “a high objective for all humanity.”²⁶⁹ Each state’s recognition of the inviolability of those same values served as an independent building block in the formation of the moral component of the common interest. For that reason, each state’s connection to that interest appears to be intentional and material.

This conclusion receives support from the fact that this component of the common interest is the product of a proactive and intentional paradigm shift, which could not have materialized but for the consensus of the international

266. Palchetti, *supra* note 228, at 179.

267. ANTÔNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 291, 326 (2020).

268. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23.

269. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 31, 47 (May 28) (joint dissenting opinion by Guerrero, McNair, Read, & Hsu Mo, JJ.).

community of states. Contrary to opinions postulated by some, the morals underlying the Convention cannot be characterized as being opposable to the international community intrinsically or inherently by reason of some higher moral authority.²⁷⁰ Whereas, in its substance, the common interest underlying the Convention is certainly reconcilable with values indispensable to natural law (such as respect for physical bodily integrity and the sanctity of life), a corresponding commitment on the part of the community of states towards the inviolability of these morals and values was not always present.

Once upon a time, acts which would today satisfy the threshold for genocide under international law failed to attract popular condemnations by states either based on a purported illegality or their moral reprehensibility.²⁷¹ As the Ruhashyankiko Report poignantly chronicles: “While the concept of genocide is a recent one, the acts which it covers are as old as the history of mankind itself.”²⁷² Complacency on the part of states appears to have been the consequence of a pervasive belief that any state was entitled to subjugate the population situated within its own territory to any treatment it desired²⁷³—thus signaling a belief that state sovereignty triumphs any tenet of moral law. As Schabas notes, up until the mid 1900s, “international law had never really concerned itself with acts perpetrated by sovereign states against their own civilian populations.”²⁷⁴ The possibility of a state being held accountable for such transgressions was at best “controversial.”²⁷⁵ Scholars from that era went so far as to characterize any interference therewith as a “trespass” against the state.²⁷⁶ Even after the tragedies of the Holocaust, the U.S. delegation would declare at the 1945 International Conference on Military Trials that in peacetime, “the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose

270. Maurizio Ragazzi, *International Obligations Erga Omnes: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 465–69 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

271. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 1–2 (2009).

272. Nicodème Ruhashyankiko (Special Rapporteur), *Study of the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. Nicodème Rubashyankiko, Special Rapporteur*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978).

273. William A. Schabas, *Genocide and Crimes against Humanity: Clarifying the Relationship*, in *THE GENOCIDE CONVENTION: – THE LEGACY OF 60 YEARS* 4–8 (Harmut van der Wilt et al. eds., 2012).

274. William A. Schabas, *Prosecuting Genocide*, in *THE HISTORIOGRAPHY OF GENOCIDE* 254 (Dan Stone ed., 2008).

275. Schabas, *supra* note 274, at 4, 6; SAMANTHA POWER, “A PROBLEM FROM HELL:” *AMERICA AND THE AGE OF GENOCIDE* 17 (2002).

276. Schabas, *supra* note 274, at 6.

itself in our problems.”²⁷⁷ The majority of states shared in this view as to the status of the law.²⁷⁸ According to the United States, international interference was believed to be justified only if genocide was part and parcel of an “illegal war” conducted on an interstate basis.²⁷⁹ The advent of the Genocide Convention marked the materialization of the international community’s collective will to condemn this paradigm and abandon it in favor of the inviolability and supremacy of moral values considered to be the most fundamental to the human condition. This shift was made possible by each state’s individual commitment to those values, and for that reason, each state can be said to individually retain a material connection to the preservation of the new moral status quo.

IV. THE COMMON INTEREST OF A LEGAL NATURE MAY BE AFFECTED

Possession of a qualifying interest is not sufficient for admission. The intervenor must demonstrate that its interest may be affected by the decision.²⁸⁰ This Part argues that the common interests may be sufficiently susceptible. Specifically, the court’s decision has the potential to affect Nicaragua’s interest, because the court may find wrongdoing on the part of Israel, and it may order Israel to cease its wrongful acts and provide guarantees of non-repetition. The court is entitled to grant such redress,²⁸¹ and both South Africa and Nicaragua have called upon it to do so.²⁸² A judgment to this end would have the potential to produce direct tangible effects. If Israel complies with such a prospective judgment, the decision will have brought an end to any systemic killing or other genocidal acts perpetrated against the Palestinians, while also precluding the commission of any such acts anew. This would, in turn, affect Nicaragua’s interest related to “safeguard[ing] the very existence of certain humans”²⁸³—here, the Palestinians—by contributing to the achievement, realization and promotion thereof.

However, the principal question here is whether such a “positive effect” on Nicaragua’s interest is sanctioned by Article 62, or whether Article 62 requires

277. *Id.*

278. See generally DOUGLAS IRVIN-ERICKSON, RAPHAEL LEMKIN AND THE CONCEPT OF GENOCIDE 1 (2017) (supporting the idea that states can commit genocide against peoples in their territory).

279. See Schabas, *supra* note 274, at 6.

280. Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, Judgment, 1990 I.C.J. 92, ¶¶ 61–62, 66 (Sept. 13).

281. *DARSIWA Commentaries*, *supra* note 8, at 127–128.

282. *S. Afr. v. Isr.*, Nicaragua’s Application to Intervene, *supra* note 36, ¶ 9.

283. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

that the interest must be at risk of being actively impeded by the decision.²⁸⁴ Nothing in the ordinary meaning of Article 62 alludes to the possibility that it restricts itself to the latter qualification. The requirement is that the interest “may be affected by the decision in the case.” This is an unqualified stipulation. “Affected” is a neutral term. An interest may certainly be “affected” by being harmed or undermined. However, an interest may also be affected beneficially, say through its vindication or achievement. In both instances, the interest of the third state is actively at play and susceptible to some influence or molding by the decision rendered.

Admittedly, the court has previously elaborated that “[t]he decision granting permission to intervene can be understood as a *preventive* one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to *protect an interest of a legal nature* which risks being affected in those proceedings.”²⁸⁵ This characterization is not fatal to the thesis of this Part.

First, the court never specifies that Article 62 intervention is reserved exclusively for an intervention aimed at preventing a particular outcome. Therefore, the court has left the door open for admission of interventions that are aimed at achieving a particular outcome that would result in the effectuation of the intervenor’s interest.

Second, in that same judgment the court later highlighted “the *raison d’être* of intervention is to enable a third State, whose legal interest might be affected by a possible decision of the court, to participate in the main case in order to protect that interest.”²⁸⁶ If the emphasis is on the protection of interests, there can surely exist no justifiable reason as to why interventions should be exclusively preventive in nature. As explained above, a judgment of the court recognizing a breach of the Genocide Convention, and ordering Israel to cease any genocidal acts, could stop the eradication of Palestinians and thereby protect Nicaragua’s interest in their continued existence.

A decision by the court is also situated to affect Nicaragua’s rights proper, as well as those of any other member state to Genocide Convention. Such is the case despite the reservation in Article 59 of the ICJ Statute that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” If the court decides that Israel has violated the Genocide Convention, it will have made a ruling on rights and obligations which are opposable, in any given instance, not only as between Israel and South Africa but also

284. *But see* Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 420, 471, ¶ 54 (May 4) (dissenting opinion by Donoghue, J.) (saying in appreciation that Honduras’s participation would have introduced a new dispute).

285. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 420, ¶ 38 (May 4) (emphasis added).

286. *Id.* ¶ 46.

as between Israel and all other contracting parties to the Genocide Convention.²⁸⁷ As mentioned earlier, in *Furundžija*, the ICTY duly observed that the “violation of such an obligation simultaneously constitutes a breach of the *correlative right of all members*”²⁸⁸ owed. Therefore, it is difficult to conceive how the court’s judgment regarding a violation of the Genocide Convention could ever be confined to a bilateral plane as between a particular applicant and respondent.

A right or obligation under the Genocide Convention consists of a single multilateral entitlement and not a series of severable but identical bilateral entitlements.²⁸⁹ A breach of the Convention on the part of Israel constitutes a failure to fulfill the one and the same obligation it owes to all other contracting parties and therefore is a breach of the same right held by them collectively. It would be a triumph of form over substance to maintain that vis-à-vis South Africa, Israel has breached the same obligation, which by its normative configuration Israel owes simultaneously to all other contracting parties, whilst insisting that it has not contravened this obligation vis-à-vis any other contracting party to the Convention. Such attitudes would have the effect of “importing an inappropriate bilateralism or relativism into the judgments of the Court.”²⁹⁰ Attempts to do so, as exemplified in an erroneous aspect of Judge Weeramantry’s conceptualization of *erga omnes* rights and obligations in *East Timor*, must be dismissed. He suggests that when a “right *erga omnes*” is asserted against a respondent, it “becomes a right *erga singulum* which, in turn, becomes a *res judicata erga singulum* against” that alone.²⁹¹ This conceptualization cannot stand because it reduces an obligation *erga omnes* (*partes*), which is multilateralized obligation, into a bundle of bilateral entitlements.²⁹² Such conceptualization of obligations *erga omnes* has since been authoritatively debunked by the ILC and should be rejected.²⁹³ Although it might perhaps be argued that the associated *procedural* rights are bilateralizable,²⁹⁴ meaning any one single member of the “omnes” is empowered to adjudicate a claim against any wrongful actor without the need for all other members of the “omnes” being present, it would be a legal fiction to suggest that the invocation of responsibility transforms the *substantive* (multilateralized) nature of the underlying rights in question.

287. *DARSIWA Commentaries*, *supra* note 8, at 118–19, 126–27.

288. Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, ¶ 151 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (emphasis added).

289. *DARSIWA Commentaries*, *supra* note 8, at 118–19, 126–27.

290. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 148, ¶ 34 (Mar. 21) (dissenting opinion by Jennings, J.).

291. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 139, 172 (June 30) (dissenting opinion by Weeramantry, J.).

292. *Id.*

293. *DARSIWA Commentaries*, *supra* note 8, at 118–19.

294. Beatrice Bonafé, *Adjudicative Bilateralism and Community Interests*, 115 AJIL UNBOUND 164, 166 (2021).

Scholars and judges of the court alike have already acknowledged that where the court recognizes an entitlement which by its very nature can be asserted against third states—say sovereign title over territory—the net effect of the judgment cannot be confined between the two litigants.²⁹⁵ This Article sees no reason why the same ought not to apply where the court rules on the breach of a right or obligation which does not operate in a bilateralized manner as between applicant and respondent alone, but in a multilateralized manner as between a commune of states (or the international community as a whole) and the respondent.

Against this backdrop, it can be argued that the court's judgment would go beyond affecting the parties' rights. It would, in essence, prove determinative on the very obligations Israel owes to the all other contracting parties of the Genocide Convention, including Nicaragua, therefore proving indicative of: (i) whether their rights or, the obligations owed to them thereunder, have been respected; and (ii) whether their substantive interests protected by those rights and obligations enshrined in the Convention have been undermined.²⁹⁶ The court's decision, being so inevitably admittance, must invariably be taken to satisfy the seemingly lower threshold of affecting said rights and accompanying interests.²⁹⁷

V. THE OBJECTS OF NICARAGUA'S INTERVENTION

After satisfying itself that its anticipated judgment may affect Nicaragua's interests, the court would have needed to examine whether the so-called "object" of the intervention (that is, why and how Nicaragua seeks to engage with the court) was "proper" (that is, whether Nicaragua is or ought to be entitled to participate both for that requested purpose and in that desired manner).

Nicaragua had compartmentalized the object of its intervention into four separate limbs paginated (a)–(d). Strictly speaking, Nicaragua presented each

295. Christian Tams & Alexandre Belle, *Erga Omnes Effects of Judicial Decisions: International Adjudication*, ¶ 5, MAX PLANCK ENCYCLOPAEDIAS OF INT'L L. (Sept. 2021), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3733.013.3733/law-mpeipro-e3733> [<https://perma.cc/HF4B-SVBP>]; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 90, ¶¶ 8–9, 37 (Mar. 21) (dissenting opinion by Oda, J.); Chester Brown, *Article 59*, in COMMENTARY, *supra* note 51, ¶ 59; East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 224, ¶ 64 (June 30) (dissenting opinion by Skubiszewski, J. ad hoc).

296. See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Provisional Measures, Order, 2020 I.C.J. 3, 65 (Jan. 23) (declaration by Kress, J. ad hoc).

297. On the notion that the risk of interests being affected is of a lower threshold than the determination of the rights of a third party, see Miron & Chinkin, *supra* note 51, ¶ 32.

prong not as an independent object *per se*, but as individual components comprising a singular overarching object.²⁹⁸

Despite Nicaragua's decision to formulate its object in this peculiar manner, admission of its application ought not to have been contingent on all four prongs being deemed proper. For the most part, each prong refers to a distinctive way in, or reason for, which Nicaragua sought to engage with the Court. Admittedly, whereas there are two separate pairs of prongs where the purposes embodied in each constituent overlap with those of its covalent counterpart, even then, it can be said that the common or overlapping purpose featured in one set of bonded objects appears functionally distinct from that observed in the other. As will be illustrated in greater detail below, prongs (a) and (d) have as their common purpose the desire to intimate the Court as to whether Israel is in breach of the Genocide Convention. In contradistinction thereto, prongs (b) and (c) concern Nicaragua's plot to rely on its participation in the proceedings as a vehicle to (supposedly) discharge its own obligation to prevent and punish genocide.

Each prong, or at the very least each pair of prongs, being so individualized and functionally distinguishable, this Article sees no compelling reason why the court could not have admitted the intervention by declaring some prongs proper while recognizing others as improper as if they were independent objects. The extent of Nicaragua's participation would have depended on which objects were upheld as being proper. This Article will therefore treat and refer to each prong as "Objects (a)–(d)," respectively. This Part isolates each object and critically assesses controversies surrounding its propriety individually.

Objects (a) and (d) correspond to Nicaragua's interest to see the Genocide Convention's obligations complied with (that is, its interest in the capacity of a "beneficiary"). This Article takes the view that they constitute proper purposes. This Part will address said objects first to perfect the thesis of the Article (that Nicaragua's application to intervene was deserving of admission) and emphasize these objects' wider significance and applicability. Indeed, their propriety is not beholden to the substantive specificities of the Genocide Convention. Instead, these objects are proper because they express motivations which are generally considered germane and apt reasons for permitting third parties to participate—irrespective of the substantive nature or particularities of the underlying rights in question. These motives should prove similarly satisfactory where a state invokes them to justify a prospective intervention premised on another type of common interest in a future case involving the adjudication of a different *erga omnes* (*partes*) obligation corresponding to that interest.

298. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶ 21.

Objects (b) and (c) relate to Nicaragua's interest in complying with its own duty to prevent and punish genocide. These are improper purposes. They are not apt for reasons specific to the substantive particularities of the obligation to prevent and punish genocide and, disjunctively, because they do not fall within the ambit of the two categories of objects whose general propriety the court has previously acknowledged. States are thus forewarned against couching the object of any future interventions made in reliance on the same or other communitarian values in similar motivations. These objects are addressed (out of sequence) after objects (a) and (d) to contour the parameters of the perfected thesis by illustrating, distilling, and dispensing with aspects of the application that are not conducive to securing third state participation.

A. *Object (a)*

Pursuant to Object (a), Nicaragua seeks to: (i) "protect the legal rights of Nicaragua arising from the Genocide Convention;" and (ii) "participate in the determination of the extent of the obligations imposed by the Convention."²⁹⁹

1. *Intervention for the Purpose of Protecting One's Rights and Interest is Generally Deemed Proper*

In *El Salvador/Honduras*, a chamber of the court confirmed "[i]ntervention under Article 62 of the Statute is for the purpose of protecting a State's interest of a legal nature that might be affected by a decision in an existing case."³⁰⁰ Naturally, the same can be said about the protection of rights.³⁰¹ In practice, states protect their interests and rights by informing the court of them.³⁰² Indeed, the court has acknowledged:

It is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard.³⁰³

299. *Id.* ¶ 21(a).

300. *Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Application by Nicaragua for Permission to Intervene, Judgment, 1990 I.C.J. 92, ¶ 97 (Sept. 13).

301. *Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Order, 1990 I.C.J. 3, ¶¶ 90–92 (Feb. 28).

302. See Zeno Crespi Reghizzi, *The Objects and Effects of Non-Party Intervention Before the International Court of Justice*, 35 LEIDEN J. INT'L L. 163, 164 (2022); Miron & Chinkin, *supra* note 51, ¶¶ 84–86; QUINTANA, *supra* note 71, at 869; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Application by Equatorial Guinea for Permission to Intervene, Judgment, 1999 I.C.J. 1029, ¶ 3 (Oct. 21); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, Application by the Philippines for Permission to Intervene, Judgment, 2001 I.C.J. 575, ¶ 7 (Oct. 23); *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, ¶ 33 (May 4).

303. *Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Application by Nicaragua for Permission to Intervene, Judgment, 1990 I.C.J. 92, ¶ 90 (Sept. 13).

In light of the above, there can be no qualms about the propriety of the first half of Object (a).

In respect of the second half of Object (a) the phrase “determination of the extent” is, at first glance, ambiguous. One’s natural inclination may be to deem it synonymous with a desire to comment on the construction or interpretation of the Genocide Convention. In that case, Article 63, not Article 62, would be the designated mechanism for such participation.³⁰⁴ However, elsewhere, Nicaragua confirms it does not seek to limit its participation merely to the interpretation of the Convention. Instead, it is “concerned with the application or the fulfillment of the Convention, as well as with its construction or interpretation which is inseparable from its application.”³⁰⁵ One can extrapolate therefrom the purpose of Object (a) is not merely to aid the Court in understanding the scope of the obligations enshrined in the Genocide Convention but also to inform the court as to whether they have been breached. Coupled with Nicaragua’s specification that it is “of the opinion that the actions being taken by Israel amount to clear violations of the Convention,”³⁰⁶ it is clear that Nicaragua was seeking, in particular, to prove that a breach has in fact transpired.

This Article opines that Nicaragua’s desire to participate in the process of the judicial determination of Israel’s compliance with its obligations under the Convention [second half of Object (a)] is nothing more than a means of protecting its interests and rights [first half of Object (a)]. Indeed, protecting one’s interest and rights by informing the court thereof entails more than bringing awareness to the existence of said interests and rights. The intervenor will actively contribute to their protection by engaging with the court to persuade it to accommodate those interests and rights.³⁰⁷ It follows that, in protecting its rights, the intervening state will invariably participate in the process of the determination of the principal disputants’ rights and obligations under international law or their compliance or non-compliance with the latter.

To that end, the specific way in which Nicaragua seeks to engage with the court, that is, its desire to persuade the court to find that a breach has transpired, can be characterised as functionally protective. Securing juridical recognition of a wrongful act, in this instance taking the form of a violation of the Genocide Convention, is an indispensable precondition to acquiring a declaration calling for cessation and non-repetition of that breach. Therefore, Nicaragua would, for all intents and purposes, have been protecting its interests by engaging with the court with a view to persuading it to hand down a judgment

304. Miron & Chinkin, *supra* note 51, ¶ 53.

305. S. Afr. v. Isr., Nicaragua’s Application to Intervene, *supra* note 36, ¶ 16.

306. *Id.* ¶ 5.

307. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 148, ¶ 14 (Mar. 21) (dissenting opinion by Jennings, J.).

specifically recognizing and declaring that Israel has not complied with its obligations under the Genocide Convention.

2. *The Commonality of the Rights and Interests Between South Africa and Nicaragua Ought Not to Be an Impediment to the Propriety Object (a)*

As alluded to throughout this Article, the substantive rights and interests underlying South Africa's claim against Israel, and those animating Nicaragua's intervention, are essentially one and the same. Consequently, in hearing South Africa's case, it is axiomatic that the court will invariably be informed of the very same interests and rights as those relied on by Nicaragua.

However, according to the "letter" of the court's jurisprudence, this should *not* render Nicaragua's intervention redundant. In the above-quoted passage from *El Salvador/Honduras*, the court emphasized that the purpose of intervention is to ensure that the intervenor's interests and rights are not affected without that particular intervenor being allowed to advocate for their protection.³⁰⁸ It appears implicit therefrom that the purpose of Article 62 intervention is not to ensure solely that the court is somehow materially informed of the intervenor's interest. Rather, Article 62 ensures that any state whose interests are susceptible to being influenced by the court's judgment can itself personally apprise the court of their vindication or the risk of their being jeopardized.

This (personal) dimension of Article 62 in turn suggests that even if South Africa's and Nicaragua's respective interests and rights are materially one and the same, the former state's participation is no substitute for that of the latter. Thus, the fact that the interests and rights Nicaragua sought to protect were the same as the interests and rights South Africa sought to enforce should have been no barrier to the admission of Nicaragua's intervention under Object (a).

Nevertheless, the court's treatment of previous applications indicates that there may be avenues pursuant to which it may deem that the personal and material purposes of Article 62 have been satisfied,³⁰⁹ *de facto* and in spirit, without ultimately admitting the intervention. As Alina Miron and Christine Chinkin observe, "the Court can—and does—rely on a [*sic*] its own engagement to protect the third State's interests at the merits stage in order to reject the application."³¹⁰ As such, there was a plausible risk that, by deploying such practices again as a basis of justification, the court may have eventually elected to dismiss Nicaragua's application despite the *prima facie* propriety of Object (a).

308. Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, Judgment, 1990 I.C.J. 92, ¶ 90 (Sept. 13).

309. Miron & Chinkin, *supra* note 51, ¶ 28.

310. *See id.*

In *Libyan Arab Jamahiriya/Malta*, the court dismissed Italy's application under Article 62. Despite its decision to dismiss the application, the court caveated that it "cannot wholly put aside the question of the legal interest[s] of Italy . . . and they will have to be taken into account."³¹¹ The court reasoned that it was aptly situated to have regard to said interests without admitting the intervention because:

[S]ufficient information as to Italy's claims for the purpose of safeguarding its rights has been given to the Court during the proceedings on the admissibility of the Italian Application.³¹²

This excerpt suggests that the objective of enabling the intervenor to inform the court of its interests and rights may be achieved through that intervenor's participation in the incidental proceedings on the admissibility of intervention alone.³¹³ The information presented to the court during these incidental proceedings may suffice to materially inform the court of the intervenor's interests, while guaranteeing that the court receives said information from the affected state itself. Indeed, in *Libyan Arab Jamahiriya/Malta*, the information was conveyed to the court by way of Italy's submissions contained in its Application and participation in the ensuing oral phase.³¹⁴ Italy's participation was so immersive that Judge Singh elucidated that the court deemed that "intervention would not have added anything to the process of cautioning the Court."³¹⁵

In that sense, Nicaragua's application was not dissimilar to Italy's. The application could have been considered sufficiently comprehensive, such that the court would have been positioned to declare that admitting it would not have provided any further contribution to the protection of Nicaragua's interests and rights enshrined in the Convention [first half of Object (a)], or to its participation in the determination of Israel's alleged violations of corresponding obligations thereunder [second half of Object (a)]. Indeed, in its application, Nicaragua clearly presented its views on the question of Israel's compliance with the Genocide Convention. It unequivocally proclaimed that "the actions taken by Israel amount to clear violations of the . . . Genocide Convention" and made submissions on why and how it believed Israel to violate this instrument.³¹⁶ Accordingly, Nicaragua

311. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, ¶ 41 (Mar. 21).

312. *Id.* ¶ 40.

313. QUINTANA, *supra* note 71, at 869–70; *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, ¶ 51 (May 4).

314. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, ¶ 40 (Mar. 21).

315. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene Judgment, 1984 I.C.J. 3, 31, 32 (Mar. 21) (separate opinion by Singh, J.).

316. *S. Afr. v. Isr.*, Nicaragua's Application to Intervene, *supra* note 36, ¶ 5.

supported its contentions by presenting detailed evidence.³¹⁷ Having made its case comprehensively, it was plausible that the court could have taken the view that admitting the intervention would have contributed nothing more to Nicaragua's attempt to protect its interests.

Furthermore, the risk of a dismissal could have been exacerbated by the practical reality that South Africa has invoked the same rights and obligations and will be defending the same common interests as those claimed by Nicaragua.³¹⁸ This feature is what precisely distinguishes the present matter from *Libyan Arab Jamabiriyah/Malta*. In that case, there was no alignment or overlap between the interests of Italy, on the one hand, and those of Libya or Malta, on the other. Each state had invoked its own special, or entirely personal, interests.³¹⁹ Neither Libya nor Malta would be defending, directly or indirectly, the interest invoked by Italy specifically. Thus, in the present matter, the court might have been even more satisfied with proffering Nicaragua only a limited right to be heard through the proceedings related to the admissibility of its intervention, because, thereafter, it could have trusted South Africa to *continue* advocating in favor of these same interests, rights, and determinations in its capacity as the applicant conducting the principal proceedings.

For all the foregoing reasons, the court could have decided that Nicaragua had, during the proceedings on the admissibility of intervention, essentially fulfilled its purpose of informing the court as to the protection of its rights, and that its Object (a) was now devoid of purpose.

Be that as it may, the court's approach in *Libyan Arab Jamabiriyah/Malta* was motivated by a peculiar aspect unique to that case's factual configuration. This distinction may temper concerns that the court would be inclined to arbitrarily transform the incidental proceedings on admissibility of the intervention into a makeshift summary intimation process to inform itself of the intervenor's opinions where there is duplicative reliance (by claimant and intervenor) on the same common interest.³²⁰

Indeed, in *Libyan Arab Jamabiriyah/Malta*, the court deemed that the object of Italy's intervention was such that Italy would be entitled to intervene in

317. *Id.* ¶¶ 2–4, n.3–27.

318. *Id.* ¶¶ 15–16.

319. *Libyan Arab Jamabiriyah/Malta*, 1984 I.C.J. at 25, ¶ 40; 9–10, ¶¶ 13–15.

320. The practice of using the proceeding on the admissibility of the intervention in such a manner has attracted disapproval from the court's individual judges. *See* Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 417, ¶¶ 1–4 (May 4) (declaration by Gaja, J.); Territorial and Maritime Dispute Between Nicaragua and Honduras (Nicar. v. Hond.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 421, 471, ¶¶ 57–59 (May 4) (dissenting opinion by Donoghue, J.).

the capacity of a party only.³²¹ However, there existed no valid basis of jurisdiction as between Italy and the two principal disputants.³²² The majority, hence, felt compelled to reject Italy's intervention for failing to satisfy the so-called "jurisdictional link" requirement to intervene in the capacity of a party, despite having formed the opinion that Italy retained a qualifying interest which was at risk of being jeopardized by the court's decision.³²³ Having acquired actual knowledge of Italy's susceptible legal rights and interests, the court felt it had assumed a "duty" to "safeguard" them.³²⁴ The court's solution was to afford due regard to Italy's claims when formulating its judgment and to do so based purely on the information furnished during the proceedings on the admissibility of the intervention.³²⁵

The demand for a similar compromise is unlikely to emerge where the intervenor does not seek to become a party to the case, or disjunctively where it has identified a valid "jurisdiction link." Insofar as Nicaragua's intervention was concerned, there would have been no such obstruction because, despite applying to be admitted as a party, Nicaragua could point to Article IX of the Genocide Convention as an effective basis of jurisdiction as between itself and the two principal parties.³²⁶

B. *Object (d)*

Nicaragua stipulated also that its objective, "as that of South Africa, is to invoke Israel's responsibility under the Genocide Convention 'with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end.'"³²⁷

1. *Nicaragua's Desire to Align with and Support South Africa's Case*

Nicaragua confirms that it "does not intend to change the subject matter of the case brought by South Africa."³²⁸ Whereas it had independently requested from the court to adjudge and declare wrongfulness on Israel's part, it had also recited, verbatim, the "prayer"³²⁹ contained in South Africa's own application,

321. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, ¶¶ 40–41 (Mar. 21).

322. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene Judgment, 1984 I.C.J. 3, 31, 32 (Mar. 21) (separate opinion by Singh, J.).

323. *Id.*

324. *Id.*

325. *Id.*

326. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶ 22.

327. *Id.* ¶ 21(d).

328. *Id.*

329. "Prayer" meaning the relief sought by South Africa. See S. Afr. v. Isr., South Africa's Application, *supra* note 38, ¶ 111.

thereby remaining strictly within its parameters.³³⁰ In light of these self-imposed caveats, Nicaragua's object of invoking Israel's responsibility, when translated into practice, appears to denote the desire to participate in these proceedings with a view to contributing materially to the process of obtaining a successful declaration of wrongdoing against Israel (accompanied by a demand for cessation thereof). Thus, the propriety of Object (d) depends principally on whether it would be proper for an intervenor "to intervene in favour of a principal party, and to present arguments tending to reinforce that party's legal position."³³¹

2. *The Travaux Préparatoires of the Statute Affirm the Propriety of Object (d)*

Admittedly, the court has never expressly recognized the propriety of such an object. In fact, there are broadly only two categories of objects whose general propriety the court has previously acknowledged.³³² Nevertheless, these are not exhaustive, and the court is entitled to recognize the propriety of novel types of objects anew.³³³ For the reasons articulated below, it would be justified in exercising such margin of appreciation vis-à-vis Object (d). The historical development of Article 62 strongly endorses an affirmative Answer to the outstanding question concerning the propriety of Object (d).

In 1920, the Advisory Committee of Jurists foresaw that an intervenor may desire to align themselves, or "take sides with," one of the principal disputants.³³⁴ The committee affirmed that where circumstances arise, such that the prospective intervenor seeks to lend its aid to any one of the principal disputants, it should be permitted to do so.³³⁵ Reference to the permissibility of Article 62 intervention with the purpose of lending "support [to] the cause of one of the original parties" was also later acknowledged, without corresponding protest, by the judges of the PCIJ during their deliberations on amendments to the Rules of court.³³⁶ For example, Judge van Eysinga observed, in particular, that intervention allowed for participation irrespective of whether a state was

330. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶ 9.

331. KOLB, *supra* note 171, at 717.

332. *Id.* at 716.

333. *Id.*

334. Advisory Comm. of Jurists, *supra* note 88, at 745 ("*U*)ne partie peut vouloir se ranger, soit près du demandeur, soit près du défendeur. [“One party may wish to side with either the plaintiff or the defendant.”]) (translation by author).

335. *Id.* ("*U*)n État se borne à joindre son assistance à celle de l'une des parties: doit-on le lui permettre? Oui, répond le Comité." [“If a State confines itself to lending its assistance to one of the parties: should it be permitted to do so? Yes, replies the Committee.”]) (translation by author).

336. Perm. Ct. of Int'l Justice [PCIJ], *Elaboration of the Rules of Court of March 11, 1936*, 1936 P.C.I.J. Ser. D No. 2, 3d Add., at 306.

“intervening on its own account or of another party.”³³⁷ It is thus evident that the machinery of intervention was incorporated into the ICJ Statute with the pointed intention of allowing third states to intervene for the purposes of supporting one of the disputants in making out its case.

3. *Prospects of Dismissing Interventions Aimed at Supporting One of the Disputants on Account of Jeopardizing the Equality of Parties*

Whereas based on the legislative history of the ICJ Statute such collaborative action under Article 62 appears proper, could the court still refuse to admit the intervention, and if so, on what bases? There may be concerns that inviting third states with the marked intention of aiding one of the principal litigants may imbalance the equality of the parties before the court. In *South Africa v. Israel*, this trepidation could apply both with respect to Nicaragua’s intervention in its singularity and to the precedential consequences which a successful intervention based on Object (d) could have in catalysing further interventions by similar intentioned states (that is, other states may feel enticed to intervene for the sole purpose of lending assistance to South Africa).

The possibility of denying admission where “multiple” applicants sought to join the proceedings in order to “bring reinforcement” to one of disputants was documented in the extrajudicial writings of Judge Fitzmaurice.³³⁸ Judge Owada advocated for the same in respect of New Zealand’s insular Article 63 intervention in *Whaling in the Antarctic*.³³⁹ Therein, Australia had accused Japan of certain practices pertaining to whaling in violation of the International Convention for the Regulation of Whaling. New Zealand’s intervention had been coordinated with Australia, with the former seeking to engage with the court for the purposes of corroborating the latter’s case theory. Acknowledgement of this cooperation was well curated in official statements recognizing that both nations were “partner[s]” in “the bid to end ‘scientific’ whaling and improve whale conservation worldwide;” that New Zealand would “make both written and oral submissions to the Court that Japanese whaling in the Southern Ocean is contrary to its obligations under applicable international conventions;” and that Australia was “kept in close consultation with the Government of New

337. *Id.* at 305. On the possibility of siding with one of the disputants, see also Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920, with Annexes, at 592, League of Nations Doc. 307806 (1920). (“LORD PHILLIMORE explained the right of intervention as existing in English Law. He emphasised, in particular, the fact, that in England intervening party could only associate itself with the defendant. . . . M. LODER gave an explanation of the same institution as it existed in Dutch Law. This admits of intervention both on the side of the plaintiff and of the defendant.”).

338. FITZMAURICE, *supra* note 226, at 553.

339. *Whaling in the Antarctic (Austl. v. Japan)*, Declaration of Intervention by New Zealand, Order, 2013 I.C.J. 3, 11, ¶¶ 1–6 (Feb. 6) (declaration by Owada, J.).

Zealand about how best to progress our shared anti-whaling objectives” and was “very pleased with the valuable support New Zealand will lend to this vital case.”³⁴⁰ Against this backdrop, Judge Owada urged the court that, where there was evidence of two states’ leveraging intervention as a form of “active collaboration in litigation strategy . . . for the purpose of promoting their common interest,”³⁴¹ the court ought to reflect prudently on the possible implications on procedural fairness before admitting the intervenor.³⁴²

It must first be ascertained whether the court enjoys the prerogative to reject an application on grounds that allowing the applicant(s) to participate would erode the sound administration of justice or undermine the equality of the parties before the court. For the most part, scholars and judges of the court alike have argued that: Article 62 does not contain a foothold allowing the court to consider extraneous variables; that the court consequently must admit an application if satisfied that the criteria prescribed in Article 62 are met; and that nonetheless the court enjoys a considerable margin of appreciation in determining the content and scope of these vague criteria and in deciding whether they have been satisfied.³⁴³ Because Article 62 contains no express reference to the sound administration of justice, it has been argued that concerns related to its erosion can have no bearing on the court’s decision to admit or reject an applicant whose application otherwise satisfies the three criteria necessary for admission.³⁴⁴

The court’s most recent judgment in *Sovereignty over the Sapodilla Cayes/Cayos Zapotillos* appears, at first glance, to be aligned with the foregoing position. Therein, Honduras argued the court should dismiss Guatemala’s application to intervene because Guatemala’s participation would constitute an abuse of process and would therefore prove “contrary to the general principles of procedural law—most notably judicial economy and the sound

340. Press Release, Murray McCully, N.Z. Minister of Foreign Affairs, *Joint Statement: Australia and New Zealand Agree on Strategy for Whaling Legal Case* (Dec. 12, 2010), <https://www.beehive.govt.nz/release/joint-statement-australia-and-new-zealand-agree-strategy-whaling-legal-case> [https://perma.cc/D9L4-59GW].

341. *Austl. v. Japan*, Declaration by Owada, J., 2013 I.C.J. ¶ 5.

342. *Id.* ¶ 6.

343. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 421, 471, ¶¶ 9–15 (May 4) (dissenting opinion by Abraham, J.); Miron & Chinkin, *supra* note 51, ¶ 28; Julien Cazala, *Good Administration of Justice*, in MAX PLANCK ENCYCLOPEDIAS OF INT’L L., ¶¶ 9–10 (Dec. 2019), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3448.013.3448/law-mpeipro-e3448> [https://perma.cc/WC4P-96U3]; Andrea Gattini, *Judicial Discretion*, in MAX PLANCK ENCYCLOPEDIAS OF INT’L L., ¶ 40 (June 2021), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3033.013.3033/law-mpeipro-e3033?d=%2F10.1093%2Flaw-mpeipro%2Fe3033.013.3033%2Flaw-mpeipro-e3033&p=emailAeL9erLHsCM%2Fg&print> [https://perma.cc/74W9-JLSF]; Bonafé, *supra* note 95, at 748–49.

344. *Nicar. v. Hond.*, Dissenting Opinion by Abraham, J., 2011 I.C.J. ¶¶ 9–15.

administration of justice—and amount[] to a misuse of the procedural mechanism of intervention.”³⁴⁵ The court rejected this argument, finding that:

In the opinion of the Court, Article 62 of the Statute confers upon it the power to determine whether a State has an interest of a legal nature that may be affected by the decision in the case. The authority entrusted to the Court is one of objective assessment and not a general discretion to accept or reject an application for permission to intervene. As the requirements set out in Article 62 of the Statute and Article 81 of the Rules of Court have been met, it has no discretion to reject this Application.³⁴⁶

The court justified this conclusion by citing to an earlier judgment wherein it had previously found that it may not refuse admission of an Article 62 application by reason of “policy” alone.³⁴⁷

In response to this development, this Article makes two points. One, the court’s judgment in *Sovereignty over the Sapodilla Cayes/Cayos Zapotillos* should not be understood as having closed the door on the possibility of relying on concerns about the sound administration of justice (and in particular equality of the parties) as an extrinsic variable to deny admission of an application which otherwise satisfies all criterion prescribed by Article 62. Two, in any event, in the context of Object (d) specifically, concerns pertaining to procedural fairness are not necessarily extraneous. Rather, they are relevant in the appraisal of whether the object is proper to begin with, which is in turn a question with which the court enjoys a wide margin of appreciation. Thus, even if the court is precluded from rejecting applications for reasons other than non-satisfaction of the criteria prescribed by Article 62, this limitation would not prevent it from relying on concerns regarding procedural fairness to declare Object (d) improper to begin with.

a. Reliance as Extrinsic Variable

First, it bears distinguishing that in *Sovereignty over the Sapodilla Cayes/Cayos Zapotillos* the court did not hold that it would be obligated to admit Guatemala even if it had been satisfied that Guatemala’s participation would amount to an abuse of process. Rather, it admitted the intervention without commenting on whether Guatemala’s participation was in fact abusive.³⁴⁸ As such, there is no guarantee that the court is bound to take a similar course in a future case where an abuse of process, or any other risk of impeachment of the proper administration of justice, is pronouncedly obvious.

345. *Sovereignty over the Sapodilla Cayes/Cayos Zapotillos* (Belize v. Hond.), Application by Guatemala for Permission to Intervene, Judgment, ¶ 71 (Mar. 19), <https://www.icj-cij.org/sites/default/files/case-related/185/185-20260319-jud-01-00-en.pdf> [https://perma.cc/FL57-HYXF].

346. *Id.* ¶ 74.

347. *Id.*

348. *See id.* ¶¶ 74–75.

Second, whereas the court has cautioned that it may not refuse admission of an Article 62 application discretionarily or by reason of “policy” alone,³⁴⁹ the risk of an infringement to the equality of the parties might not necessarily be disqualified by this foregoing caveat. The maxim of sound administration of justice (of which the principle of equality of parties is a derivative)³⁵⁰ is not a question of policy per se. It is a fundamental rule of procedural law, which may be classified as an overarching, if not hierarchically superior, maxim which should always steer the court’s decision-making the admissibility of interventions.³⁵¹ Judge Xue has cautioned that the equality of the parties must always “guide the judicial process,” and the court must be vigilant never to “lose sight” of the emergence of any prospective imbalances.³⁵² According to Kolb, the maxim may demand “a departure from (or a softening of) the rules contained in the constitutive instruments, which would, if applied formally, create an improper inequality and affect the fairness of proceedings.”³⁵³ These qualifications would imply that the court cannot be beholden to the four corners of Article 62 when deciding on whether or not to admit an application. It must at all times remain conscientious of the need to uphold the proper administration of justice. Moreover, one struggles to reconcile the court’s commitment to upholding rules indispensable to the proper preservation of its judicial function with the act of exercising discretion. In particular, because it is difficult to imagine the court has any real choice over whether to abstain or act where an inaction or action would irreversibly and excessively impeach the equality of the parties to the point of depriving the proceedings of their just and fair nature.³⁵⁴

Third, the fact that Article 62 does not provide an express foothold for the court to factor in concerns pertaining to procedural fairness does not mean the court is precluded from denying admission for such reasons. As Judge Owada has argued, the prerogative to take action in the interest of the proper

349. *Continental Shelf (Tunis./Libyan Arab Jamahiriya)*, Application by Malta for Permission to Intervene, Judgment, 1981 I.C.J. 3, ¶ 17 (Apr. 14).

350. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, 1956 I.C.J. 77, 86 (Oct. 23).

351. Robert Kolb, *General Principles of Procedural Law*, in COMMENTARY, *supra* note 51, ¶ 16.

352. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Admissibility of the Declarations of Intervention, 2023 I.C.J. Rep. 354, 391, ¶ 29 (June 5) (dissenting opinion of Xue, J.).

353. Kolb, *supra* note 353, ¶ 16.

354. *Id.* ¶ 27 (“First, there are (negative) limitations on the action the Court may take. The ICJ is a court of justice, not an all-competent constituent or political organ. Thus, there are certain limitations upon what it may do, even if there is a joint request of the parties to indulge in some action. Strictly speaking, this is not a matter of discretion. The Court must decline to act in a certain way if it finds that its judicial integrity is incompatible with the course of action requested. . . . It is furthermore debarred from engaging in a course of action which would entail an (excessive) inequality of the parties, according to what has been discussed previously.”).

administration of justice is sourced from the Court's inherent powers.³⁵⁵ The court does not require a positive foothold to draw on these powers³⁵⁶ and therefore must be understood as having intrinsic authority to declare "a declaration inadmissible if its admission should unduly compromise fundamental principles of justice underlying its jurisdiction or the fairness of the proceedings."³⁵⁷

Fourth, there is an innate fallacy to the court's aversion to extra-statutory considerations. It ought to be borne in mind that the requirement of a proper object, a quintessential and undisputed criterion for admission to intervene, is itself extra-statutory. Indeed, "Article 62 makes no reference to the proper object of intervention and nor did any of the earlier Rules of Court."³⁵⁸ Despite the extra-statutory source of this criterion,³⁵⁹ the court has acknowledged that an applicant cannot be admitted to intervene if the object of its intervention is

355. Whaling in the Antarctic (Austl. v. Japan), Declaration of Intervention by New Zealand, Order, 2013 I.C.J. 3, 11, ¶ 1 (Feb. 6) (declaration by Owada, J.).

356. On the source of inherent powers, see Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT'L L. 195, 205 (2005). The exercise of an inherent power in the manner proposed by Judge Owada would not appear to run afoul of the limitations identified by Brown. *Id.* at 239–40. Strictly speaking, most it would not contradict or prove inconsistent with the criteria prescribed in Article 62. At most it may be perceived as being supplemental in that it would add a further criterion for successful admission.

357. Judge Owada specified that the court could exercise this prerogative "with respect to intervention, whether it be under Article 63 or under Article 62. In this respect, there should be no difference between intervention under Article 62 and intervention under Article 63 as far as the principle of ensuring the fair administration of justice is at issue." Austl. v. Japan, Declaration by Owada, J., 2013 I.C.J. ¶¶ 1–2.

358. Miron & Chinkin, *supra* note 51, ¶ 75; Continental Shelf (Lybian Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgement, 1984 I.C.J. 3, ¶¶ 28, 32, 52–56 (dissenting opinion by Sette-Camara, J.).

359. Article 81(5)(b) of the Rules of Court does mandate that the application to intervene should specify "the precise object of the intervention." However, it does not per se prescribe that the object must be proper. Thus, whereas the Rules of Court, which the ICJ is empowered to prescribe by reason of Article 30 of the Statute, are sometime treated as an extension of the Statute and which are therefore "equally binding on States parties to the Statute by virtue of their consent to Article 30," see Hugh Thirlway, *Article 30, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* 589, ¶¶ 4–7 (2019), the requirement of a proper object is not a statutory requirement. This can be contrasted with the requirement in Article 81(1) of the Rules of Court, which dictates that applications "shall be filed as soon as possible, and not later than the date fixed for the filing of the Counter Memorial." In *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the court appears to accord the cutoff date the status of a time bar that can be the basis of a *ratione temporis* object to the admissibility of an Article 62 application to intervene. On the facts of that case, the Philippines' application was lodged before the prescribed cutoff date and therefore was not time barred. Nonetheless, the court expressed that the "requirement" was included in the name of the good administration of justice; for "essential for an orderly and expeditious progress of the procedure before the Court;" and in appreciation of the fact that a tardy application made in the later stage of proceedings could be disruptive. *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), Application by the Philippines for Permission to Intervene, Judgment, 2001 I.C.J. 575, ¶ 21 (Oct. 23).

improper.³⁶⁰ The existence of the proper object requirement all but proves the assessment of an application to intervene cannot be confined strictly to the four corners of Article 62. The court's self-contradiction is rendered all the more perplexing because the rationale underpinning the extra-statutory requirement of a proper object seems to be rooted in a desire to ensure the proper administration of justice. For instance, the rule that a state cannot intervene in order to introduce an extraneous dispute is premised on the notion that such an act would be at "odds both with its incidental nature, with the functions of intervention³⁶¹ and possibly with the principle of consent³⁶² to jurisdiction."³⁶³

b. Equality of the Parties as a Variable Relevant to Propriety

Finally, in the context of Object (d), concern for procedural fairness is not an extraneous variable. The prospective risk of imbalance to the equality of the parties is inherently linked to the intentions with which the applicant seeks to join and participate in the proceedings. It therefore should be treated as a variable that goes to determining whether it would be appropriate to allow the applicant to engage with the court for the purposes of supporting one of the disputants. Indeed, the addition of a second, third, or *n*th party, all with

360. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, ¶ 34 (Mar. 21); Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. Rep. 421, ¶ 47 (May 4); Sovereignty over the Sapodilla Cayes/Cayos Zapotillos (Belize v. Hond.), Application by Guatemala for Permission to Intervene, Judgment, ¶¶ 54–55 (Mar. 19), <https://www.icj-cij.org/sites/default/files/case-related/185/185-20260319-jud-01-00-en.pdf> [<https://perma.cc/FL57-HYXF>].

361. Intervention as an incidental procedure is a juridical tool which exists in and of itself for the proper administration of justice. It is a vehicle through which the court is informed "on the factual and legal context of the dispute submitted to it, thus providing it with all the necessary elements for deciding it." Miron & Chinkin, *supra* note 51, ¶ 28. It seeks "to avoid repetitive litigation and to afford a fair hearing to those States whose interest may be affected by the court's decision, and thus to ensure a better administration of justice." Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 374, ¶ 7 (May 4) (dissenting opinion by Al-Khasawneh, J.). Thus, anything which would successfully usurp that function would inherently impede the sound administration of justice. See Malcom N. Shaw, *Jurisdiction over Incidental Matters*, in ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 (2017) (on the purpose of incidental proceedings generally as tools "to ensure better administration of justice.").

362. See Whaling in the Antarctic (Austl. v. Japan), Declaration of Intervention by New Zealand, Order, 2013 I.C.J. 3, 11, ¶ 2 (Feb. 6) (declaration by Owada, J.) (recognizing that subverting or disregarding the principle of consensual jurisdiction and dispute settlement would be an affront to the proper administration of justice and judicial propriety); see also Pierre d'Argent, Article 65, in COMMENTARY, *supra* note 51, ¶ 45 (acknowledging the same in a matter other than intervention); Cazala, *supra* note 341, ¶ 27; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 9, 261, ¶ 23 (Feb. 25) (dissenting opinion by Donoghue, J.).

363. Miron & Chinkin, *supra* note 51, ¶ 77.

the marked intention of assisting the applicant in making out its claims, has the potential of amplifying that state's voice before the court. This risk was expressly acknowledged by Judge Gevorgian in respect of thirty-two states seeking to intervene under Article 63 in *Ukraine v. Russia* all with the desire to support Ukraine's position.³⁶⁴

In the context of Article 62, the risk of amplification is even more pronounced because this provision allows for a more invasive scope of participation. Whereas under Article 63, states are afforded a right to be heard on only the interpretation of a convention, an intervenor under Article 62 is entitled to comment on "all of the substantive aspects concerning the intervention, as they were understood by the Court when admitting the application."³⁶⁵ Indeed, under Article 62, intervenors may present arguments of both fact and law concerning the actual fulfillment or breach of any obligations and write in both written and oral proceedings.³⁶⁶ Thus, intervening states can contribute to the curation and presentation of legal and evidentiary materials to the court in support of the applicant's claims. One can imagine that their participation may improve upon and diversify the arguments put to the court, and provide heuristic value by corroborating the applicant's stance, thereby punctuating, and enriching the overall persuasiveness of the applicant's case theory or aspects thereof.³⁶⁷ Article 62 intervenors thus appear more aptly situated to influence

364. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Admissibility of the Declarations of Intervention, Judgment, 2023 I.C.J. 354, 381 ¶ 3 (June 5) (declaration by Gevorgian, J.).

365. QUINTANA, *supra* note 71, at 898.

366. See generally, e.g., Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Application to Intervene, Order, 1991 I.C.J. 1029 (Oct. 21); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Verbatim Record, CR 2002/19 (Mar. 18, 2002), <https://www.icj-cij.org/sites/default/files/case-related/94/094-20020314-ORA-02-00-BI.pdf> [<https://perma.cc/WGR8-XBMZ>]; Written Statement of the Hellenic Republic, Jurisdictional Immunities of the State (Ger. v. Ital.) (Aug. 3, 2011), <https://www.icj-cij.org/sites/default/files/case-related/143/16658.pdf> [<https://perma.cc/HEA8-G4HC>]; Jurisdictional Immunities of the State (Ger. v. Ital.), Verbatim Record, CR 2011/17 (Sept. 14, 2011), <https://www.icj-cij.org/sites/default/files/case-related/143/143-20110912-ORA-01-00-BI.pdf> [<https://perma.cc/F9X3-WTHN>].

367. Laura Van den Eynde, *Amicus Curiae: European Court of Human Rights (ECtHR)*, MAX PLANCK ENCYCLOPEDIA OF INT'L PROCEDURAL L. ¶¶ 53–54 (2019), <https://perma.cc/374Q-A3TG> (explaining the role of *amicus curiae* in international adjudication); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 813–15 (2000) (on the role of *amicus curiae* in American adjudication). See generally Richard L. Pacelle, Jr., *Amicus Curiae Briefs in the Supreme Court*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2022); Maxi Scherer, Dharshini Prasad & Dina Prokic, *The Principle of Equal Treatment in International Arbitration*, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 1127, 1142–45 (Stefan Kröll, Andrea K. Bjorklund & Franco Ferrari eds., 2023) (raising concerns about how *amicus* participation might impede equality of the parties in international arbitration).

the final determination of the case (at the very least they seem better positioned to do so vis-à-vis any intervenor participating pursuant to Article 63).

For the foregoing reasons, concerns about procedural fairness ought to fall within the court's margin of appreciation in determining whether Object (d) is proper to begin with. Judge Fitzmaurice himself, writing extrajudicially, acknowledged that "where there were multiple interventions . . . an intervention would be liable to bring a reinforcement, perhaps powerful reinforcement, to one side or other in the case" and that this would constitute a concern which puts into question the "propriety" of those interventions.³⁶⁸

Nevertheless, whatever position the court adopts, Object (d) should ultimately be deemed proper. If the court is not inclined to treat procedural fairness as a variable in the admissibility of the intervention, it must then recognize the propriety of Object (d) because, based on the *travaux préparatoires* of Article 62, Object (d) is perfectly aligned with the intention the drafters had for the mechanism of intervention.

If, however, concerns about procedural fairness are capable of influencing a decision on admission of an applicant, the court should not dismiss interventions outright for the purposes of maintaining the equality of the parties. Insofar as it is possible, the quantity of intervenors, and their respective alignments, should remain variables that the court is obliged to account for when determining how to conduct the proceedings after having admitted all applicants who satisfy the conditions for admission. This was precisely the commitment the court undertook in *Ukraine v. Russian Federation*, with a view to ensuring that it could counterbalance any risk of unfairness which may be produced from the participation of the thirty-two admitted intervenors.³⁶⁹

4. *The Risk of "En Masse" Interventions Should Not Bar Interventions Based on Common Interests*

When seized of a matter involving obligations *erga omnes* (*partes*), the court's protection of the equality of parties in relation specifically to the admission of intervenors seeking to uphold the protection of said interests should be *ex post*, not *ex ante*. In dealing with communal interests, permissive attitudes should be adopted to promote participation by members of that community. Scholars have already articulated that the classic bilateralist paradigm of dispute resolution is not suited for the determination of such disputes.³⁷⁰ The adoption of

368. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 34 BRIT. Y.B. INT'L L. 1, 127 (1958).

369. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v Rus.), Admissibility of the Declarations of Intervention, Order, 2023 I.C.J. 354, ¶¶ 52–53 (June 5).

370. Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Humankind*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE

such an ex post approach would be one way to tweak the proceedings to better accommodate such disputes within the parameters of the existing bilateralist model.

Balancing the desire for collective participation in the determination of disputes involving *erga omnes (partes)* principles can prove synergistic with the rationale underlying intervention as a vehicle for the more effective and legitimate administration of justice, in two main respects.

First, as Judge Weeramantry notes, by allowing wider participation and the opportunity for states to furnish their own submissions of “law and fact,”³⁷¹ Article 62 seeks to ensure “that the decision will conform to the truth, and therefore with justice, so that the authority and credibility of justice do not suffer.”³⁷² This consideration is exacerbated when dealing with *erga omnes (partes)* principles. These principles encompass the communal interests of a group and protect their shared rights. Consequently, to achieve the most credible outcome, it is paramount that all voices of that community are offered at least the opportunity to be heard before a final decision is handed down. Such inclusive participation ensures that the court’s judgment can be informed by all concerned members of the community, which in turn lends a greater sense of legitimacy to the administration of justice when the court ultimately pronounces on those very same shared interests, rights, and obligations.³⁷³

Second, it is widely acknowledged, even by those who oppose admission of *erga omnes (partes)* interest-based intervention,³⁷⁴ that the invocation of the respondent’s responsibility by one applicant would not preclude other states from themselves instituting principal proceedings against that same respondent, on the same *erga omnes (partes)* bases. Nicaragua had itself alluded to its entitlement to do so.³⁷⁵ This suggests that if third states interested in the dispute were barred from intervening, they may instead resort to bringing new claims of their own against the putative wrongful actor. This means that their exclusion could thus produce a risk of proliferating “repetitive litigation.”³⁷⁶

SETTLEMENT: TRENDS AND PROSPECTS 105, 110 (Laurence Boisson de Chazournes, Cesare Romano & Ruth Mackenzie eds., 2002).

371. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application by the Philippines for Permission to Intervene, Judgment, 2001 I.C.J. 575, 630, ¶ 20 (Oct. 23) (separate opinion by Weeramantry, J.).

372. *Id.*

373. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Judgment, 2011 I.C.J. 349, 374, ¶¶ 7–11 (May 4) (dissenting opinion by Al-Khasawneh, J.); *see also* Gaja, *supra* note 75, at 119 (“When the interest at stake in a case is common to a large number of States, a wider use of third States’ participation in judicial proceedings seems desirable.”).

374. McGarry, *supra* note 104.

375. S. Afr. v. Isr., Nicaragua’s Application to Intervene, *supra* note 36, ¶ 18.

376. Nicar. v. Colom., Dissenting Opinion of Al-Khasawneh, J., 2011 I.C.J. ¶ 7.

Judges Al-Khasawneh and Weeramantry characterize such a development as something which both the court and states themselves would like to see avoided, if possible, in the name of judicial economy and efficiency.³⁷⁷ The ILC itself has observed, vis-à-vis Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts (“ARSIWA”),³⁷⁸ and the prerogative of a “non-injured State” to invoke the *erga omnes (partes)* responsibility of another, there is always a “countervailing interest in not encouraging the proliferation of disputes.”³⁷⁹ Thus, allowing a permissive approach towards intervention, as a form of participation to members of any relevant communities, wherein their common interests are at stake, could be an effective means of furthering these objectives—thereby legitimizing the decision to allow for such intervention.

C. Object (c)

Nicaragua characterizes its intervention as a means of complying with “its conventional obligation to prevent and punish genocide.”³⁸⁰ This object is certainly a novel construct. Prior hereto, no state had ever invoked Article 62 for the purported purpose of discharging its own binding international commitments.³⁸¹ The framing of Object (c) presents two questions. First, can the obligation to prevent and punish genocide impose upon third states a *requirement* to intervene in proceedings instituted under Article IX of the Convention? Second, does an intervenor’s objective of discharging its own obligations qualify as a proper object of Article 62 intervention?

The former question must be answered in the negative. While participating in legal proceedings against a state suspected of genocide does qualify as a means of preventing genocide, the duty to prevent genocide does not oblige states to employ any and all preventive measures at their disposal. States are obligated to deploy only those “means likely to have a deterrent effect on those suspected of preparing genocide.”³⁸² Save for the most exceptional of circumstances, Nicaragua’s intervention is unlikely to produce a deterrent effect above and beyond that which is already produced by South Africa’s institution of proceedings in the first place. Moreover, to the extent the commission of genocide is attributable to Israel itself, Object (c) is partially redundant because the law

377. *Id.*; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Application by the Philippines for Permission to Intervene, Judgment, 2001 I.C.J. 575, 630, ¶ 20 (Oct. 23) (separate opinion by Weeramantry, J.).

378. *DARSIWA Commentaries*, *supra* note 8, at 126.

379. Crawford, *supra* note 155, ¶ 42.

380. *S. Afr. v. Isr.*, Nicaragua’s Application to Intervene, *supra* note 36, ¶ 21(c).

381. See Reghizzi, *supra* note 300, at 163–83.

382. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 47, ¶ 431 (Feb. 26).

of state responsibility does not recognize the possibility of one state *punishing* another state in response to violations of international law.

With respect to the latter question, Object (c) appears irreconcilable with the broadly two categories of objects of Article 62 intervention whose general propriety the court has previously recognized.³⁸³ Thus, to admit the application based on Object (c), the court would need to acknowledge the propriety of a new category. However, unlike with Object (d), there exist no similar considerations or indicia, tied to the historical development of Article 62, pointing in favor of conceiving a new object.³⁸⁴

1. *Substantive Flaws in Nicaragua's Proposition*

Nicaragua does not specify whom the prevention is directed at, or whom it is seeking to punish.³⁸⁵ Nicaragua may be referring to preventing and punishing the commission of genocide by Israel itself. Alternatively, if the genocidal acts are not attributable to Israel, Nicaragua may be postulating that to discharge its own obligations under the Genocide Convention, it is compelled to secure a judgment declaring that Israel has itself failed to comply with its duty to prevent and punish genocide. The latter would imply that the obligation to prevent and punish genocide obliges one contracting party to ensure that all other contracting parties to the Genocide Convention respect their own obligations to prevent and punish genocide. It does not appear as though the Convention has ever been interpreted as operating in this manner.³⁸⁶ As such, this Article will assess Object (c) on the assumption that Nicaragua seeks to intervene to prevent and punish the commission of genocide by Israel itself.

2. *The Duty of States to Prevent the Commission of Genocide by Other States*

Today, it is trite law that the Convention outlaws the commission of genocidal acts by states themselves.³⁸⁷

The more pressing question is whether it is incumbent on one state to deploy deterrent measures with a view to ensuring that another state does not itself commit genocide. If no such duty exists, then Object (c) is rendered redundant because there will be no outstanding obligation that can be satisfied through Nicaragua's participation. In 1993, Judge ad hoc Lauterpacht answered the

383. KOLB, *supra* note 171, at 716; QUINTANA, *supra* note 71, at 888.

384. Miron & Chinkin, *supra* note 51, ¶¶ 4–10.

385. See S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶¶ 15, 21(c).

386. See generally Anja Seibert-Fohr, *State Responsibility for Genocide under the Genocide Convention*, in THE UN GENOCIDE CONVENTION: A COMMENTARY 349–71 (Paola Gaeta ed., 2009).

387. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶¶ 166, 179 (Feb. 26).

former question affirmatively.³⁸⁸ He opined that the duty to prevent “extends also to the obligation to prevent a State from committing genocide.”³⁸⁹ He underscored that Article I of the Genocide Convention is drafted in an unqualified manner.³⁹⁰ It refers to an obligation to prevent genocide without prescribing to whom these preventive endeavors should be directed.³⁹¹ Consequently, he argued, it must be opposable vis-à-vis the whole scope of perpetrators envisaged by the Genocide Convention, which included actors whose conduct is attributable to states themselves.³⁹² His views were confined exclusively to the prevention of genocide and not to punishment. However, the court, in its majority, has never pronounced on this specific conceptualization of the duty to prevent. Thus, there is no further authoritative source to suggest whether one state has a duty to prevent the commission of genocide by another state. This ambiguity is the first prospective pitfall capable of rendering Object (c) redundant.

3. *Recourse to the ICJ as a Means of Preventing and Suppressing Genocide*

A second preliminary obstacle to Object (c) is whether the invocation of an offending state’s responsibility before the ICJ for violations of the Genocide Convention can be considered a means of preventing genocide. If the underlying proceedings do not possess preventive qualities, then it must follow that Nicaragua’s participation in those proceedings, as an intervenor, is equally deprived of preventive value, and therefore does not qualify as a means by which it could satisfy its obligation to prevent genocide.

Under Article I of the Genocide Convention, the contracting parties undertake to prevent and to punish genocide. Article I does not “specify the kinds of measures that a Contracting Party may take to fulfil this obligation.”³⁹³ In *Bosnian Genocide*, the court observed, whereas the Convention “includes fairly detailed provisions concerning the duty to punish,” it contains only a singular provision that expressly refers back to the duty to prevent.³⁹⁴ This provision is Article VIII, which dictates that a state “may call upon the competent organs of the United Nations to take such action under the Charter of the United

388. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Provisional Measures, 1993 I.C.J. 325, 407, ¶ 111 (Sept. 13) (separate opinion of Lauterpacht, J. ad hoc).

389. *Id.*

390. *See id.* ¶¶ 111–12.

391. *Id.*

392. *Id.*

393. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Rus.*), Provisional Measures, Order, 2022 I.C.J. 211, ¶ 56 (Mar. 16).

394. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 47, ¶ 426 (Feb. 26).

Nations as they consider appropriate for the *prevention* and suppression of acts of genocide.”

The court is the principal judicial organ of the United Nations and therefore ought to fall within the purview of this provision. However, on previous occasions, the court has opted to proactively disassociate itself from being recognized as a nominated agent thereunder. In *The Gambia v. Myanmar*, the court acknowledged the phrase “competent organs of the United Nations” is sufficiently wide that it is capable of encompassing the ICJ itself.³⁹⁵ Be that as it may, it asserted that the act of referring a dispute to the court to be adjudicated was not reconcilable with the modal verb to “call upon” an organ of the United Nations to “take action” for the prevention or suppression of genocide.³⁹⁶

Further analysis on Article VIII is not necessary. The court’s findings merely indicate that bringing a dispute before it is not among the means of preventing genocide included in, Article VIII, specifically. This is not to say that petitioning the court, in and of itself, is not a means of preventing genocide at all—rather, it simply is not among the means envisaged by Article VIII. The processes tabulated in Article VIII, however, are not the only means by which the duty to prevent may be satisfied. As the court affirmed in *Bosnian Genocide*, this duty “has its own scope, which extends beyond the particular case envisaged in Article VIII.”³⁹⁷

Article IX is the compromissory clause of the Genocide Convention.³⁹⁸ Pezzano proposes that in *Ukraine v. Russian Federation*, the court has finally “drawn a link between the obligation [to prevent genocide] and the compromissory clause” of the Genocide Convention.³⁹⁹ In support, he invokes the court’s Order of March 16, 2022, in which the court emphasizes that states must “implement this obligation [i.e., the duty to prevent] in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its preamble.”⁴⁰⁰

However, Pezzano’s cautious description (that the court had merely “drawn a link”) fails to illustrate the imperativeness which the court afforded to the interrelationship between Article IX and the duty to prevent. Reading this excerpt in its immediate context, the majority appears to have ventured beyond merely drawing a connection and implicitly characterized recourse to the ICJ,

395. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, Order, 2020 I.C.J. 3, ¶ 35 (Jan. 23).

396. *Id.*

397. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. ¶ 427.

398. Genocide Convention, *supra* note 37, art. IX.

399. Luciano Pezzano, *The Obligation to Prevent Genocide in South Africa v. Israel: Finally a Duty with Global Scope?*, EJIL: TALK! (Jan. 4, 2024), <https://perma.cc/A73H-HJ39>.

400. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, Order, 2022 I.C.J. 212, ¶ 56 (Mar. 16).

through invoking Article IX, as one of many alternative means of realizing the duty to prevent. The relevant portions of the order read as follows:

56. The Court observes that, in accordance with Article I of the Convention, all States parties thereto have undertaken “to prevent and to punish” the crime of genocide. Article I does not specify the kinds of measures that a contracting party may take to fulfil this obligation. However, the contracting parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its preamble. Pursuant to Article VIII of the Convention, a contracting party that considers that genocide is taking place in the territory of another contracting party “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.” In addition, pursuant to Article IX, such a contracting party may submit to the Court a dispute relating to the interpretation, application, or fulfilment of the Convention.

57. A Contracting Party may resort to other means of fulfilling its obligation to prevent and punish genocide that it believes to have been committed by another Contracting Party, such as bilateral engagement or exchanges within a regional organization. However, the Court emphasizes that, in discharging its duty to prevent genocide, ‘every State may only act within the limits permitted by international law,’ as was stated in a previous case brought under the Convention.

First, the court characterizes Article IX as a mechanism which is available to parties “[i]n addition” to Article VIII.⁴⁰¹ Bearing in mind that the court had expressly classified Article VIII as a means of preventing genocide in its earlier *Bosnian Genocide* judgment, its decision now to characterize Article IX as supplementary to Article VIII implies both mechanisms are accessory means of reaching a singular end objective: the duty to prevent.

Second, the court acknowledges that states “may resort to *other means of fulfilling its obligation to prevent* and punish genocide that it believes to have been committed by another Contracting Party, such as bilateral engagement or exchanges within a regional organization.”⁴⁰² Reading this excerpt in sequence to, and appreciation of, the findings presented in paragraph 56, it is evident that these “other means of fulfilling its obligation to prevent” are alternatives to the methods the court tabulated in its earlier paragraph, that is, Articles VIII and IX. This would imply the court considers that Articles VIII and IX are themselves means of satisfying the obligation to prevent.

401. *Id.*

402. *Id.* ¶ 57 (emphasis added).

Both lines of reasoning were echoed in the separate opinion of Judge Robinson. First, he expressly acknowledged that in the context of fulfilling the duty to prevent genocide, recourse to Article IX was “[e]qually significant” vis-à-vis recourse to Article VIII.⁴⁰³ Second, in response to Russia’s argument that its use of force was a means of preventing genocide, Judge Robinson expressly states Articles VIII and IX were “means [which] would of course have been open to Russia as *alternatives to the military action* that it commenced in Ukraine on 24 February 2022.”⁴⁰⁴ The implication is that Articles VIII and IX would have been the lawful alternatives by which Russia could have tried to prevent the purported commission of genocide instead of its recourse to the use of force.

Finally, the *travaux préparatoires* of the Genocide Convention reveals that the compromissory clause was incorporated to ensure that recourse to a juridical body, with authority to order the cessation of genocidal acts, was made available to states. The architect of Article XI, Judge Fitzmaurice (before assuming judicial office), expressly underscored “by invoking violation of an international convention, States or Governments could be brought before an international court, which would not pronounce sentence but would order cessation of those acts.”⁴⁰⁵ He described the ICJ as the “only existing international court in a position to enact measures capable of putting a stop to the criminal acts.”⁴⁰⁶

Belgium, endorsing the proposal, posited it would be the court’s responsibility to “order the cessation of the imputed acts.”⁴⁰⁷ India concurred that the ICJ should be allowed to intervene “to put an end to the acts in question.”⁴⁰⁸ These statements should be taken as an acknowledgement of the preventative nature of Article IX.

Admittedly, by the time a dispute reaches the court, it may be too late to completely avert the perpetration of genocidal acts.⁴⁰⁹ Nevertheless, genocide is a systematic and gradual process. Therefore, the court is positioned, by ordering the stoppage of genocidal acts, to *prevent* the commission of further atrocities.⁴¹⁰ The preventative nature of such a cessation ordinance or judgment was expressly recognized by Belgium: “It was in connexion with prevention

403. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, Order, 2022 I.C.J. 212, 242, ¶ 28 (Mar. 16) (separate opinion by Robinson J.).

404. *Id.* (emphasis added).

405. U.N. GAOR, 3d Sess., 6th Comm., U.N. Doc. A/C.6/SR.61-140, at 303 (Sept. 21–Dec. 10, 1948) [hereinafter Genocide Convention Preparatory Works] (emphasis added).

406. *Id.* at 370.

407. *Id.* at 316.

408. *Id.* at 317.

409. “The representative of Czechoslovakia observed that there was every reason to think that the human group concerned would be massacred before the completion of proceedings instituted with the International Court of Justice.” *Id.* at 439.

410. *Id.* at 444.

that the International Court of Justice could be useful, for it alone was competent to decide whether or not a State was guilty of violating the terms of the convention and to determine the necessary legal redress. The court could, in fact, contribute in no mean degree to the prevention of genocide.⁴¹¹

Ecuador similarly acknowledged that domestic courts would likely be powerless or unwilling to curb or curtail the commission of genocidal acts sanctioned by their state. Thus, the only viable means of securing juridical prevention would be to enable states to petition an international court: “The domestic jurisdiction of a State would not be effective in preventing the commission of the crime by the State itself. It was therefore essential that some form of international tribunal should be established to deal with such cases.”⁴¹² Finally, Australia endorsed the preventive role of the compromissory clause by expressly arguing that, irrespective of Article IX (at the time draft Article X), referral of a dispute to the ICJ was already one of the means of suppressing genocidal acts envisaged under Article VIII anyways.⁴¹³

It follows from all of the foregoing that the bringing of an international claim against a state suspected of committing genocide is deemed, by the court and the drafters of the Convention, to have preventative qualities. This, however, leaves the question of whether third states’ participation in such proceedings is necessary for them to comply with their own obligation to prevent genocide.

4. *The Duty to Prevent is Unlikely to Ever Necessitate an Intervention*

As alluded to above, Article I of the Genocide Convention does not exhaustively specify or limit the “kinds of measures that a Contracting Party may take to fulfil this obligation” to prevent genocide.⁴¹⁴ Despite its non-exhaustive scope, the court has confirmed that the duty to prevent is neither unqualified nor all-encompassing. States are not obliged to employ any and all means at their disposal. Rather, states are required to employ only those “means likely to have a deterrent effect on those suspected of preparing genocide.”⁴¹⁵ Thus, there is a certain threshold of deterrent value that an action or response must meet for it to become obligatory under Article I. As confirmed by the court, the

411. *Id.* at 375.

412. *Id.* at 374.

413. *Id.* at 428 (“Article X dealt with the settlement of disputes by the International Court of Justice, which was one of the competent organs of the United Nations covered by article VIII.”).

414. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Rus.), Provisional Measures, Order, 2022 I.C.J. 211, ¶ 56 (Mar. 16).

415. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶ 431 (Feb. 26).

preventative response must have the capacity “to influence effectively the action of persons likely to commit, or already committing, genocide.”⁴¹⁶

It follows that intervention in a case before the ICJ is only compellable if the intervening state’s participation would produce an effect satisfying this threshold.

When one state invokes the responsibility of another pursuant to Article IX of the Genocide Convention, it initiates a process capable of bringing about the cessation of any genocidal acts.⁴¹⁷ If a third state is successful in invoking the responsibility of another for violations of obligations *erga omnes* (*partes*), it is entitled to request a binding declaration demanding the respondent to cease its internationally wrongful acts and provide guarantees of non-repetition.⁴¹⁸ If the applicant were to succeed in obtaining such a declaration, the respondent would incur an obligation, under Article 94(1) of the U.N. Charter, “to comply with the decision.”⁴¹⁹ Thus, it would be legally required to cease any ongoing genocidal acts and refrain from commissioning any new ones. Hence, one may deduce that such a binding legal declaration should meet the court’s “effective influence” and “likely deterrent effect” thresholds.

However, the deterrent effect is produced only if a declaration favorable to the applicant is in fact secured. When a state invokes Article IX against another, it is not guaranteed that the proceedings instituted by the applicant will yield a judgment in its favor. The court may deduce that genocide is not made out. Thus, recourse to Article IX creates the *mere opportunity* of a declaration of wrongdoing and for cessation thereof.

Therefore, for a state to be obliged to intervene, at the absolute minimum, its participation in the case would need to contribute meaningfully to augmenting the odds of securing a deterrent final judgment beyond the likelihood already established by the institution of proceedings itself. Otherwise, states would be compelled to intervene despite the fact that their interventions would have no deterrent or influential effect of their own.

Without delving deep into the realm of hypotheticals, it is difficult to identify precisely when such a situation would ever arise. One may imagine an extreme instance wherein one state, owing to its geographical proximity

416. *Id.* ¶ 430.

417. A contrary position was posited by the U.S.S.R. during the negotiations of the Sixth Committee. Their delegate proclaimed without elaboration or justification that “the Court was not the competent body to consider situations endangering the maintenance of international peace and security, since it did not have the means to prevent acts of genocide.” Genocide Convention Preparatory Works, *supra* note 412, at 440.

418. *DARSIWA Commentaries*, *supra* note 8, at 126–27.

419. Karin Oellers-Frahm, *Article 94*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1957, 1959 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, & Andreas Paulus eds., 2012).

to the respondent⁴²⁰ or its political ties,⁴²¹ has evidence of a *decisive* nature to the outcome of the proceedings. In this practically unlikely event, the state's furnishing of evidence through its participation would increase the likelihood of securing a "likely deterrent" final judgment. Thus, in those circumstances, one might argue that it ought to be compelled to intervene. However, even in this hypothetical, there would be alternative avenues for the dissemination of said evidence. For example, the state could simply share the evidence with the applicant themselves through diplomatic channels. Intervention would not be the exclusive mechanism by which the evidence could eventually be furnished before the court. Thus, save for in perhaps the most exceptional of circumstances, the duty to prevent is unlikely to ever oblige a state to intervene in an active case.

5. *Invoking the Responsibility of a State is not a Form of Punishment*

The obligation to punish genocide entails subjecting those convicted of its commission (and of incidental acts such as its incitement, conspiracy, or attempt) to penalties.⁴²² In the context of natural persons, this is achieved principally by prosecuting them before domestic or international *fora*⁴²³ and obtaining a criminal sentence aimed at admonishing the perpetrator by imposing some stricture or burden—normally taking the form of the deprivation of liberty or a monetary fine.⁴²⁴ However, insofar as inter-state disputes are concerned, there is no normative equivalent to such reprove.

In public international law, states are held accountable, as between themselves, for their transgressions under a set of secondary rules of law on responsibility. Within this system of law, there exists no avenue for one state to lawfully punish another. Successfully invoking the responsibility of a state can never attract consequences that are punitive in nature. In fact, the customary law on responsibility expressly proscribes the attachment of punitive repercussions to a violation of public international law. Consequently, it seems inconceivable that the obligation to punish perpetrators of genocide could ever compel one state to sue another for the alleged commission of genocide.

As discussed below, a successful invocation of international law entitles the injured state to certain relief. These remedies do not function to reprimand

420. GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES: LAW AND PRACTICE* 87 (2019).

421. *Id.*

422. Orna Ben-Naftali, *The Obligations to Prevent and to Punish Genocide*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* 27, 28 (Paola Gaeta ed., 2009).

423. *Id.* at 46–55.

424. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 344 (2019); William A. Schabas, *Penalties*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Parts IV (A)–(C) (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones eds., 2002).

the wrongdoing state. Instead, their purpose is to repair any harm incurred on the part of the injured state. A remedy cannot chastise a state by imposing on it an encumbrance beyond that which is necessary to negate the injury it has inflicted (restore the *status quo ante*). Moreover, states have, by virtual consensus, rejected the prospects of attaching criminal or penal consequences to states' violations of international law (and the Genocide Convention specifically).

Punishment in international law is commonly associated with a purpose of sentences handed to persons having incurred individual (international) criminal responsibility.⁴²⁵ Punishment is principally a means of exacting "retribution."⁴²⁶ Retribution entails condemning the impugned criminal acts.⁴²⁷ It brands the perpetrator with a mark of stigmatization⁴²⁸ through the imposition of some hardship⁴²⁹ as "just deserts"⁴³⁰ for their crimes. However, retribution, in and of itself, has no reparative properties. It cannot amend or otherwise satisfy the injury inflicted upon victims.⁴³¹

Said qualities render the notion of punishment incompatible with consequences that ensue from successfully invoking the responsibility of a state. The invocation of a state's responsibility, even in response to violations of the Genocide Convention,⁴³² is not directed at exacting retribution against the wrongdoer.⁴³³ Instead, invocation is aimed at securing relief by way of "reparations."⁴³⁴ Reparations possess an instrumental function. Their purpose is to rectify the harm inflicted against an injured state and are thus purely remedial. They serve to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been

425. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 496–97 (2012).

426. Prosecutor v. Brđanin, IT-99-36-T, Judgment, ¶ 1090 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

427. Prosecutor v. Aleksovski, IT-95-14/1-A, Appeal Judgement, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2004).

428. Prosecutor v. Erdemović, IT-9622-T, Sentencing Judgment, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996); see also Mirko Bagaric, *Redefining the Circumstances in Which Family Hardship Should Mitigate Sentence Severity*, 42 U.N.S.W. L.J. 154, 178 (2019).

429. ROB CANTON, WHY PUNISH?: AN INTRODUCTION TO THE PHILOSOPHY OF PUNISHMENT 1 (2017).

430. Prosecutor v. Krajišnik, IT-00-39-A, Appeal Judgment, ¶ 804 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009).

431. See Mark Drumbl, *Impunities*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 238, 259 (Kevin J. Heller, Frédéric Mégret, Sarah M. H. Nouwen, Jens D. Ohlin, & Darryl Robinson eds., 2020).

432. See Seibert-Fohr, *supra* note 386, at 370–71.

433. James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 882 (2002).

434. DARSİWA Commentaries, *supra* note 8, at 91–94.

committed.⁴³⁵ In other words, unlike punishment, the objective of reparations is to restore the *status quo ante*.

Reparations can assume various forms. Compensation is “the most commonly sought mode of reparation in international practice.”⁴³⁶ The law of state responsibility expressly rejects the awarding of punitive damages,⁴³⁷ even in response to serious breaches of *jus cogens* norms.⁴³⁸ As Special Rapporteur Crawford observed, “[p]unitive damages are intended to punish the defendant and thereby deter blameworthy conduct. The ARSIWA generally do not allow for the award of punitive damages.”⁴³⁹ Likewise, as emphasized in the commentaries to ARSIWA, compensation “is not concerned to punish the responsible State, nor does compensation have an *expressive* or *exemplary* character.”⁴⁴⁰ In contrast to the function of compensation, punitive sentences are intentionally expressive. Punishment is a way of “expressing the outrage of the international community at these crimes”⁴⁴¹ by channeling that indignation into a hardship to be borne by the convicted. Punishment is also “exemplary” in that it serves to make an example out of the perpetrator and thereby “deter others from committing similar” violations of the law.⁴⁴²

The foregoing illustrates how reparations ensuing from states’ violation of international law are animated by considerations and serve purposes, readily distinguishable from those underpinning punitive sentences. The invocation of state responsibility does not produce outcomes involving punitive consequences for states. In inter-state adjudication, there is no normative equivalent of a criminal “sentence.”⁴⁴³

Whereas reparations may certainly cause the state to endure some detriment (say, financial loss on account of paying damages), this hardship is not

435. *Factory at Chorzów* (Ger. v. Pol.), Merits Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

436. *DARSIWA Commentaries*, *supra* note 8, at 99.

437. *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), 2018 I.C.J. 15, ¶ 31 (Feb. 2); *see also DARSIWA Commentaries*, *supra* note 8, at 107 (“In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term ‘humiliating’ is imprecise, but there are certainly historical examples of demands of this kind.”).

438. *DARSIWA Commentaries*, *supra* note 8, at 111.

439. James Crawford, *Remedies*, in *STATE RESPONSIBILITY: THE GENERAL PART* 506–38 (2013).

440. *DARSIWA Commentaries*, *supra* note 8, at 99.

441. *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2004).

442. *Id.*

443. *Genocide Convention Preparatory Works*, *supra* note 405, at 326.

inflicted for the purpose of causing distress to, undermining the interests of, or stigmatizing the responsible state as a means of admonishing their wrongdoing and dissuading other states from perpetrating similar delicts. Any hardship experienced is merely an inevitable byproduct of the need to ensure the injured state is made whole again. They impose no surplus burden (a burden in excess of that which is necessary to restore the status quo ante), which exists with the supplemental object of deterring other states from carrying out similar transgressions. The invocation of state responsibility thus has no real retributive properties and is, for that reason, conceptually irreconcilable with the practice of enacting punishment.

Invocation is not the only aspect of the law on state responsibility wherein the notion of punishment is rejected. Customary international law proscribes the unilateral taking of punitive reprisals against another state in response to that state's wrongful conduct. This prohibition casts even further doubt on whether it is ever permissible and feasible for one state to punish another in response to a violation of international law. The law on so-called "countermeasures" (codified in Articles 22, 49–54 of ARSIWA) provides that an injured state (State A) may, without itself incurring responsibility, enact against an offending state (State B), measures which are not in conformity with State A's obligations towards State B. However, State A will be insulated against wrongfulness only if these retaliatory measures serve to induce the offending State B to cease its wrongful acts and remedy its breaches. Measures adopted to castigate the offending state—say, measures that inflict harm disproportionate in its severity or intensity to the injury incurred by State A,⁴⁴⁴ or those which are not revoked after State B has ceased its wrongful acts⁴⁴⁵—are considered punitive and therefore not absolved of their wrongfulness.⁴⁴⁶ This wider denouncement of

444. *DARSIWA Commentaries*, *supra* note 8, at 131 ("By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles."); *see also id.* at 135 ("In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.").

445. *Id.* at 129 ("[I]n other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States."); *see also id.* at 131 ("Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.").

446. *Id.*

punishment-oriented philosophies reinforces the idea that such motivations have no place in legal processes through which states hold each other accountable.

It is not a matter of mere serendipity that the law on state responsibility is devoid of punitive elements. Consultations during the development of ARSIWA reveal that states expressly opposed the attachment of sanctions with either criminal or penal connotations, purposes, or associations to the commission of wrongful acts. The denouncement of punishment within the scheme of state responsibility is entirely intentional. As Special Rapporteur Crawford summarizes, “[t]he exclusion of any form of punitive or ‘exemplary’ damages . . . resulted from nearly unanimous criticisms of governments,”⁴⁴⁷ and “[g]overnments . . . do not support a developed regime of criminal responsibility of States, that is to say, a genuine “penalizing” of the most serious wrongful acts.”⁴⁴⁸

The United States noted that the function of state responsibility is to repair injuries inflicted⁴⁴⁹ and therefore posited it would be antithetical “to establish a criminal regime punishing States for such violations.”⁴⁵⁰ Ireland observed there was no state practice which lent support to the attachment of criminal or penal properties to the law of state responsibility.⁴⁵¹ The United Kingdom agreed, postulating there was “no basis in customary international law” to attach penalties to breaches of international law by states.⁴⁵² This position was endorsed by Austria and France.⁴⁵³ The latter commented that punitive functions have “hitherto been unknown in the law of international responsibility,”⁴⁵⁴ and thus wrongful acts, should not, and cannot “expose the wrongdoing to punitive legal consequences.”⁴⁵⁵ Finally, it was largely accepted that there existed no adjudicatory mechanism within the international legal order with the requisite authority to dispense such punishment.⁴⁵⁶ This realization is significant, as it implies that states did not perceive recourse to existing international adjudicatory bodies (entrusted with resolving state-to-state disputes) as a means of enacting punishment.

Finally, the *travaux préparatoires* of the Genocide Convention reveal that even fifty years before the codification of ARSIWA, the drafters were pointedly cognizant that: (i) States cannot be made to incur punitive consequences; and

447. Crawford, *supra* note 433, at 875.

448. Crawford, *supra* note 147, ¶ 54(d).

449. UN GAOR, 50th Sess., at 115, 120, State Responsibility: Comments and Observations Received by Governments, U.N. Doc. A/CN.4/488 (Mar. 25, 1998).

450. *Id.* at 121.

451. *Id.* at 116.

452. *Id.* at 120.

453. *Id.* at 113.

454. *Id.* at 115.

455. *Id.*

456. Int'l L. Comm'n, *Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session*, ¶ 110, U.N. Doc. A/CN.4/496 (Feb. 16, 1999).

(ii) any redress which the ICJ is empowered to award would be purely remedial and devoid of punitive qualities.⁴⁶³

6. Object (c) Has No Proper Purpose

In addition to the substantive flaws plaguing Object (c), the court is unlikely to recognize an intervenor's desire to discharge its own international obligations, by way of intervening in a case, as a "proper" motivation for intervening. Thus far the court has recognized the propriety of broadly two categories of objects: (i) informing the court of one's interests or rights,⁴⁶⁴ thereby safeguarding or protecting one's interests or rights from being affected by the judgment;⁴⁶⁵ or (ii) exclusively when intervening in the capacity of a party, submitting one's own claims which are "linked to the subject of the main dispute."⁴⁶⁶ It is not possible to reconcile Object (c) with any of these categories.

c. Category (i)

The motivation behind Object (c) is to ensure, in the event Israel is found in violation of the Genocide Convention, Nicaragua itself does not incur *erga omnes partes* responsibility for having "failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."⁴⁶⁷ This alludes to the presence of protective intent over its interest as the object of its intervention. However, Object (c) still fails to achieve synergy with category (i).

As confirmed by Judge Jennings, when a state intervenes under category (i), it seeks to protect its interest by persuading the court to tinker with its final judgment, and hand down a decision which vindicates, is acclimatized to, or accommodates said interests.⁴⁶⁸ This may be distinguished from the function

463. Genocide Convention Preparatory works, *supra* note 405, at 304 (Sweden); *id.* at 319 (United Kingdom); *id.* at 345 (Venezuela); *id.* at 347 (Syria); *id.* at 355 (Brazil); *id.* at 444 (Iran); *id.* at 433, 442 (Philippines); *id.* at 438–39 (Canada); *id.* at 445, 690 (Haiti and the United States) (opposing both civil responsibility and criminal liability of states); *id.* at 349–50, 435 (Luxembourg, Ecuador, and Poland, which reflect a more ambivalent attitude vis-à-vis sanctions).

464. KOLB, *supra* note 171, at 716.

465. *Id.*

466. QUINTANA, *supra* note 71, at 888.

467. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶ 430 (Feb. 26); S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶¶ 15, 17, 20.

468. Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, 1984 I.C.J. 3, 148, ¶ 14 (Mar. 21) (dissenting opinion by Jennings, J.) ("For the Court has to consider, besides the existence of interests of the kind referred to in Article 62, what the intervening State proposes to ask the Court to do about them. If, for example, it were allowed to intervene, in what ways might it be asking the Court to modify the decision it has to make in the main case? Or are there other ways in which the Court might be asked to assist the intervening State? Obviously, therefore, this kind of information is relevant to

of Nicaragua's intervention. Nicaragua intended to protect its interest by using participation in this case (a juridical process directed towards bringing about the cessation of a suspected genocide) as a vehicle, in and of itself, to discharge its duty to prevent genocide. Nicaragua did not seek to engage the court with the object of asking that the court to "modify"⁴⁶⁹ its findings in such a way that they would safeguard or effectuate Nicaragua's interest. Thus, the way in which Nicaragua sought to protect its interest as a duty-bearer is not reconcilable with the manner in which protection is designed to be provided under Article 62. Thus, Object (c) does not appear to synergize with category (i) and at least one of the overarching purposes of Article 62 intervention generally.

What is more, Nicaragua's discharge of its duty to prevent is not conditional on even the admission of its intervention. The duty to prevent is an obligation "of conduct . . . in the sense that a state cannot be under an obligation to succeed."⁴⁷⁰ Thus, it is incumbent on states to exercise only best efforts and due diligence⁴⁷¹ with a view to the "furtherance of a specific goal."⁴⁷² Insofar as Nicaragua has made a genuine effort to intervene, the court's decision ultimately to reject it should be of no prejudice to the question of whether Nicaragua has discharged its duty to prevent.

b. Category (ii)

Compatibility with category (ii) must be dismissed. Nicaragua was not seeking to introduce additional claims, say, a request for a declaration recognizing that it has in fact complied with its duty to prevent. Nicaragua had repeatedly emphasized it shall not introduce any claims, supplementary to those in South Africa's "prayer."⁴⁷³

D. Object (b)

Finally, Nicaragua pleads that it is intervening to "comply with its obligation to cooperate in the liberation of mankind . . . from the scourge of genocide."⁴⁷⁴ This object appears to overlap with Object (c). Therefore, its assessment may be mostly dispensed with by concise reference thereto.

the Court's consideration whether or not the intervention should be permitted."); see also A.J.J. de Hoogh, *Intervention Under Article 62 of the Statute and the Quest for Incidental Jurisdiction Without the Consent of the Principal Parties*, 6 LEIDEN J. INT'L L. 17, 27 (1993).

469. Libyan Arab Jamahiriya/Malta, Dissenting Opinion by Jennings, J., 1984 I.C.J. ¶ 14.

470. Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. ¶ 430.

471. ALICE OLLINO, DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL LAW 74–75, 92, 99 (2022).

472. Constantin P. Economides, *Content of the Obligation: Obligations of Means and Obligations of Result*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 154, at 371, 372.

473. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, ¶¶ 8–9, 18.

474. *Id.* ¶ 21(b).

First, the admissibility of Object (b) depends on whether intervention with a view to discharging one's own international obligations is deemed proper. Thus, potential barriers to the propriety of Object (c), discussed previously (in subsection V.C.6 of this Article), are transposable *mutatis mutandis* to Object (b).

Secondly, the objects appear to embody the same obligations and therefore prove substantively indistinguishable. Indeed, Object (b) is a virtually verbatim restatement of the Convention's third preambular recital. The *Oxford Commentary* to the Genocide Convention confirms the liberation of mankind from said scourge is achieved through "two separate, albeit related, paths: *ex ante* prevention and *ex post* punishment."⁴⁷⁵ If Objects (c) and (b) are materially one and the same, it must follow that the substantive limitations illustrated in the context of Object (c) would be applicable equally the same to Object (b). That is to say, for the same reasons discussed in subsections V.C.1–4 of this Article, an obligation to liberate mankind from the scourge of genocide cannot compel a state to intervene in proceedings before the ICJ—thereby rendering Object (b) redundant.

Alternatively, Object (b) may allude to the obligation to "cooperate to bring to an end . . . any serious breach by a State of an obligation arising under a peremptory norm of general international law."⁴⁷⁶ Nicaragua's Foreign Minister has publicly expressed "outrage" at the "inhuman aggressions, genocide and serious war crimes committed by the Zionist State."⁴⁷⁷ This statement had been made by an authoritative representative of the state,⁴⁷⁸ and a transcript of the speech was included as an evidentiary exhibit in Nicaragua's Application to the court, thereby suggesting that Nicaragua genuinely perceived Israel's alleged breaches as serious.

Recourse to the court appears to be recognized as a means of fulfilling this obligation. In its *Namibia* advisory opinion, the court confirmed that whereas "qualification of a situation as illegal does not by itself put an end to it. It can . . . be the first, necessary step in an endeavour to bring the illegal situation to an end."⁴⁷⁹ The ILC has characterized Ethiopia and Liberia's collaborative recourse to the ICJ, with a view to bringing the Union of South Africa's breaches of the right to self-determination and apartheid to an end, as "perhaps

475. Ben-Naftali, *supra* note 422, at 27–28.

476. Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, Peremptory Norms of General International Law (Jus Cogens), U.N. Doc A/77/10, at 70 (2022).

477. S. Afr. v. Isr., Nicaragua's Application to Intervene, *supra* note 36, Annex 2, ¶ 2.

478. JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 112 (2014).

479. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 111 (Jun. 21); Dire Tladi (Special Rapporteur on Peremptory Norm of General International Law (Jus Cogens)), *Third Rep. on Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/CN.4/714, ¶ 96 (Feb. 12, 2018).

one of the earliest examples of non-institutional forms of cooperation to bring to an end a breach of the *jus cogens* norm.”⁴⁸⁰ One might thus deduce that a strategically planned intervention with a view to helping an applicant state secure a declaration ordering a wrongdoing state to cease its genocidal acts to take measure to prevent and punish the commission of genocide—similar in form to the litigation strategy employed by New Zealand (intervening) and Australia (applicant) in *Whaling in the Antarctic*⁴⁸¹—could qualify as a means of satisfying this obligation. However, any obligation to cooperate would likely remain an obligation of conduct.⁴⁸² Therefore, it is ambiguous under what circumstances, if any, a failure to successfully be granted admission could ever prove fatal to the fulfilment of this obligation. The exertion of genuine and best efforts to intervene with a view to supporting the applicant might be sufficient.⁴⁸³ In any event, for reasons already explained, it remains the case that it would not be proper to allow a state to intervene just so that it may leverage its participation as means of proving it has complied with its own obligations. For all these reasons, even under this alternative interpretation afforded to Object (b), the object risks being deemed redundant.

CONCLUSION

In recognizing the admissibility of applications to intervene premised on *erga omnes (partes)* norms and the common interests animating them, the court has the opportunity to perfect the paradigm shift towards multilateralism that it initiated with its landmark *Barcelona Traction* dictum over fifty years ago. This Article has demonstrated that there are legally viable avenues for the court to employ the machinery of Article 62 intervention as a means to promote and

480. *Id.* ¶ 92.

481. *Whaling in the Antarctic (Austl. v. Japan)*, Declaration of Intervention by New Zealand, Order, 2013 I.C.J. 3, 11, ¶ 5 (Feb. 6) (declaration by Owada, J.).

482. Advisory Comm. on Public Int’l Law, *Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression*, Advisory Report No. 41 (Nov. 17, 2022), at 8, <https://perma.cc/DBP2-59JN>; Rebecca J. Barber, *Cooperating Through the General Assembly to End Serious Breaches of Peremptory Norms*, 71 INT’L & COMPAR. L. Q. 1, 27 (2022); Antal Berkes, *The Obligation to Cooperate to Protect Against Serious Breaches of the European and American Conventions on Human Rights*, 26 INT’L COMMENTARY L.R. 550, 588, 586 (2024); see also Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, 19 J. CONFLICT & SEC. L. 471, 480 (2014). See generally Application of the International Convention for the Suppression of the Financing of Terrorism & of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2024 I.C.J. 78, ¶ 137 (Jan. 31).

483. Int’l Law Comm’n, *supra* note 471, at 75; see also Int’l Law Comm’n, *Rep. on the Work of Its Seventy-First Session, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, U.N. Doc. A/74/10, at 60 (Aug. 10, 2019); see generally Economides, *supra* note 467, at 372.

facilitate multilateralist participation in cases involving *erga omnes* (*partes*) rights and obligations. This Conclusion serves as an opportune moment to underscore three principal to be drawn from the Article and to invite further reflection thereon.

First, common interests satisfy the “interest of a legal nature” criterion. One staunch opponent of this proposition has argued:

invocation of State responsibility based on obligations *erga omnes* or *erga omnes partes* serves to resolve a *horror vacui*—situations where impunity would reign because, in the absence of direct injury, no State would be entitled to bring the perpetrator State to justice. The object of this rule is satisfied as soon as one State institutes a justiciable case. It is not furthered by adding more States to ongoing proceedings through any form of intervention.⁴⁸⁴

This argument does not stand up to scrutiny. States have a substantive interest both in seeing human groups not driven to extinction and in the conservation of their cultural and other contributions which enrich human civilization as a whole. To accept the argument highlighted above would be to concede that the moment State A institutes a “justiciable case,” States C–Z no longer care for the continued existence of, say, either the Palestinian group or the Rohingya group. This is an unrealistic proposition that appears to be premised on a misconception that the common interests animating *erga omnes* (*partes*) norms have no substantive or material dimensions.

Moreover, taking McGarry’s stance to its most extreme, it would follow that where State A has, relying on common interests as the basis of its standing, instituted proceedings against State B, State C can no longer rely on that same common interest to adjudicate a separate case against State B for a violation of the same norm. Indeed, if the purported “object of this rule [of common interest standing]” is satisfied the moment State A’s justiciable case is instituted, it should follow equally that the same common interest, now allegedly depleted and objectless, can no longer serve as a valid basis for State C’s standing to bring a claim against State B. This would create a most undesirable “race to be first,” where states would be beholden to any state who happened to be the first to invoke the responsibility of the prospective wrongdoer to defend their common interest and shared rights. It is difficult to imagine that states would ever find it palatable to relinquish such control over the protection of their own rights—even in instances where those particular rights are shared and the interests they protect are largely altruistic.

Second, the court’s judgment has the potential to juridically recognize that states’ shared interest in the continued existence of the Palestinian group is

484. McGarry, *supra* note 104.

being impeded and to neutralize that risk by ordering Israel to cease its breach and provide assurances of non-repetition. This, in and of itself, suffices to demonstrate that the court has the potential to make good states' collective interest underpinning the Genocide Convention and that therefore its final judgment carries the potential to affect this common interest of a legal nature.

What is more however is that the obligation(s) in question constitute(s) the very same obligation(s) Israel owes to each contracting party to the Genocide Convention collectively. The entitlement to see that Israel does not commit genocide is a single entitlement, one in the same, held by all member states to the Convention. It is therefore axiomatic that in issuing a judgment the court will be ruling on the same right(s) as shared by all those states parties. The court's judgment thus goes beyond affecting any particular right and is in fact determinative as to whether any such shared right is being respected.

It is understandable if this proposition invokes in some concern over the compatibility between common interest standing and the so-called *Monetary Gold* principle.⁴⁸⁵ This principle dictates that the court cannot exercise jurisdiction over a case where "the rights and duties of a state that is not party to the dispute form the dispute's 'very subject matter.'"⁴⁸⁶ There is an inherent friction between this procedural safeguard and the enforcement of *erga omnes (partes)* obligations, and significant scholarly efforts have been exerted to try to reconcile the two as compatible with one another.⁴⁸⁷ Whereas this Article cannot comprehensively contribute to this discussion, it warrants emphasizing the court has never relied on the principle so as to bar adjudication of a claim on the basis that only one, and not all, *erga omnes (partes)* rights holders are parties to the case.

The court's judgment in *East Timor* does not appear to contradict the foregoing proposition. In that case, Portugal accused Australia of violating the people of East Timor's right to self-determination by concluding and implementing the so-called 1989 "Timor Gap Treaty," whereby Australia and Indonesia had agreed to a "provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf" of Timor Leste.⁴⁸⁸ The court decided that it could not pronounce on the legality of Australia's behavior without first

485. Case of the Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., & U.S.), Preliminary Question, Judgment, 1954 I.C.J. 19, 33–34 (June 15).

486. Robert Stendel & Alexander Wentker, *Monetary Gold in the Age of Public Interest Litigation*, 36 EUR. J. INT'L L. 559, 561 (2025).

487. See e.g., Brian McGarry & Nasim Zargarinejad, *All That Glitters Is Not Monetary Gold: Indispensable Parties and Public Interest Litigation before International Tribunals*, in PUBLIC INTEREST LITIGATION IN INTERNATIONAL LAW 137, 137 (Justine Bendel & Yusra Suedi eds., 2023); Robert Stendel & Alexander Wentker, *supra* note 481, at 561. See generally Beatrice I. Bonafé, *Adjudicative Bilateralism and Community Interests*, 115 AM. J. INT'L L. UNBOUND 164 (2021).

488. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶ 18 (June 30).

determining the lawfulness of Indonesia's entry in (by way of armed force)⁴⁸⁹ and continued occupation of East Timor, which in turn would bear on whether Indonesia "could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf."⁴⁹⁰ Against this backdrop, because Indonesia was not a party to the proceedings, the court felt compelled to decline to exercise jurisdiction.⁴⁹¹

Even if one could explain the foregoing—in the form of an oversimplification—that the question of Australia's violation of the East Timorese's right to self-determination was contingent on whether Indonesia had itself failed to comply with, *inter alia*, the obligation to respect the right to self-determination of the East Timorese,⁴⁹² the obligations in question constituted two separate obligations each divisibly and exclusively opposable to Indonesia and Australia separately and independently. It was not a case where there was a single duty, one in the same, indivisibly shared between the two states (Indonesia and Australia).

The prospective illegality of Indonesia's presence in and administration over Timor Leste would not, in and of itself, have constituted a breach on the part of Australia of its duty to respect the East Timorese's right to self-determination. Indonesia's conduct could amount to a breach of Indonesia's obligations alone. This is because obligations *erga omnes (partes)* do not create a system of joint responsibility, or "plurality of duty-bearers," where a breach on the part of State A of an obligation invariably renders State B internationally responsible for that same act of non-compliance.⁴⁹³ Instead, it is only through its own later conduct in engaging with Indonesia, as if Indonesia were the rightful sovereign over Timor Leste, that potentially Australia could separately, itself, have been found in breach of its own divisible duty to respect the East Timorese's right to self-determination.

489. Malcolm D. Evans & Christine Chinkin, *The East Timor Case (Portugal v. Australia)*, 45 INT'L & COMP. L.Q. 712, 719 (1996).

490. East Timor, 1995 I.C.J. at ¶ 28.

491. *Id.* ¶¶ 32, 38.

492. Counter-Memorial of Australia, East Timor (Port. v. Austl.), 1995 I.C.J. Pleadings 1, at 199–204 (June 1) (as was argued by Australia); *see also* Iain G.M. Scobbie & Catriona J. Drew, *Self-Determination Undetermined: The Case of East Timor*, 9 LEIDEN J. INT'L L. 185, 203 (1996); Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for Advisory Opinion), Advisory Opinion, 2024 I.C.J. 753, ¶¶ 230–43 (July 19) (explaining how annexation can undermine the right to self-determination); G.A. Res. 3485, Question of Timor, ¶ 5 (Dec. 12, 1975) (on U.N. recognition that Indonesia's annexation interfered with the people of East Timors' right to self-determination).

493. Nataša Nedeski, *Indivisible and Divisible Shared Obligations in International Law*, in SHARED OBLIGATIONS IN INTERNATIONAL LAW 97, 100, 104–05 (2022). In fact, where there is a shared obligation, the court has found that its jurisdiction is not barred in the absence of all the obligors. *See DARSİWA Commentaries, supra* note 8, at 124; *see also* Evans & Chinkin, *supra* note 484, at 719–20.

In contradistinction thereto, when a state relies on an *erga omnes partes* obligation as the basis of its standing, it is invoking an entitlement which it shares with all member states to that particular treaty. Thus, any determination by the court is directed at the one and the same entitlement over which each state exercises ownership. The entitlement in this example and the duties in *East Timor* are not similar in kind. The former is a singular indivisible entitlement belonging to each state collectively, whereas the latter involved two separate obligations opposable separately and exclusively to each state respectively. Where a state invokes an obligation *erga omnes (partes)*, the court has not treated the absence of the other rights-holding states who are entitled to the performance of that obligation as a barrier to its exercising jurisdiction. It has not even discussed the *Monetary Gold* principle.⁴⁹⁴ Against this backdrop, if it is to be treated as authority, *East Timor* seems to provide simply that the court cannot exercise jurisdiction where the determination of the dispute between State A and State B would require it to first pass judgment over the specific, divisible, and independent obligations of State C even if thematically the content of the duties overlap.

Third, the jurisprudence of the court recognizes that it is proper for states to engage with it with a view to protecting their rights and interests. Of course, juridical recognition that a breach of a right has transpired is an indispensable first step to ensuring that the breach can be brought to an end. It is therefore entirely proper for states to engage with the court with a view to persuading it to recognizing wrongdoing and to order cessation and non-repetition of the wrongful act.

Moreover, the *travaux préparatoires* of the ICJ Statute confirm that the machinery of intervention was devised with a view to allowing third to states to align themselves with one of the principal disputants and support that party in securing its desired outcome. Whereas the court has not had the opportunity to pronounce on whether an intervention motivated by such intentions is proper, the legislative history of the ICJ Statute points in favor of an affirmative answer.

Finally, whereas Nicaragua has withdrawn its application, the court will have an opportunity to potentially set a precedent recognizing the admissibility of interventions in reliance of common interests when it rules on Belize's pending application in *South Africa v. Israel*, which is presented along lines not dissimilar to that of Nicaragua's. It remains to be seen to what degree, if any, the opinion of the court will align with the findings presented in this Article.

494. See generally *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, 2012 I.C.J. 423, ¶¶ 68–69 (July 20); *Application of the Covenant on the Prevention and Punishment of the Crime of Genocide* (The Gam. v. Myan.), Preliminary Objections, Judgment, 2022 I.C.J. 478, ¶¶ 93–114 (July 22).