A New Tool for Enforcing Human Rights: 
*Erga Omnes Partes* Standing

ALAA HACHEM, OONA A. HATHAWAY, AND JUSTIN COLE*

In 2019, The Gambia brought suit against Myanmar in the International Court of Justice to hold it accountable for its alleged genocidal acts against the Rohingya, an ethnic Muslim minority group that has long been subjected to systemic abuse by the Myanmar government. As a State party to the Genocide Convention, The Gambia claimed that it had a common interest in preventing genocide by Myanmar. In a landmark decision issued in 2022, the Court accepted that The Gambia had standing and ordered Myanmar to prevent the commission of genocidal acts against the Rohingya.

This Article argues that this decision offers the promise of a revolution in the enforcement of international law, especially international human rights law. It transforms what has long been the Achilles heel of international human rights law—the protection of legal rights shared by all—into an asset through the recognition of *erga omnes partes* standing, which allows a State party to a treaty that protects common legal rights to enforce those rights even if that State is not specially affected by the violation. As a result, whereas it was once too often the case that no State

*Respectively, J.D. candidate, Yale Law School; Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; J.D. Yale Law School 2023. For helpful comments and conversations, the authors thank John Bowers, Mikaela Carlson, Aroosa Cheema, Nienke Grossman, Rekha Kennedy, Raquel Leslie, Asaf Lubin, Helen Malley, Maggie Mills, Juan Miramontes, Solveig Olson-Strom, Duncan Picard, Thomas Poston, Aaron Sobel, Michael Sullivan, Beatrice Walton, Alyssa Yamamoto, Saifeldeen Zihiri, and Heather Zimmerman.
possessed the capacity to enforce the law, now every State that is party to the relevant treaty may have that capacity.

This Article places these recent developments in context, tracing the evolution of the case law on erga omnes and erga omnes partes obligations over the course of more than a half century. It considers the extent to which the recent recognition of erga omnes partes standing as an enforcement mechanism might be expanded to other treaties. This Article considers, too, the potential drawbacks of this new mechanism for international law enforcement and the new questions the Court will inevitably face as this revolutionary development continues to unfold.

INTRODUCTION ........................................................................................................... 261
I. THE EMERGENCE OF ERGA OMNES PARTES OBLIGATIONS.............. 270
   A. Step One: Barcelona Traction and the Origin of the Erga Omnes Principle in International Law ....................... 271
   B. Step Two: Obligation to Prosecute Opens the Door to Erga Omnes Partes Standing....................................................... 277
   C. Step Three: The Gambia v. Myanmar Establishes Erga Omnes Partes Standing For All States Parties............. 280
II. THE PROSPECT OF AN ERGA OMNES PARTES REVOLUTION........... 286
   A. The Framework for Erga Omnes Partes Suits......................... 287
      1. Treaty Provision Establishes Mandatory Jurisdiction Over Disputes ............................................................... 288
      2. Violations of an Erga Omnes Partes Character.............. 289
         a. The Treaty Must Create a Common Interest....... 290
         b. The Provision Invoked Must Be “Relevant” to the Purported Common Interest................................. 297
   B. Applying the Framework ......................................................... 300
      1. Human Rights Treaties ......................................................... 300
      2. Counter-Terrorism and Weapons Treaties............... 304
      3. Environmental Treaties......................................................... 310
III. THE FUTURE OF ERGA OMNES PARTES STANDING .................... 314
A NEW TOOL FOR ENFORCING HUMAN RIGHTS

A. Potential Drawbacks of Expanding *Erga Omnes Partes* Standing .................................................. 314
   1. Reduced Commitments to Treaties That Protect Common Interests .............................................. 314
   2. Challenges to the Legitimacy of the Court ....... 318
   3. Inequities in Enforcement ........................................ 322

B. Questions Raised by the Expansion of *Erga Omnes Partes* Standing ................................... 325
   1. Evidentiary Challenges ........................................... 326
   2. Reparations ............................................................. 328
   3. Balancing Interests of Multiple States ................. 329

CONCLUSION ................................................................. 331

INTRODUCTION

On August 25, 2017, the Myanmar military launched a brutal campaign of massacres, mass rape, and arson in the northern Rakhine State against the Rohingya,1 an ethnic Muslim minority group that has long been subjected to systemic discrimination and abuse by the Myanmar government.2 The soldiers murdered children in front of


their mothers, burned people alive, and destroyed entire villages. Over 700,000 Rohingya were forced to flee to neighboring Bangladesh, where many have since remained, in miserable and dangerous conditions, for more than six years. Several States, including the United States, Canada, France, and Turkey, have declared the military’s 2017 massacres to be genocide, and human rights groups have been persistently calling for international efforts to hold Myanmar accountable for its actions. Arguably the most powerful response came from what was perhaps the unlikeliest source—a small country in West Africa, with a population of under three million, over nine thousand miles away from Myanmar.

In 2019, The Gambia brought suit against Myanmar in the International Court of Justice (ICJ) to hold it accountable for its alleged genocidal acts against the Rohingya. Myanmar argued that The Gambia lacked standing on the basis that it had “no link whatsoever to

3. See supra note 1.


the facts of the case.\textsuperscript{8} Specifically, Myanmar emphasized that there was neither a “territorial connection between The Gambia and the alleged violations of the 1948 Convention on the Prevention and Punishment of Genocide (Genocide Convention) for which Myanmar purportedly bears responsibility” nor “any other relevant links between either the alleged offenders or the victims of the purported Convention violations on the one hand, and The Gambia on the other.”\textsuperscript{9} Notably, The Gambia itself never asserted that it was directly injured, specially affected, or even specially interested in Myanmar’s genocidal acts against its own Rohingya population. Instead, it claimed that its basis for standing derived from its status as a State party to the Genocide Convention. As a State party, The Gambia claimed, it had a common interest in preventing genocide by other States parties, including Myanmar. Myanmar unsurprisingly challenged The Gambia’s right to bring suit, reminding the Court that it had previously established that a “protected legal interest” was necessary for a State to bring a case before the Court.\textsuperscript{10}

In 2020, the Court sent shockwaves through the international community by accepting The Gambia’s argument that it had standing and ordering Myanmar to prevent the commission of genocidal acts against the Rohingya.\textsuperscript{11} The Court affirmed this decision in its judgment issued in 2022. It explained:

All the States parties to the Genocide Convention . . . have a common interest to ensure the prevention, suppression[,] and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. . . . [S]uch a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations \textit{erga}


\textsuperscript{9} Id.

\textsuperscript{10} Id. ¶ 217.

omnes partes, in the sense that each State party has an interest in compliance with them in any given case.\textsuperscript{12}

It went on to emphasize:

It follows that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations \textit{erga omnes partes} under the Convention and to bringing that failure to an end.\textsuperscript{13}

In short, the Court concluded, The Gambia had standing because it was seeking to protect a common interest of States parties in the core obligations under the treaty. This Article argues that this decision offers the promise of a revolution in the enforcement of international law, especially with respect to human rights.

To understand why this development is so revolutionary, it helps to understand the long process leading up to it. The case brought by The Gambia against Myanmar built on a slow but steady evolution in the law that began more than five decades ago. In 1970, the Court developed the idea of \textit{erga omnes} obligations—literally, obligations “towards all.” The Court first developed this concept in \textit{Barcelona Traction}, where it recognized the existence of a class of obligations that are “the concern of all States.”\textsuperscript{14} According to the Court, these obligations include the prohibitions against aggression and genocide, as well as “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”\textsuperscript{15} Because of “the importance of the rights involved,” the Court concluded that “all States can be held to have a legal interest in their protection.”\textsuperscript{16}


\textsuperscript{13}. Id. ¶ 112.

\textsuperscript{14}. \textit{Barcelona Traction, Light and Power Co. (Belg. v. Spain)}, Judgment, 1970 I.C.J 3, ¶ 33 (Feb. 5) [hereinafter \textit{Barcelona Traction Judgment}].

\textsuperscript{15}. Id. ¶ 34.

\textsuperscript{16}. Id. ¶ 33.
The Court did not provide significant analysis of *erga omnes* obligations until 2012,\(^\text{17}\) when it held in *Obligation to Prosecute* that *erga omnes partes* obligations—*erga omnes* obligations protected by treaties and owed to contracting parties—could alone provide a basis for standing. Although Belgium asserted a special interest in the dispute in its application to the Court, the Court determined that there was no need to assess whether Belgium was specially affected by Senegal’s alleged violations of the Convention Against Torture (CAT). Instead, the Court held that the provisions purportedly violated were *erga omnes partes* obligations and that Belgium therefore had standing simply by virtue of its status as a State party to the CAT.

*The Gambia v. Myanmar* was the third, and most critical, step in this evolution. Here, the Court expressly confirmed that even States not specially affected have standing to invoke the responsibility of a State for violating *erga omnes partes* obligations. This third step opened up the possibility of a revolution in the enforcement of international law, especially human rights law. Human rights treaties enumerate legal rights, but violations of those rights are too often not followed by remedies. Most human rights treaties do not include penalties for violations, relying instead on what Abram Chayes and Antonia Handle Chayes once referred to as the “managerial legal process”\(^\text{18}\) and what Thomas Franck called the “compliance pull” of legitimate and fair legal institutions.\(^\text{19}\) Most prominently, the core human rights treaties establish treaty bodies to monitor compliance.\(^\text{20}\)

\(^{17}\) In 1995, the Court identified self-determination as being of an *erga omnes* character in its *East Timor* opinion, relying on the United Nations Charter and its own prior jurisprudence. *East Timor* (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 88 (July 9) (favorably discussing the conclusion in *East Timor*); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 169, ¶ 180 (Feb. 25) (same). However, this analysis contributed little to the overall framework of *erga omnes* obligations other than adding to the short list of such obligations laid out in *Barcelona Traction*. In fact, after *Barcelona Traction*, the Court avoided explicitly addressing the issues of *erga omnes* and *erga omnes partes* even though the concepts may nonetheless have been in play. See infra notes 99 & 248.


\(^{19}\) *Thomas M. Franck, Fairness in International Law and Institutions* 37 (1995).

\(^{20}\) Each of the nine core international human rights treaties has a treaty body (Committee) of experts to monitor the implementation of the treaty. Many of these treaty
Unfortunately, human rights violations remain common, including in States that have ratified the treaties.\(^{21}\) Indeed, two decades ago, one of us authored an article that asked: “Do Human Rights Treaties Make a Difference?” The disheartening answer was, most often, no.\(^{22}\) In fact, the opposite was sometimes true: Because human rights treaties were largely unenforceable, States often saw joining a treaty as a less burdensome substitute for changing their practices. This dynamic has meant that the explosion of human rights treaties sometimes called the “human rights revolution” in the post-war era has on many occasions proven to be an empty promise.

But what has long been the Achilles heel of international human rights law—the protection of legal rights shared by all—may no longer be such a hindrance after *The Gambia v. Myanmar*. Indeed, that very feature could be transformed into an asset by the concept of *erga omnes partes* standing. Whereas it was once too often the case that *no State* was able to enforce the law, now *every State*, or at least every State that is party to the relevant treaty, may possess that capacity.

We are already seeing this possibility begin to play out: In May 2023, borrowing a page from The Gambia’s playbook, the Netherlands and Canada instituted proceedings against Syria at the ICJ for its alleged violations of the CAT during the Syrian civil war.\(^{23}\) These bodies may consider individual complaints or communications from individuals, and many treaties provide for state-to-state complaints. For a brief overview, see *Complaints about Human Rights Violations: Treaty Bodies*, U.N., https://www.ohchr.org/en/treaty-bodies/complaints-about-human-rights-violations (last visited Dec. 27, 2023).


\(^{22}\) Hathaway, *supra* note 21.

violations include “abhorrent treatment of detainees, inhumane conditions in places of detention, enforced disappearances, the use of sexual and gender-based violence, and violence against children.”

The horrors that unfolded in that war have gone largely unaddressed. Although the United Nations has been gathering evidence of war crimes committed by the Syrian government since 2018 through the International, Impartial and Independent Mechanism (IIIM), those responsible for gross human rights abuses have thus far remained largely outside the reach of the law. The sole exception has been a handful of cases against former Syrian regime officials who have been prosecuted in select European States that offer universal criminal law jurisdiction.

As the IIIM explained, the “Dutch-Canadian Accountability Initiative represents the type of justice process that the IIIM was established to assist.” The emergence of *erga omnes partes* standing—and the filing of this new lawsuit—suggest that the complete impunity of the Syrian government may be coming to an end.

South Africa has also followed The Gambia’s template in its recent suit against Israel in the ICJ for alleged violations of the Genocide Convention during Israel’s military campaign in Gaza. In its December 2023 application to the Court, South Africa argues that Israel’s conduct in Gaza since October 7, 2023 constitutes genocidal acts in light of the damage inflicted on civilian life and infrastructure, including the killing of more than “21,110 named Palestinians,” over

---


26. *Id.*

7,729 whom are children, and the destruction of over 355,000 Palestinian homes.\(^\text{28}\) It also argues that Israel violated the Convention by failing to prevent or hold senior Israeli officials and others accountable for their direct and public incitement to genocide.\(^\text{29}\) The application urgently requests several provisional measures from the Court, including the suspension of Israel’s military operations in and against Gaza.\(^\text{30}\) Like The Gambia, The Netherlands, and Canada, South Africa relied on the \textit{erga omnes partes} standing doctrine to institute its proceedings. In its provisional measures order, issued in January 2024, the Court specifically relied on its decision in \textit{The Gambia v. Myanmar} in concluding that South Africa has prima facie standing to submit the dispute to the Court.\(^\text{31}\) The case is expected to have important ramifications both for Israel and for States supporting its campaign, including the United States.\(^\text{32}\)

In this Article, we ask where else this same technique might be used to enforce international law. Looking closely at the Court’s language in \textit{Barcelona Traction}, in which it broadly construes \textit{erga omnes} obligations as “principles and rules concerning the basic rights of the human person,” we argue that these obligations could extend to other treaties protecting rights that are the “concern of all states.”\(^\text{33}\) We introduce a framework for determining whether a treaty creates \textit{erga omnes partes} standing, inferred from the Court’s decisions in \textit{Obligation to Prosecute} and \textit{The Gambia v. Myanmar}. We show that \textit{erga omnes partes} standing may be used to enforce treaties before the ICJ where a treaty both provides for mandatory jurisdiction over disputes arising under the treaty and establishes an \textit{erga omnes partes} obligation. We then apply this framework to human rights, counter-terrorism and weapons, and environmental treaties. We find that the possibilities for this new doctrine extend far beyond where it has so far been applied, allowing States to hold other States accountable for...

\(^{28}\) Id. ¶ 4.

\(^{29}\) Id. ¶ 1.

\(^{30}\) Id. ¶ 144(1).


\(^{33}\) \textit{Barcelona Traction} Judgment, supra note 14, ¶ 33.
failing to uphold their obligations under international law, particularly obligations towards their own citizens, in some cases for the first time.

Of course, expanded access to an international court does not guarantee justice will be served. Estimates of compliance with decisions of the ICJ vary, but none place it at 100 percent. Even so, a decision by the Court brings attention to violations of international law and serves as a tool for marshaling the other mechanisms of international law enforcement—including sanctions, countermeasures, diplomatic suasion, and even seizure of assets—that can follow directly from a definitive ruling that a State’s actions violate international law. A decision that their legal rights have been violated carries important normative value for victims, too, independent of whether they receive any material benefit from the litigation.

Decisions also contribute to norm development and the formation of customary international law by influencing both general State practice and opinio juris—thus shaping State behavior in the future. Hence, while there is no guarantee that a State will comply with a decision against it, access to the ICJ can make a significant difference nonetheless.

This is not to suggest that the emergence of *erga omnes partes* standing is a panacea for fixing underenforcement in international law. For one, the particular combination of features that it requires is most common in human rights treaties, but often absent in other underenforced areas of international law, particularly environmental law. Additionally, even with respect to human rights law, there could be downsides to further development of this form of standing. For instance, negative reactions from States in response to the growth in *erga omnes partes* standing may undermine the ICJ’s legitimacy. Moreover, an increase in human rights disputes might lead States to withdraw from human rights treaties or deter them from entering into new ones in the first place. We cannot celebrate the possibilities this new development offers without acknowledging its possible, potentially substantial, drawbacks.

---

34. See infra text accompanying notes 295–298.


This Article proceeds in three parts. In Part I, we explain the concepts of *erga omnes* and *erga omnes partes* obligations, tracing the evolution of the case law from *Barcelona Traction* to *The Gambia v. Myanmar*. In Part II, we consider the extent to which *erga omnes partes* standing as an enforcement mechanism can be expanded to other treaties. We do so by proposing a framework for the new standing requirements based on *The Gambia v. Myanmar* and its predecessors, which we then apply to human rights, counter-terrorism and weapons, and environmental treaties. In Part III, we consider the potential drawbacks of using *erga omnes partes* as a mechanism of human rights enforcement and the new, crucial questions the Court will likely face as the *erga omnes partes* principle continues to develop.

*Erga omnes partes* standing is a critically important development in the field of international law that offers an exciting new opportunity for addressing an important accountability gap in the field of human rights. At the same time, this new development raises potential concerns and a flurry of new questions that the field of international law must address. This Article aims to begin that conversation.

I. THE EMERGENCE OF *ERGA OMNES PARTES* OBLIGATIONS

The foundation for *erga omnes partes* standing emerged in three steps over the course of fifty years. The ICJ first recognized that some States’ obligations are owed towards the international community as a whole in dictum in *Barcelona Traction*. Forty years later in *Obligation to Prosecute*, the Court referenced this dictum as part of its reasoning for accepting Belgium’s standing to bring its case against Senegal. The Gambia then pushed this analysis one critical step further, relying on the *erga omnes partes* principle as the sole basis for its standing to bring suit against Myanmar. The Court, by accepting The Gambia’s standing and permitting the case to move forward, explicitly demonstrated its support of the right of a State not specially affected to bring suit against other States for violating their *erga omnes partes* obligations. Here, we trace this evolution, setting the stage for Part II, in which we consider the possibilities that these cases create for further expansion of this new form of standing.
A. Step One: Barcelona Traction and the Origin of the Erga Omnes Principle in International Law

The ICJ first recognized what it termed “erga omnes obligations” in Barcelona Traction. To understand that case, it is worth reflecting on two prior cases wherein the Court discussed the right of States to invoke the responsibility of another State for violating its treaty-based obligations: S.S. “Wimbledon”—the first contentious dispute before the Permanent Court of International Justice (PCIJ), the ICJ’s predecessor—and the South West Africa cases. In S.S. “Wimbledon”, the PCIJ allowed England, France, Italy, and Japan to invoke Germany’s responsibility under the Treaty of Versailles after Germany denied the steamship Wimbledon entry through the Kiel Canal. The English steamship, which had been chartered by a French company and was carrying arms and munitions consigned to Poland, was denied entrance to the Kiel Canal by Germany based on the German neutrality orders in connection with the Russo-Polish War. The applicants instituted proceedings at the PCIJ under the Treaty of Versailles. The Court accepted the four States’ standing to bring the dispute under Article 386(1) of the Treaty, “even though they may be unable to adduce a prejudice to any pecuniary interest,” based on the fact that “each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags.”

S.S. “Wimbledon” was thus the first case in which the Court allowed non-specially affected States to invoke the responsibility of another State party. Yet a few years later, the ICJ (which had by then replaced the PCIJ) reversed course in the South West Africa cases.

---

39. Id. at 19.
40. Id. at 20.
41. “In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations.” Peace Treaty of Versailles art. 386, June 28, 1919.
1960, Ethiopia and Liberia instituted proceedings against South Africa for alleged breaches of the League of Nations Mandate for South West Africa (modern day Namibia), including the practice of apartheid. In 1962, the Court rejected all four of South Africa’s preliminary objections, including objections to the standing of Ethiopia and Liberia, finding that a dispute existed between the parties and that it had jurisdiction over this dispute. However, in an equally divided judgment on the merits four years later, the Court found that the applicants did not have standing to raise the dispute. It distinguished between “standing before the Court itself,” a right the applicants had per the treaty’s jurisdictional clause, and an applicant’s “legal right or interest regarding the subject-matter of their claim,” which it found the applicants lacked. The Court expressly rejected the contention that the “Applicants do not need to show the existence of any substantive rights outside the jurisdictional clause, and that they had—that all members of the League had—what was in effect a policing function under the mandates and by virtue of the jurisdictional clause.” It also rejected the argument that “humanitarian considerations are sufficient in themselves to generate legal rights and obligations.” By rejecting Ethiopia’s and Liberia’s standing in the South West Africa cases for lacking a “legal interest” beyond the treaty’s jurisdictional clause, the Court reversed course from the PCIJ’s holding in S.S. “Wimbledon”


44. Id. at 328 (“[T]here can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.”).

45. Id. at 343 (“The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. . . . [T]he manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.”).

46. Although the Court initially rejected South Africa’s preliminary objections and allowed the case to proceed to the merits stage, the final judgment was decided on the issue of standing, and the Court never assessed the merits of the dispute.


48. Id. ¶¶ 66–67; see also id. ¶ 72 (“Thus reduced to its basic meaning, it can be seen that the clause is not capable of carrying the load the Applicants seek to put upon it, and which would result in giving such clauses an effect that States accepting the Court’s jurisdiction by reason of them, could never suppose them to have.”).

49. Id. ¶ 49.
allowing non-specially affected States parties to invoke the responsibility of another State party.

The *South West Africa* cases faced severe criticism, including by the dissenting judges.\(^{50}\) Indeed, it is widely believed that four years later, in deciding *Barcelona Traction*, the Court’s reference to *erga omnes* obligations was an attempt to correct its mistake in the *South West Africa* cases.\(^{51}\)

This brings us to *Barcelona Traction*. On its face, the case seems like an unlikely vehicle for lofty human rights pronouncements. Belgium sought monetary compensation for damages that it claimed were caused to Belgian nationals who were shareholders in the *Barcelona Traction*, Light and Power Company (*Barcelona Traction*), a Canadian company.\(^{52}\) In 1936, the servicing of various *Barcelona Traction* bonds was suspended because of the Spanish Civil War, and authorization for the transfer of foreign currency necessary to service the bonds was refused, meaning that applicable interest payments were never paid.\(^{53}\) Following the Second World War, despite attempts to pursue a compromise to allow for the reimbursement of the debt, the Spanish authorities declined to provide the necessary authorization “unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain.”\(^{54}\) On February 9, 1948, three Spanish holders of the bonds at issue petitioned a Spanish court to declare *Barcelona Traction*

---


52. *Barcelona Traction* Judgment, supra note 14, ¶¶ 1–2.

53. Id. ¶ 11.

54. Id. ¶ 12.
bankrupt as a result of failing to pay the interest on the bonds. The court granted the request, appointing a bankruptcy commissioner and an interim receiver and ordering the seizure of Barcelona Traction assets. Following a lengthy series of proceedings, the bankruptcy trustees received judicial authorization to sell “the totality of the shares, with all the rights attaching to them, representing the corporate capital.”

In response, Belgium argued that Spain had violated international law and was obligated to make reparations for the damage suffered by Belgian nationals. Specifically, it argued that Spain was required to annul the bankruptcy adjudication and all related acts and pay compensation as a result of the incidental damage sustained by Belgian nationals. Spain, in relevant part, argued that Belgium lacked standing to bring a claim on behalf of its shareholders for several reasons, including that Belgium was claiming a right to protect a Canadian company, and that contrary to Belgium’s claims, no rules or principles of international law confer any right of diplomatic protection of national shareholders in a foreign company allegedly injured by a third State.

When the case was finally decided in 1970, the Court emphasized that it

ha[d] to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts

55. *Id.* ¶ 13.
56. *Id.*
57. *Id.* ¶ 17.
59. *Id.* ¶ 2.
61. The Court even noted that while it did not want to refuse requests by the parties for long time limits or extensions thereof, “[i]t nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.” *Barcelona Traction* Judgment, *supra* note 14, ¶ 27.
prejudicial to both it and its shareholders; and the State
under whose laws the company is incorporated, and in
whose territory it has its registered office.  

Up to this point, one would be forgiven for being unclear as to
how this case relates to core human rights and why it would be relied
upon by the Court years later in *Obligation to Prosecute* and *The
Gambia v. Myanmar*, which implicated the CAT and the Genocide
Convention, respectively. Yet on the way to holding that Belgium
lacked standing to exercise diplomatic protection of shareholders in

the Canadian company,  

the Court in *Barcelona Traction* distinguished between “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.” Specifically, it found that “[b]y their
very nature the former,” which it called *erga omnes* obligations, were
“the concern of all States,” meaning that “all States can be held to have
a legal interest in their protection.” The Court identified a few such
obligations: “the outlawing of acts of aggression, and of genocide . . .
and rules concerning the basic rights of the human person, including
protection from slavery and racial discrimination.” As the Court
noted, some of these rights had “entered into the body of general
international law,” while others were “conferred by international
instruments of a universal or quasi-universal character.” With this
rather brisk discussion concluded, the Court determined that
“[o]bligations[,] the performance of which is the subject of diplomatic
protection[.]” and proceeded with its

analysis. Although the Court did not make any direct references to
the *South West Africa* cases, the Court retreated from its earlier
decision that humanitarian considerations were not “sufficient in
themselves to generate legal rights and obligations.” The Court
effectively confirmed that there are some obligations that all States

62. *Id.* ¶ 31.
63. *Id.* ¶ 101.
64. *Id.* ¶ 33.
65. *Id.*
66. *Id.* ¶ 34.
67. *Id.*
68. *Id.* ¶ 35.
have an inherent legal interest in protecting—including human rights obligations.

While the idea of erga omnes obligations was not revolutionary—indeed, the general principle dates as far back as Roman law 70—Barcelona Traction represents its clear emergence in modern international law. Although the discussion of erga omnes obligations in this case was confined to dictum, it quickly became “famous, even commonplace, in international legal literature.” 71

Indeed, the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, which specifically provides for “[i]nvocation of responsibility by a State other than an injured State,” 72 effectively codifies the Court’s dictum in Barcelona Traction, providing that “[a]ny State other than an injured State is entitled to invoke the responsibility of another State . . . if . . . the obligation breached is owed to the international community as a whole.” 73

In Barcelona Traction, the Court recognized that States have obligations towards the international community as a whole, but it left unclear whether a breach of these obligations could create a legal basis for standing before the Court. 74 As the next sections explain, it was not until Obligation to Prosecute and The Gambia v. Myanmar, both of which explicitly rely on Barcelona Traction, that the Court significantly expanded the erga omnes principle to affirm that standing


73. Id. art. 48(1)(b); see Priya Urs, Obligations Erga Omnes and the Question of Standing Before the International Court of Justice, 34 Leiden J. of Int’l L. 505, 510 (2021).

74. Urs, supra note 73, at 511–12.
could arise in at least some instances under the related concept of *erga omnes partes*.

**B. Step Two: Obligation to Prosecute Opens the Door to Erga Omnes Partes Standing**

In 2009, Belgium instituted proceedings against Senegal for its alleged violations of the CAT in failing to prosecute or extradite Hissène Habré, the former Chadian dictator, who was accused of committing acts of torture during his presidency. Habré’s rule from 1982 to 1990 was “marked by widespread atrocities, including waves of ethnic cleansing.” After he was deposed by President Idriss Déby Itno in 1990, Habré fled to Senegal. In 2000, Chadian victims filed a criminal complaint against him in Senegal, accusing him of torture and crimes against humanity. However, local courts dismissed the case for lack of jurisdiction. Subsequently, several of Habré’s victims who had acquired Belgian nationality filed a suit against him in Belgium, taking advantage of its universal jurisdiction laws. In 2005, after a four-year investigation, a Belgian judge charged Habré with, among other things, crimes against humanity and torture and requested his extradition from Senegal. The Dakar Appeals Court,

---

75. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 69 (July 20) [hereinafter *Obligation to Prosecute Judgment*] (“[A]ny State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . . to bring that failure to an end.”); *The Gambia v. Myanmar Judgment*, supra note 12, ¶ 107 (“[A] common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.”).

76. *Obligation to Prosecute Judgment*, supra note 75, ¶ 1.


78. Id.


80. Id.

81. Id.

82. Id.
however, held that it had no jurisdiction to rule on the extradition request, leaving Habré “at the disposal of the President of the African Union.” In 2009, Belgium finally filed its suit against Senegal at the ICJ for failing to prosecute or extradite Habré.

Belgium alleged that Senegal had violated two provisions of the CAT: Article 6(2), for failing to immediately initiate an inquiry once the government had reason to suspect Habré of being responsible for acts of torture; and Article 7(1), for failing to take all measures necessary for the implementation of the CAT, including extraditing or prosecuting the accused, as soon as possible. Belgium argued that the Court had jurisdiction to hear the dispute under Article 30(1) of the CAT, which provides the Court with mandatory jurisdiction over a dispute if the States parties are unable to settle it through negotiation and if, within six months from the date of the request for arbitration, they are unable to agree on the organization of the arbitration. Agreeing with Belgium, the Court determined that these requirements had been satisfied.

As for standing, Belgium argued that it was specially affected by Senegal’s violations “in a way which distinguished it from the generality of other States to which the obligation is owed”: (i) “the Belgian courts [were] actively seized of the H. Habré case as a result of the complaints filed in 2000”; (ii) “some of the victims [were] of Belgian nationality”; and (iii) Belgium had “formally requested Mr.

---

83. Id.
84. Id.
85. Obligation to Prosecute Judgment, supra note 75, ¶ 13.
86. Id. ¶¶ 56, 61.
87. Of course, in international law, the idea of “specially affected” States also arises in the context of the formation of customary international law. In its North Sea Continental Shelf decision, the ICJ reasoned that “an indispensable requirement” in considering whether a rule had attained the status of customary international law was that “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.” North Sea Continental Shelf (Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 73–74 (Feb. 20) (emphasis added). However, “[t]he ICJ itself has never again explicitly referenced the doctrine in a main judgment or advisory opinion,” and “not a single book or article published in English since North Sea Continental Shelf has even attempted to provide a systematic analysis of what it means for a state to be ‘specially affected.’” Kevin Jon Heller, Specially-Affected States and the Formation of Custom, 112 Am. J. Int’l L. 191, 191 (2018).
88. Memorial of Belgium, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2010 I.C.J. No. 12160, ¶ 5.17 (July 1, 2010).
Habré’s extradition.” For all these reasons, Belgium claimed it was an “injured State” and thus “entitled to invoke the responsibility of Senegal.”

The Court, however, found no need to assess whether Belgium was specially affected. It held that “[i]f a special interest were required for [bringing a claim concerning an alleged breach of the Convention], in many cases no State would be in the position to make such a claim.” Instead, the Court found standing based on the *erga omnes partes* principle. Citing *Barcelona Traction*, the Court held that a common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved. These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case.

As a result, the Court concluded that “any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . . to bring that failure to an end.” Critically, the *erga omnes partes* obligation to which the Court was referring was not the general prohibition of torture. Rather, it was the specific obligations that Belgium accused Senegal of violating in Articles 6(2) and 7(1), respectively: failing to immediately initiate an inquiry once it had reason to suspect Habré of committing acts of torture and failing to prosecute or extradite him as soon as possible. In this decision, the Court expanded on its opinion in *Barcelona Traction*, suggesting that *erga omnes partes* obligations are not limited to the general preemptory norms it enumerated in *Barcelona Traction* but instead could be extended to other obligations that contracting States parties have a common interest in protecting.

---

89. *Id.*
90. *Id.* ¶ 5.18.
91. *Obligation to Prosecute Judgment*, supra note 75, ¶ 69.
92. *Id.* ¶ 68 (emphasis added).
93. *Id.* ¶ 69.
The Court ultimately found that Senegal had violated its obligations under Articles 6(2) and 7(1) of the CAT. A few days after the judgment was announced, Senegal and the African Union agreed to establish a special court to prosecute Habré. In 2016, this special court, the Extraordinary African Chambers, convicted Habré of crimes against humanity, war crimes, and torture. A year later, an appeals court confirmed the verdict and required Habré to pay 123 million euros in reparations. Almost twenty-five years after the dictator was overthrown and fled to Senegal, his victims brought him to justice in what was “a [m]ilestone for [j]ustice in Africa.”

C. Step Three: The Gambia v. Myanmar Establishes Erga Omnes Partes Standing For All States Parties

Just ten years after Obligation to Prosecute, the Court issued its landmark holding in The Gambia v. Myanmar. The decision eliminated any uncertainty left by the Court in Obligation to Prosecute. In Obligation to Prosecute, the State bringing suit, Belgium, had claimed to be specially affected. Although the Court had determined that Belgium had standing simply by virtue of its status as a party to the treaty, there remained some uncertainty as to whether the Court would extend that finding to a State that made no claim to be specially affected by a violation. In The Gambia v. Myanmar, the Court affirmed that, indeed, erga omnes obligations could, on their own, provide a basis for standing—even in the absence of any claim that the State bringing suit was specially affected. The Court also

94. Id. ¶ 119.


97. Id.

98. Id.

signaled that it was prepared to apply this principle more broadly than just a single treaty.

It is worth reviewing the case in some detail to understand why this is such a critical step. In 2019, The Gambia instituted proceedings against Myanmar before the ICJ, alleging violations of the Genocide Convention. Specifically, The Gambia argued that “from around October 2016[,] the Myanmar military . . . and other Myanmar security forces began widespread and systematic ‘clearance operations’—the term that Myanmar itself uses—against the Rohingya.” These genocidal acts, committed from August 2017 onward, “were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape[,] and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses.” The Gambia’s Application contained a request for provisional measures, which sought to protect the rights of the Rohingya by asking Myanmar to “prevent all acts that amount to or contribute to the crime of genocide.”

Myanmar filed its preliminary objections a few months later, unsurprisingly focusing significantly on standing. It argued that The Gambia had “no link whatsoever to the facts of the case.” Specifically, Myanmar accurately pointed out that there was no territorial connection or “any other relevant links between either the alleged offenders or the victims of the purported Convention violations on the one hand, and The Gambia on the other.” Acknowledging the importance of Obligation to Prosecute, Myanmar also attempted to distinguish the claims made by The Gambia and Belgium, respectively. Unlike The Gambia, Myanmar argued, Belgium had “a relevant link to the facts of the case in that at least some of the alleged victims were residing in Belgium and possessed its nationality.” The Gambia, in contrast, had “put before the Court for the first time

101. Id.
102. Id. at 2.
103. Myanmar Preliminary Objections, supra note 8, ¶ 212.
104. Id.
105. Id. ¶ 213.
ever . . . a naked form of *actio popularis*—whereby an individual seeks to represent the interest of the broader public. In response, Myanmar contended that this principle was not established in international law.  

Myanmar further contended that the Genocide Convention “does not grant non-injured Contracting States standing to claim alleged violations of the Convention.” It distinguished “between the right to invoke another State’s responsibility” and the “fundamentally different question [of] whether a State has standing to bring a claim before this Court.” Myanmar reminded the Court of its holding in its 1995 *East Timor* decision “that the *erga omnes* character of a norm does not exempt an applicant State from fulfilling otherwise applicable jurisdictional preconditions for the bringing of a case before the Court.” Relying on State practice, the Court’s precedents, and the content, structure, and drafting history of the Genocide Convention, Myanmar argued that regardless of whether the obligations in question were *erga omnes*, The Gambia must have a direct injury to have standing.

In its response, The Gambia crucially made no claims of injury from, or special interest in, Myanmar’s alleged genocidal acts against the Rohingya. Instead, citing *Obligation to Prosecute*, it relied on what it described as a “well-settled principle of international law that any State party to an international treaty that imposes obligations *erga omnes partes* is entitled to invoke the responsibility of another State party in any given case and seek reparation for the breach of those obligations without having to prove a special interest.” The Gambia noted that the Court had already held that “the obligations enriched in the [*Genocide*] Convention are . . . obligations *erga omnes*.” It argued that “each State party has an interest in compliance with them

106. *Id.* ¶ 214.
107. *Id.* ¶ 217.
108. *Id.* ¶ 215.
109. *Id.* ¶ 218.
110. *Id.* ¶ 219.
112. *Id.* ¶ 2.23.
113. *Id.* ¶ 2.25.
in any given case because of the universal character both of the condemnation of genocide and of the co-operation required in order to liberate mankind from such an odious scourge."\textsuperscript{114} Accordingly, it maintained, all States parties to the Convention have a “common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity.”\textsuperscript{115} “This common interest,” The Gambia declared, “implies that the obligations under the Convention are owed by any State party to all the other States parties.”\textsuperscript{116} As a State party to the Genocide Convention, The Gambia asserted that it had as much of a right as any other State party to hold Myanmar accountable for violating its obligations and that the Court had jurisdiction to hear such disputes under Article IX.\textsuperscript{117}

The Court agreed with The Gambia, holding that: (i) it had jurisdiction to hear the dispute under the Genocide Convention; and (ii) The Gambia had standing.\textsuperscript{118} First, the Court found it had jurisdiction under Article IX of the Genocide Convention, which states:

Disputes between the Contracting Parties relating to the interpretation, application[,] or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in [A]rticle III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.\textsuperscript{119}

The Court interpreted “disputes” to mean that “only a party to the dispute may bring [the dispute] before the Court,” but not necessarily to mean that “such a dispute may only arise between a State party allegedly violating the Convention and a State ‘specially affected’ by

\textsuperscript{114} Id. (citing Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Reports 15, 23).

\textsuperscript{115} Id. ¶ 2.26.

\textsuperscript{116} Id. (internal quotation marks and citations omitted).

\textsuperscript{117} Id. ¶¶ 2.27–2.28.


such an alleged violation.” As such, the Court expanded the scope of “a party to the dispute” and held that “any State party to the Genocide Convention may invoke the responsibility of another State party . . . with a view to determining the alleged failure to comply with its obligations erga omnes partes under the Convention and to bringing that failure to an end.”

Second, flowing from its jurisdiction analysis, the Court confirmed that The Gambia did have erga omnes partes standing under the Genocide Convention to bring its claims. It held that “[a]ll the States parties to the Genocide Convention . . . have a common interest to ensure the prevention, suppression[,] and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention.”

Citing Obligation to Prosecute and Barcelona Traction, the Court affirmed that “such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations erga omnes partes, in the sense that each State party has an interest in compliance with them in any given case.” The Court reaffirmed the distinction it made in Barcelona Traction between “the entitlement to invoke the responsibility of a State . . . for alleged breaches of obligations erga omnes partes” and “any right that a State may have to exercise diplomatic protection in favour of its nationals.” This distinction is driven by the fact that the former “entitlement derives from the common interest of all States parties in compliance with these obligations, and it is therefore not limited to the State of nationality of the alleged victims.”

Because The Gambia is a party to the Genocide Convention and acts of genocide are obligations erga omnes partes, the Court concluded that The Gambia had standing to bring its case against Myanmar. In no uncertain terms, the Court held that “[r]esponsibility for an alleged breach of obligations erga omnes partes under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest

120. The Gambia v. Myanmar Judgment, supra note 12, ¶ 111 (emphasis added).
121. Id. ¶ 112.
122. Id. ¶ 107.
123. Id.
124. Id. ¶ 109.
125. Id.
can be demonstrated.”\textsuperscript{126} In an explicit and remarkable recognition of the problem that had long plagued human rights law enforcement, the Court stated: “If a special interest were required for that purpose, in many situations, no State would be in a position to make a claim.”\textsuperscript{127} It thus concluded that “Myanmar’s purported distinction between the entitlement to invoke responsibility under the Genocide Convention and standing to pursue a claim for this purpose before the Court has no basis in law.”\textsuperscript{128}

** * **

Human rights groups have recognized The Gambia v. Myanmar as an “unprecedented opportunity for the [Court] to scrutinize the abuses of Myanmar’s military.”\textsuperscript{129} Before The Gambia’s litigation, “the government’s atrocities within Myanmar had been almost completely beyond the reach of justice.”\textsuperscript{130} Indeed, the Court’s jurisdiction over the case was only made possible by \textit{erga omnes partes} standing. As Myanmar itself acknowledged in its preliminary objections,\textsuperscript{131} Bangladesh may have been able to allege special injuries as it experienced an influx of refugees following Myanmar’s attacks against the Rohingya. However, because Bangladesh entered a reservation to the provision of the Genocide Convention providing the Court with jurisdiction over arising disputes, it could not have instituted proceedings without Myanmar’s consent.\textsuperscript{132} More fundamentally, even if Bangladesh did not have this reservation, its injury would have been related to the influx of refugees, not the core

---

\textsuperscript{126} \textit{Id.} ¶ 108.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} See \textit{e.g.}, \textit{Developments in Gambia’s Case Against Myanmar at the International Court of Justice.}\textit{ Hum. RTS. Watch} (Feb. 14, 2022), https://www.hrw.org/news/2022/02/14/developments-gambias-case-against-myanmar-international-court-justice#whyisthe [https://perma.cc/GTJ9-YEKK].

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Myanmar Preliminary Objections, supra} note 8, ¶ 312 (“In fact, the most natural State to have brought the present case is Bangladesh. Bangladesh is not only one of the neighbouring countries to Myanmar, but is also the country where a significant number of the displaced persons, said to be victims of the alleged genocide, are currently living.”).

\textsuperscript{132} \textit{Genocide Convention, supra} note 119 (“Article IX: For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case.”). Myanmar, of course, was quick to point this out in its preliminary objections. \textit{Myanmar Preliminary Objections, supra} note 8, ¶ 315.
violations of genocide. A hypothetical case brought by Bangladesh would undesirably shift the focus away from the central human rights violations, both rhetorically and legally. For these reasons, *erga omnes partes* standing permitted The Gambia to fill a substantial accountability gap in international law.

What has not received as much attention are the longer-term implications that extend far beyond the particular set of facts in *The Gambia v. Myanmar*. The acceptance of *erga omnes partes* obligations as a basis for standing permits a potentially significant expansion in access to the Court in precisely those cases that otherwise would leave no State in a position to make a claim. The Netherlands’ and Canada’s case against Syria and, more recently, South Africa’s case against Israel, provide a glimpse of some of these implications. Neither case would have been possible without *erga omnes partes* standing. In the next Part, we discuss the extent to which *erga omnes partes* can be extended to other treaties—and the revolution it potentially promises.

II. The Prospect of an *Erga Omnes Partes* Revolution

The ICJ has thus far accepted *erga omnes partes* standing for alleged violations of two human rights treaties: the CAT in *Obligation to Prosecute* and the Genocide Convention in *The Gambia v. Myanmar*. But there is nothing unique about these treaties regarding *erga omnes partes* standing. Both the CAT and the Genocide Convention protect peremptory norms (*jus cogens*),133 which give rise to *erga omnes* obligations.134 But the Court did not limit *erga omnes partes* standing to treaty provisions that protect *jus cogens* norms. Rather, the approach used by the Court could be extended to a range of treaties covering various areas of international law and could be

---

133. “A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with commentaries, in Report of the International Law Commission at its Seventy-Third Session, 73rd Sess., UN Doc. A/77/10, at conclusion 3 (2022); id. conclusion 23 (naming genocide and torture in a non-exhaustive list of peremptory norms).

134. Id. at 15.
used by other international courts and tribunals. If the Court agrees and States seize this opportunity, the development of *erga omnes partes* standing could be a transformative shift with implications across international law.

This doctrinal development has the potential to hold States to promises that have often gone unfulfilled, including those in human rights treaties and other treaties that protect rights that concern the international community as a whole. In short, *erga omnes partes* standing offers the possibility of empowering States to hold their counterparts accountable in the ICJ for failing to uphold their treaty-based obligations—regardless of who was directly injured—closing an accountability gap that has limited the international community’s response to devastating violations of international law, such as the Rohingya crisis and Syria’s civil war.

In order to understand the potential reach of *erga omnes partes* standing, this Part first outlines a framework for determining whether treaties create the possibility of *erga omnes partes* standing based on the Court’s jurisprudence. It then applies that framework to a range of possible treaties to determine the reach and limits of this new development.

A. The Framework for Erga Omnes Partes Suits

The decisions in *Obligation to Prosecute* and *The Gambia v. Myanmar* suggest that there are two threshold requirements for using *erga omnes partes* standing to invoke a State’s treaty-based responsibilities before the ICJ. First, standing can only arise if the Court has jurisdiction over the dispute. This is most likely to arise if the treaty in question provides for mandatory jurisdiction over disputes arising from the treaty. Second, the alleged violations must have an *erga omnes partes* character—that is, the obligations must be the concern of all States parties to the treaty. This Section outlines what can be learned from the Court’s existing jurisprudence about which kinds of treaties might meet these requirements beyond the two in which the Court has already identified *erga omnes partes* standing.

135. See infra note 254 and accompanying text.
136. It is also possible that jurisdiction would arise due to consent of the parties, either at the time of the dispute or by prior special agreement.
1. Treaty Provision Establishes Mandatory Jurisdiction Over Disputes

Treaty provisions establishing mandatory jurisdiction over disputes vary in their language. In *The Gambia v. Myanmar*, Article IX of the Genocide Convention is quite straightforward: “Disputes between the Contracting Parties relating to the interpretation, application[,] or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of *any of the parties to the dispute*.” 137 Meanwhile, Article 30 of the CAT from *Obligation to Prosecute* lays out a more circuitous path towards mandatory jurisdiction, providing that any party may submit to arbitration “*any dispute . . . which cannot be settled through negotiation.*” 138 Only if the parties “are unable to agree on the organization of the arbitration” can a party refer the dispute to the ICJ. 139 The common thread for both of these provisions is that any party to a treaty dispute can submit a dispute to the Court without the explicit consent of any other party to the dispute beyond its assent to the treaty.

The reason that a treaty must have a mandatory jurisdiction provision for *erga omnes partes* standing to be utilized stems from the fact that the Court lacks true compulsory jurisdiction. Its four exclusive 140 sources of jurisdiction all rely on consent: (i) a special agreement or *compromis*; 141 (ii) a compromissory clause in a treaty; 142 (iii) an optional clause declaration wherein a State accepts the Court’s jurisdiction as mandatory; 143 and (iv) *forum prorogatum*, in which a State that has not recognized the jurisdiction of the Court may consent to such jurisdiction after a case against it has been filed. 144 In *The

---

137. Genocide Convention, *supra* note 119, art. IX (emphasis added).
139. *Id.*
140. These four sources do not include those cases on the basis of declarations made under the statute of the Court’s predecessor, the Permanent International Court of Justice.
142. *Id.*
143. *Id.* art. 36(2).
A NEW TOOL FOR ENFORCING HUMAN RIGHTS

Gambia v. Myanmar, where Myanmar strenuously objected to the proceedings, the only source of jurisdiction for the Court was the treaty at issue, the Genocide Convention. If the language in Article IX had required the parties to agree on the dispute resolution mechanism, the Court would have lacked jurisdiction to entertain the case and thus would not have been able to consider whether The Gambia had standing to bring its claim or not.

Additionally, under most treaty provisions providing for ICJ jurisdiction, it is necessary to establish the existence of a dispute between the parties.145 The Court has held that a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” and that “for a dispute to exist, [i]t must be shown that the claim of one party is positively opposed by the other.”146 Therefore, before instituting proceedings before the Court, it must be clear that the parties hold opposing views on issues related to the subject-matter of the treaty. For example, in The Gambia, the Court found that The Gambia’s and Myanmar’s respective statements made before the UN General Assembly, as well as The Gambia’s Note Verbale to the Permanent Mission of Myanmar, reflected the “opposition of views between the Parties” with regards to whether Myanmar’s treatment of the Rohingya group was consistent with its obligations under the Genocide Convention.147 Therefore, the Court concluded that a “dispute relating to the interpretation, application, and fulfilment of the Genocide Convention existed between the Parties” at the time of The Gambia’s application.148

2. Violations of an Erga Omnes Partes Character

The second requirement for establishing erga omnes partes standing—that violations are of an erga omnes partes character—is thus far not well understood. The Court has left much unanswered in the few cases in which it has addressed it, including how to determine whether the alleged violations are of an erga omnes partes character.

145. See, e.g., The Gambia v. Myanmar Judgment, supra note 12, ¶ 63 (“The existence of a dispute between the parties is a requirement for the Court’s jurisdiction under Article IX of the Genocide Convention.”).
146. Id. (internal citations omitted).
147. Id. ¶¶ 73–77.
148. Id. ¶ 77.
Nevertheless, a general framework can be inferred from its decisions. First, the treaty must create an obligation that States parties have a common interest in upholding. Second, the provision invoked must be “relevant” to that common interest. We discuss each in turn.

a. The Treaty Must Create a Common Interest

For *erga omnes partes* standing, the treaty underlying the dispute must create obligations that State parties have a common interest in upholding. In *Obligation to Prosecute*, the Court held that a common interest in compliance with a treaty’s obligations “implies that the obligations in question are owed by any State party to all other States parties to the Convention.”¹⁴⁹ The Court defined these obligations as “‘obligations *erga omnes partes*’ in the sense that each State party has an interest in compliance with them in any given case.”¹⁵⁰ Furthermore, in affirming The Gambia’s standing as a non-specially affected State to bring its case against Myanmar, the Court found that all States parties had a common interest in ensuring the prevention and punishment of genocide and that this common interest implied that the treaty obligations in the Convention are owed by all States to other States parties. The Court has made clear, then, that a common interest in compliance with certain obligations suggests that they are *erga omnes partes* obligations.

It is less clear how the Court determines when the requisite common interest exists. Some obligations have already been determined by the Court to be “by their very nature . . . the concern of all States.”¹⁵¹ These include the “outlawing of acts of aggression and of genocide,”¹⁵² protection from slavery and racial discrimination,¹⁵³ and the principle of self-determination.¹⁵⁴ Therefore, treaties that codify these rights categorically protect a common interest.

For other treaties, the Court’s decisions suggest that it is possible to determine whether a common interest exists by analyzing the treaty’s object and purpose. In *Obligation to Prosecute*, the Court

---

¹⁴⁹. *Obligation to Prosecute Judgment*, supra note 75, ¶ 68.
¹⁵⁰. *Id.*
¹⁵². *Id.* ¶ 34.
¹⁵³. *Id.*
stated that the object and purpose of the CAT, as indicated by the preamble, is to “make more effective the struggle against torture . . . throughout the world.”

From this purpose, the Court found that “States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity.” The Court, therefore, held that all State parties “have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present.”

This followed the Court’s more cursory discussion in *Barcelona Traction*, where it differentiated between “obligations of a State towards the international community as a whole, and those arising vis-à-vis another State.”

This distinction resembles the approach taken years later by the Articles on Responsibility of States for Internationally Wrongful Acts (commonly referred to as the Articles on State Responsibility or ARSIWA). Specifically, Article 42 of ARSIWA states:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: . . . (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

In a similar vein, Article 48 permits States not specially affected to invoke the responsibility of another State if either “the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group” or “the obligation breached is owed to the international community as a whole.”

155. *Obligation to Prosecute* Judgment, supra note 75, ¶ 68.
156. Id. (emphasis added).
157. Id.
158. *Barcelona Traction* Judgment, supra note 14, ¶ 33.
160. Id. art. 48.
Existing scholarship supports the emphasis on the treaty’s object and purpose to identify whether a common interest exists. Writing after the Court had preliminarily accepted The Gambia’s standing but before the judgment itself was issued on this matter, Pok Yin Chow notes that the first step in identifying obligations \textit{erga omnes partes} is to ascertain “the object and purpose of the Convention and therefore the community interest that the treaty seeks to secure.”\textsuperscript{161} Chow emphasizes that determining the community interest at stake is critical, given that this interest is the basis of a non-specially affected State’s right to standing. This analysis “necessitates an inquiry into the purposes for which a treaty is adopted as well as its design.”\textsuperscript{162} Whereas it might be “difficult to imagine how a third State’s interests may be harmed if a treaty obligation is a breach” in multilateral treaties “intended to achieve the reciprocal exchange of rights,” other types of agreements have a “unique purpose and design that suggests that every State should have a right in enforcing the performance of the treaty.”\textsuperscript{163}

The Court’s emphasis on a treaty’s object and purpose dates back to its 1951 advisory opinion in \textit{Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide},\textsuperscript{164} which the Court cited in \textit{The Gambia v. Myanmar} to support its finding of a common interest in the Genocide Convention.\textsuperscript{165} In that case, to determine what kinds of reservations could be made to the Genocide Convention, the Court considered the “special characteristics of the Convention itself,”\textsuperscript{166} finding that it was “manifestly adopted for a purely humanitarian and civilizing purpose,” perhaps more than any other existing or hypothetical treaty.\textsuperscript{167} In fact, the Court concluded that the States parties had no interests of their own but solely “a

\begin{itemize}
  \item[163.] Chow, supra note 161, at 496.
  \item[166.] Dino Kritsiotis, \textit{The Object and Purpose of a Treaty’s Object and Purpose, in Conceptual and Contextual Perspectives on the Modern Law of Treaties} 237, 244 (Michael J. Bowman & Dino Kritsiotis eds., 2018).
  \item[167.] \textit{Reservations to the Genocide Convention Advisory Opinion}, supra note 164, at 23.
\end{itemize}
common interest,” rendering it impossible to “speak of individual advantages or disadvantages of States, or of the maintenance of a perfect contractual balance between rights and duties.” Thus, it limited reservations to this treaty, both the freedom of making and objecting to them.

The Court’s opinion in that case has since been codified in the Vienna Convention on the Law of Treaties (VCLT)—widely considered to reflect customary international law. Article 18 provides that States that have signed but not ratified treaties are prohibited from defeating the “object and purpose” of the treaty.

It aims to protect the “legitimate expectation of the other participants in the treaty-making process that a State which has expressed its acceptance of the treaty, albeit not yet in binding form, would not work against the object of its acceptance.” Furthermore, Article 19(c) states that parties cannot make reservations that would be incompatible with the “object and purpose” of the treaty.

It is yet unclear whether a State’s special interest in a violation may limit, in whole or in part, the ability of a State not specially affected to assert its common interest under the treaty. The Court’s opinions in Obligation to Prosecute and The Gambia v. Myanmar shed some light on this pivotal question but notably point to different answers. In Obligation to Prosecute, the Court’s decision not to determine whether Belgium was indeed specially affected, as it had

168. Id.
169. Id. at 24.
172. Kritsiotis, supra note 166, at 244 (emphasis added).
contended, suggests that once a State has a common interest, it is no longer relevant for the purposes of _erga omnes partes_ standing whether a State is also specially affected. Yet, in _The Gambia v. Myanmar_, the Court seems to place some weight on the fact that if “a special interest were required” to invoke a State’s responsibility for its breaches of the Genocide Convention, “in many situations no State would be in a position to make a claim” since “victims of genocide are often nationals of the State allegedly in breach of its obligations _erga omnes partes_.”

This suggests that the Court may consider _erga omnes partes_ standing as a way to fill a gap created by treaties that would otherwise generally not provide any party standing to challenge a violation. However, it is unclear how much weight the Court afforded this factor.

Ad hoc Judge Claus Kreß voted with the majority in _The Gambia v. Myanmar_ but filed a separate declaration in part to shed further light on the Court’s decision regarding The Gambia’s standing. He explained that the Court had “not adopted the [International Law Commission’s] distinction between an ‘injured State’ and a ‘State other than an injured State.’” Rather, he argued, the Court instead “extended the concept of ‘legal interest’ to instances in which the interest of the State concerned derives exclusively from the common (or collective) interest in compliance with an obligation _erga omnes partes_.”

Judge Kreß explained:

> Once it has been determined that an obligation has been established in pursuit of a common interest, such as that laid down by the Genocide Convention, there is thus no need to demonstrate, on the basis of additional considerations, the existence of a separate ‘individual legal interest’ in order to justify standing before the Court.

This explanation aligns with the Court’s reasoning in _Obligation to Prosecute_, as the Court did not consider Belgium’s special interest once it determined a common interest at issue.

---

174. Memorial of Belgium, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2010 I.C.J. 1, ¶ 5.17 (July 1, 2010).
177. Id. ¶ 10.
178. Id. ¶ 15.
However, unlike in *Obligation to Prosecute*, there was a third State in *The Gambia v. Myanmar*, namely Bangladesh, which saw an influx of refugees as a consequence of Myanmar’s alleged violations of the treaty. Myanmar argued in its Preliminary Objections that The Gambia lacked standing because Bangladesh, “a State which most obviously is a specially-affected State,” could not have instituted proceedings itself given its reservation to the Court’s jurisdiction under the Genocide Convention.\(^{179}\) The Court, however, did not address Myanmar’s argument, instead concluding that the influx of refugees that Bangladesh faced “does not affect the right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention.”\(^{180}\)

Judge Kreß’s declaration directly addressed Myanmar’s argument and considered whether Bangladesh could have “a special legal interest entitling it to invoke Myanmar’s responsibility” for its alleged breaches of the Genocide Convention.\(^{181}\) Specifically, he questioned whether “the flight of large numbers of human beings under genocidal attack to a particular State turn[s] that asylum State into a direct victim of genocide.”\(^{182}\) He found that the “answer is far from obvious” and depends on the treaty’s object and purpose. If “the object and purpose of the prohibition of genocide is simply to prevent protected groups of human beings from being destroyed,”\(^{183}\) then Bangladesh would not be a direct victim of genocide and therefore not a specially affected State.\(^{184}\) If, on the other hand, the object and purpose of the Genocide Convention is construed more broadly to include “the protection of the sovereign interest of States, especially those bordering the State where genocide is being committed, not to be confronted with the humanitarian need caused by the influx of a large number of refugees,” then “Bangladesh would have to be considered a direct victim and hence a State specially affected by

\(^{179}\) Myanmar Preliminary Objections, *supra* note 8, ¶ 214.


\(^{183}\) *Id.*

\(^{184}\) *Id.*
Myanmar’s alleged genocide.”\textsuperscript{185} However, Judge Kreß expressed reluctance to support the latter understanding of the treaty’s object and purpose “given the Court’s previous ruling that the Genocide Convention was adopted for a purely humanitarian and civilizing purpose and that in such a convention[,] the contracting States do not have any interests of their own.”\textsuperscript{186} Ultimately, Judge Kreß concluded that even if Bangladesh had such a special legal interest . . . [,] this would not make The Gambia’s standing in the present case dependent on that of Bangladesh. . . . [I]n the event of a violation of an obligation \textit{erga omnes (partes)}, it is . . . generally doubtful whether a State with a special legal interest—or, to use the terminology contained in the [International Law Commission] Articles on State Responsibility, a specially affected State—could ever, on its own, dispose of the relevant collective interest completely.\textsuperscript{187}

As Judge Kreß emphasized, this is especially true for disputes arising under the Genocide Convention because “the collective interest in the existence of the protected group under genocidal attack and the human beings composing that group is not mediated through the special legal interest of any State.”\textsuperscript{188} Hence, he concluded, The Gambia’s standing is not dependent on that of Bangladesh.

Both Judge Kreß and the Court agreed that any special interest Bangladesh may have had was not a bar to The Gambia’s right as a non-specially affected State to \textit{erga omnes partes} standing. However, Judge Kreß’s opinion invites the question of whether the same reasoning would be applied if the injury of the third State was directly related to the treaty’s core object and purpose—for instance, if Bangladesh itself was subject to genocidal attacks by Myanmar—or if there was another State “in a position to dispose of the relevant collective interest completely.”\textsuperscript{189} Although the Court has yet to pronounce on this question, it is clear thus far that one State’s special

\textsuperscript{185} Id.
\textsuperscript{186} Id. (internal quotation marks omitted).
\textsuperscript{187} Id. ¶ 29.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
interest does not constitute an outright bar to the right of a State not specially affected to invoke *erga omnes partes* standing.

In sum, a common interest—that is, an interest that every State party owes all other States parties in a treaty—is a prerequisite to *erga omnes partes* standing. Whether a common interest exists is assessed by analyzing the object and purpose of the treaty, which can be expressed through the text, including in the preamble, as well as how the rights and obligations enshrined in the treaty give effect to its purpose. Once a State establishes a common interest, it does not need to further assert a special interest. Finally, while the Court has given some indication that *erga omnes partes* standing is most suitable as a gap-filler—where no State would otherwise have standing to hold the offending State accountable—the Court made clear in *The Gambia v. Myanmar* that the presence of a specially affected State does not preclude a non-specially affected State from successfully asserting *erga omnes partes* standing; the legal interests of the latter are independent of the special interests of any other State.

*b. The Provision Invoked Must Be “Relevant” to the Purported Common Interest*

Once it has been established that the treaty protects a common interest, the next step is to determine whether the particular provision invoked is “relevant” to the purported common interest. In short, even if a treaty protects or promotes a common interest, not every provision within that treaty is an *erga omnes partes* obligation.

In *Obligation to Prosecute*, the Court explained that “[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.” But while the Court made clear that relevance was important, it left the precise requirements for this part of the framework under-specified.

In *The Gambia v. Myanmar*, the Court again referenced “relevance,” holding that the “common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility
of another State party for an alleged breach of its obligations \textit{erga omnes partes}.\footnote{The Gambia v. Myanmar Judgment, \textit{supra} note 12, ¶ 108 (emphasis added).} Yet, again, it did not specify the conditions for establishing relevance.

Judge Kreß, in his separate declaration in \textit{The Gambia v. Myanmar}, offered somewhat more detail than did the Court as a whole on which provisions convey \textit{erga omnes partes} standing. He explained that “[o]nce it has been determined that an obligation has been established in pursuit of a common interest, such as that laid down by the Genocide Convention, there is thus no need to demonstrate . . . the existence of a separate ‘individual legal interest’” in order to establish standing.\footnote{The Gambia v. Myanmar Judgment, \textit{supra} note 12, Declaration of Judge Ad Hoc Kreß, ¶ 1 (July 22) (emphasis added).} But, he clarifies,

\footnote{Id.}

\textit{[t]his is not to say—}and the Court refrains from so saying in paragraph 108 of the Judgment with its use of the word ‘relevant’—that once it has been established that a convention was concluded to serve a common interest, it follows that each and every obligation contained therein necessarily constitutes an obligation \textit{erga omnes partes}.\footnote{Id.}

For instance, reporting obligations established in a treaty would generally not be considered obligations \textit{erga omnes partes}. However, in the case at hand, he observed, the obligations said to have been violated by Myanmar “are central to the fulfilment of the common interest underlying the Genocide Convention,” hence the Court did not have to consider “whether it might be justified to deny the \textit{erga omnes partes} character of an obligation that is markedly peripheral to the fulfilment of a convention’s common interest.”\footnote{Id.} In short, the obligations at issue in that case were so obviously “relevant” to the common interest that the Court did not have to contend with what might occur if the provisions at issue were not.

Based on the provisions at issue in \textit{Obligation to Prosecute} and \textit{The Gambia v. Myanmar}, the following types of obligations within treaties protecting a common interest can be inferred to create a right to \textit{erga omnes partes} standing: (i) provisions requiring States to immediately make a preliminary inquiry if an alleged offender of the
core offense prohibited by the treaty is found in the State’s territory (e.g., Article 6(2) of the CAT);\(^{195}\) (ii) provisions requiring States to prosecute or extradite alleged offenders of the core offense prohibited by the treaty (e.g., Article 7(1) of the CAT);\(^{196}\) (iii) provisions criminalizing the treaty’s core prohibition (e.g., Article I of the Genocide Convention);\(^{197}\) (iv) provisions requiring States to make the treaty’s core prohibition punishable (e.g., Article III of the Genocide Convention);\(^{198}\) and (v) provisions requiring States to enact the necessary legislation providing effective penalties for persons guilty of the offense in question (e.g., Article V of the Genocide Convention).\(^{199}\)

***

In sum, *erga omnes partes* obligations can be identified by looking to obligations under a treaty that would defeat the “object and purpose” of the treaty. This approach does not apply to every provision of the treaty. Instead, it applies to those provisions that go

---

\(^{195}\) *Id.* Convention Against Torture, *supra* note 138, art. 6(2) (“Such State [in whose territory a person alleged to have committed any offence referred to in article 4 [(acts of torture)] is present] shall immediately make a preliminary inquiry into the facts.”); *Obligation to Prosecute Judgment, supra* note 75, ¶ 70.

\(^{196}\) Convention Against Torture, *supra* note 138, art. 7(1) (“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [(acts of torture)] is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”); *Obligation to Prosecute Judgment, supra* note 75, ¶ 70.

\(^{197}\) Genocide Convention, *supra* note 119, art. I (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”); *The Gambia v. Myanmar Judgment, supra* note 12, ¶ 114.

\(^{198}\) Genocide Convention, *supra* note 119, art. III (“The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide . . . “); *id.* art. IV (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials[,] or private individuals.”); *The Gambia v. Myanmar Judgment, supra* note 12, ¶ 114.

\(^{199}\) Genocide Convention, *supra* note 119, art. V (“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”); *The Gambia v. Myanmar Judgment, supra* note 12, ¶ 114.
to the fundamental purpose of the treaty, what some have referred to as its “essence.”

B. Applying the Framework

Based on the analysis above, _erga omnes partes_ standing could potentially be exercised under several types of treaties, including human rights, counter-terrorism and weapons, and environmental treaties. This Section applies the framework laid out above to each of these areas and indicates where expanded application of _erga omnes partes_ standing is most likely to succeed.

1. Human Rights Treaties

With regard to the first part of the framework, fifteen human rights treaties provide the ICJ with mandatory jurisdiction over disputes. At least six of those treaties likely allow for _erga omnes partes_ standing because they: (i) protect a common interest; and (ii) have provisions incorporated to achieve that common interest, thus satisfying the second part of the framework.

Human rights treaties are more likely than other treaties to satisfy the second part of the framework for two reasons. First, the Court has already classified several human rights obligations as _erga omnes_ obligations—those which all States can be said to have a legal interest in protecting. These include the prohibitions on aggression.

---

200. Kritsiotis, _supra_ note 166, at 247 (emphasis added); see Chow, _supra_ note 161, at 497 (arguing that “obligations _erga omnes partes_ are those that are integral to the object and purpose of the treaty” and are therefore “likely” to be “obligations that cannot be subject to reservations”); Pavitra Khaitan & Jvalita Krishan, _The Obligation of Non-Refoulement and Its Erga Omnes Parties Character_, HARV. INT’L L.J. (Dec. 2022), https://journals.law.harvard.edu/ilj/2022/12/the-obligation-of-non-refoulement-and-its-erga-omnes-partes-character [https://perma.cc/8Y9T-RW4Y] (arguing that the “particular obligation in question” must have been “incorporated to fill this purpose of the treaty as determined” in order to generate _erga omnes partes_ standing and that a provision that conveys _erga omnes partes_ standing should be “so integral to the subject and purpose of the treaty that no reservations or derogations are permissible”).

201. Here we count a treaty and its protocol as one treaty (e.g., the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees are counted as one treaty). We analyzed the multilateral treaties listed on the ICJ website as treaties that confer jurisdiction on the Court. _Treaties_, INT’L CT. OF JUST, https://www.icj-cij.org/treaties [https://perma.cc/2CX3-QHM5].

A NEW TOOL FOR ENFORCING HUMAN RIGHTS

genocide, slavery, racial discrimination, as well as “principles and rules concerning the basic rights of the human person.” Second, to the extent the Court decides to emphasize the importance of *erga omnes partes* standing as a gap-filler, human rights treaties are more likely to satisfy that criteria. Human rights treaties primarily govern the behavior of States towards those within their own territory—which means primarily, though not exclusively, their own citizens. As a consequence, States are less likely to be directly injured by another State’s breach.

In addition to the Genocide Convention and the CAT, which the Court has already held to create a right to *erga omnes partes* standing, two other human rights treaties codify obligations already classified by the Court as *erga omnes* obligations: the Slavery Convention and its protocol, which aims to “prevent and suppress the slave trade” and to “bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”; and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which aims to eliminate racial discrimination and prevent and combat racist doctrines and practices. They can therefore be said to categorically protect a common interest and thus satisfy the common interest requirement. Moreover, at least some provisions in these treaties likely also satisfy the “relevance” requirement for *erga omnes partes* standing. For example, Article 6 of the Slavery Convention requires States parties to “adopt necessary measures in order that severe penalties may be imposed” for violations of the laws or regulations enacted to give effect to the purposes of the treaty. Article 3 of the ICERD requires States parties to “condemn racial segregation and apartheid and

---

203. *Id.* ¶ 34.
204. *Obligation to Prosecute Judgment*, supra note 75, ¶ 68.
205. *Barcelona Traction Judgment*, supra note 14, ¶ 34.
206. There are, of course, exceptions. Human rights obligations can extend outside a State’s own territory to persons under the “effective control” of the State. See Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?* 43 *Ariz. State L. J.* 389, 390 (2011). In addition, the citizen of one State can be subjected to human rights violations on the territory of another.
207. Slavery Convention art. 2, Sept. 25, 1926, 60 L.N.T.S. 254 (emphasis added).
209. Slavery Convention art. 6, Sept. 25, 1926, 60 L.N.T.S. 254 (emphasis added).
undertake to prevent, prohibit[,] and eradicate all practices of this nature in territories under their jurisdiction." Both of these obligations (ensuring violations are penalized, as well as preventing and prohibiting violations) are ones that the Court has previously found to create a right to *erga omnes partes* standing.

While it protects rights not already recognized as creating *erga omnes* obligations by the Court, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) provides for mandatory ICJ jurisdiction and likely also creates a right to *erga omnes partes* standing. Given its emphasis on human rights and the fact that it creates obligations for States vis-à-vis their own citizens, it likely satisfies the common interest requirement. The ICPPED’s object and purpose indicates that States parties have a common interest in preventing enforced disappearances and combating impunity for the crime of enforced disappearance. As such, the “common interest” requirement under the framework is satisfied. Furthermore, like the Genocide Convention and CAT, the ICPPED creates obligations for States towards their own citizens. As a result, breaches of this convention are unlikely to cause direct harm or injury to another State—this makes it extremely unlikely for a State to allege a special interest in another State’s breaches of the convention. If the Court were to limit *erga omnes partes* standing to cases where the violation could not otherwise be challenged, the ICPPED would therefore still qualify.

Moreover, the ICPPED has provisions that create the type of “relevant” obligation the Court has previously found to create a right to *erga omnes partes* standing. For example, Articles 10(2) and 11(1), respectively, require States to “immediately carry out a preliminary inquiry or investigation[,]” once they suspect a person of having committed an offense of enforced disappearance and to prosecute or extradite a person alleged to have committed such an offense. These provisions are almost identical to Article 6(2) and 7(1) of the CAT, which the Court found created a right to *erga omnes partes* standing.

---

210. ICERD, *supra* note 208, art. 3 (emphasis added).
212. *Id.* at pmbl. (“Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance.”).
213. *Id.* at arts. 10(2) and 11(1).
in *Obligation to Prosecute*. Therefore, *erga omnes partes* standing can likely be invoked for at least some provisions in the ICPPED.

Finally, the Refugee Convention, which provides the ICJ with mandatory jurisdiction over disputes, also likely creates a right to *erga omnes partes* standing. The Convention is "*[g]rounded in Article 14 of the Universal Declaration of [H]uman [R]ights 1948, which recognizes the right of persons to seek asylum from persecution in other countries.*"214 It codifies the preemptory norm of non-refoulement—that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment, and other irreparable harm.215 This norm protects a common interest since it is a "*principle[] and rule[] concerning the basic rights of the human person.*"216 Non-refoulement has, indeed, been recognized as the core principle of the Refugee Convention, and it is now embedded in customary international law.217 States parties to the convention may not make reservations or derogations to it.218 Given the importance of non-refoulement to the treaty’s object and purpose, States have a common interest in ensuring compliance with this requirement. As a consequence, at least Article 33 of the Refugee Convention,219 which prohibits the expulsion or return of a refugee, likely meets the relevance standard and thus creates a right to *erga omnes partes* standing.220

Despite the Refugee Convention’s mandatory language providing the ICJ with jurisdiction, the ICJ has not published any decisions or advisory opinions regarding the Refugee Convention. One reason might be the ICJ’s previous emphasis on the bilateral nature of a dispute, which might have made it difficult for States to

---


219. *Id.* art. 33.

220. *See* Khaitan & Krishan, *supra* note 200 (suggesting that *erga omnes partes* standing could be used to enforce the Refugee Convention).
establish that a dispute exists. Nevertheless, non-refoulement is often violated by States. That was particularly true during the COVID-19 pandemic, when several States pushed back or returned migrants through land and sea borders without considering their asylum claims or assessing the likelihood that they might face persecution upon return. States that have been accused of violating non-refoulement obligations during the pandemic include the United States, Greece, and Spain. Violations of this kind could present an opportunity in the future for further application of *erga omnes partes* standing.

2. Counter-Terrorism and Weapons Treaties

Beyond traditional human rights treaties, a number of sectoral counter-terrorism treaties also provide for mandatory ICJ jurisdiction and may also create a right to *erga omnes partes* standing on grounds similar to the ICPPED.


rights that have not yet been recognized as creating *erga omnes* obligations by the Court. Nonetheless, they likely fulfill the common interest requirement. The counter-terrorism treaties emphasize the common interest of maintaining international peace\(^{227}\) and the importance of State cooperation\(^{228}\) to tackle issues which are of “grave concern to the international community.”\(^ {229}\) Furthermore, like the ICPPED, these treaties have provisions that are almost identical to Articles 6(2) and 7(1) of the CAT.\(^ {230}\) Therefore, *erga omnes partes* standing can likely be invoked as to some of their provisions.

In addition, there are seven treaties concerning weapons—many of them also relating to suppression of terrorism—that provide for ICJ jurisdiction.\(^ {231}\) However, only four of these treaties provide for *mandatory* ICJ jurisdiction: the International Convention for the Suppression of Acts of Nuclear Terrorism (Convention on Nuclear

---


\(^{229}\) See Convention Against Mercenaries, *supra* note 226, pmbl.; Terrorism Financing Convention, *supra* note 226, pmbl.; Hostages Convention, *supra* note 226, pmbl.; Protected Persons Convention, *supra* note 226, pmbl.; see also Convention Against Mercenaries, *supra* note 226, pmbl. (affirming that the offences in question should be considered as a “grave concern to all States”).


Terrorism),\textsuperscript{232} the Convention on the Marking of Plastic Explosives for the Purpose of Detection (Convention on Plastics Explosives),\textsuperscript{233} the Convention for the Establishment of a European Organization for Nuclear Research,\textsuperscript{234} and the Convention on the Privileges and Immunities of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean.\textsuperscript{235}

Of these four treaties, the Convention on Nuclear Terrorism and the Convention on Plastic Explosives both arguably protect a

\textsuperscript{232} International Convention for the Suppression of Acts of Nuclear Terrorism art. 23(1), July 7, 2007, 2445 U.N.T.S. 89 [hereinafter Nuclear Terrorism Treaty] ("Any dispute between two or more States [p]arties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months of the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court."). Notably, Article 23(2) of this treaty allows States parties to declare themselves not bound by the jurisdictional provision, and currently, the following States have made reservations in this regard: Algeria, Argentina, Azerbaijan, Bahrain, China, Cuba, Egypt, Georgia, India, Indonesia, Jamaica, Jordan, Kuwait, Morocco, Qatar, Saudi Arabia, Singapore, St. Lucia, St. Vincent and the Grenadines, Tajikistan, Thailand, Turkey, United Arab Emirates, the United States, Uzbekistan, and Yemen. This represents a sizable number of States parties, but only about twenty-five percent of the total States parties in the treaty. See U.N. Treaty Collection, International Convention for the Suppression of Acts of Nuclear Terrorism, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&clang= en [hereinafter Information on the Nuclear Terrorism Treaty].

\textsuperscript{233} Convention on the Marking of Plastic Explosives for the Purpose of Detection art XI, Mar. 1, 1991, 2122 U.N.T.S. 359 [hereinafter Convention on Plastic Explosives] ("Any dispute between two or more States [p]arties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice, unless the Member States concerned agree on some other mode of settlement.").

\textsuperscript{234} Convention for the Establishment of a European Organization for Nuclear Research art. XI, July 1, 1953, 2701 U.N.T.S. 150 [hereinafter CERN Treaty] ("Any dispute between two or more Member States concerning the interpretation or application of this Convention which is not settled by the good offices of the . . . Council shall be submitted to the International Court of Justice, unless the Member States concerned agree on some other mode of settlement.").

\textsuperscript{235} Convention on the Privileges and Immunities of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean art. 7(2), Dec. 23, 1969, available at https://www.opanal.org/en/convention-on-the-privileges-and-immunities [hereinafter CERN Treaty] ("Disputes arising out of the interpretation or application of the present Convention may be referred to the International Court of Justice, unless in any case it is agreed by the Parties to have recourse to another mode of settlement.").
common interest and have provisions that are sufficiently relevant thereto, thereby creating the possibility of *erga omnes partes* standing.

The object and purpose of the Convention on Nuclear Terrorism is to prevent nuclear terrorism and ensure that those who engage in nuclear terrorism do not enjoy impunity. The preamble is replete with references suggesting that such object and purpose constitutes a common interest rather than an interest of any particular State, including its invocation of maintaining *international* peace and security pursuant to the purpose and principles of the United Nations Charter, its recognition that nuclear terrorism “may pose a threat to *international* peace and security,” and its condemnation of the practices of terrorism “wherever and by whomever committed.” Therefore, it satisfies the common interest requirement.

Some provisions of the treaty likely meet the relevance requirement as well. Article 3 of the Convention explicitly states that it “shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State,” and no other State has a basis for jurisdiction, with a few exceptions. This provision clearly distinguishes the Convention on Nuclear Terrorism from human rights treaties, which continue to apply even when the offense, offender, and victims are found in the territory of one State. This suggests that States do not have a common interest in *always* ensuring compliance with the object and purpose of the treaty, but rather only when the violations cross borders. Nevertheless, this provision is quite narrow in several respects. First, it applies only to a narrow category of nuclear terrorism offenses that are viewed as being entirely the concern of a single State. Second, various provisions of the treaty continue to apply even when Article 3 is applicable—and

---


238. *Id.* art. 3. The exceptions are Articles 7, 12, 14, 15, 16, and 17 of the Convention. *Id.*

239. *Cf. id.* art. 9(2) (“A State Party may also establish its jurisdiction over any such offence when: . . . (b) The offense is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act. . .”).
these are similar to ones the Court has previously held to meet the relevance requirement and thus create a right to *erga omnes partes* standing. For example, Article 7 requires parties “to *prevent* and counter preparations in their respective territories for the commission within or outside their territories of the offences.”240 Similarly, Article 12 guarantees fair treatment for proceedings carried out pursuant to this treaty, while Articles 15, 16, and 17 relate to extradition and the transfer of detained individuals “whose presence in another State Party is requested for purposes of testimony, identification, or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention.”241 The application of Articles 7, 12, 14, 15, 16, and 17—even where the nuclear terrorism offense is otherwise deemed to be outside the scope of the Convention—strongly suggests that violations of these obligations in particular would defeat the object and purpose of the treaty per the Court’s framework based on Article 18 of the VCLT. Indeed, while the treaty does not expressly preclude reservations to these six provisions, no State has made a reservation with respect to any of them.242 In short, there is a strong argument that at least Articles 7, 12, 14, 15, 16, and 17 are obligations giving rise to *erga omnes partes* standing.

The Convention on Plastic Explosives243 is similar in many respects to the Convention on Nuclear Terrorism. Its preamble emphasizes “the implications of acts of terrorism for *international security*” and recognizes the ways in which “the marking of such explosives for the purpose of detection would contribute significantly to the prevention of such unlawful acts,” as well as “the urgent need for an international instrument obliging States to adopt appropriate measures to ensure that plastic explosives are duly marked.”244 Much like the Convention on Nuclear Terrorism, this treaty seeks as its object and purpose to make it more difficult for terrorists to engage in

---

240. *Id.* art. 7 (emphasis added).
241. *Id.* art. 17.
242. Russia and Uzbekistan made declarations regarding Article 16, Costa Rica made a declaration regarding Article 15, and the United States issued an understanding regarding Article 12. See Information on the Nuclear Terrorism Treaty, *supra* note 232. None of these appear to be reservations in disguise, although the Netherlands objected to the Costa Rica declaration as “constitut[ing] a reservation.” *Id.*
244. *Id.* at pmbl.
unlawful acts involving explosives, specifically by addressing the difficulties inherent in the detection of unmarked plastic explosives. Therefore, it satisfies the common interest requirement with the States parties recognizing in the preamble “that for the purpose of deterring such unlawful acts there is an urgent need for an international instrument obliging States to adopt appropriate measures to ensure that plastic explosives are duly marked.”

In addition, there is a strong argument that Article II meets the relevance requirement and thus gives rise to *erga omnes partes* standing. Article II provides: “Each State Party shall take the necessary and effective measures to prohibit and prevent the manufacture in its territory of unmarked explosives.” It is difficult to see how the object and purpose of the treaty could be fulfilled if States parties were permitted to continue manufacturing unmarked explosives in their respective territories. Similar arguments can be made for both Article III and Article IV. Article III requires States parties to “take the necessary and effective measures to prohibit and prevent the movement into or out of its territory of unmarked explosives,” with an exception “for purposes not inconsistent with the objectives of this Convention” for “authorities of a State Party performing military or police functions, of unmarked explosives under the control of that State Party.” Article IV includes various obligations related to the effective control and destruction of unmarked explosives. On the other hand, both Articles allow for certain exceptions where the movement of the unmarked explosives is related to military or police functions. One could reasonably argue that the more exceptions a provision has, the less likely it is to be a provision that, if violated, would destroy the object and purpose of the treaty.

It is important to acknowledge that if the Court were to decide that the existence of a specially affected State precludes States lacking a special interest from invoking responsibilities for alleged breaches, the Court would likely disfavor the use of *erga omnes partes* standing in the context of weapons treaties. Unlike many human rights treaties, which are frequently if not predominantly about the relationship between a State and its own people, a breach of a weapons treaty by one State will often directly injure another State. Therefore, although

245. *Id.*
246. *Id.* art. 2.
247. *Id.* art. 3.
these treaties may satisfy the \textit{erga omnes partes} framework as laid out by the Court thus far, it is unclear whether the Court would extend this form of standing to weapons treaties, especially if, as Judge Kreß puts it, the common interest of these treaties can be fully protected by a specially affected State.

3. Environmental Treaties

Environmental treaties would appear to be categorically strong candidates for the \textit{erga omnes partes} enforcement framework given the transnational nature of most environmental law violations.

However, most environmental treaties allow for ICJ jurisdiction only if both parties mutually consent to the Court’s jurisdiction at the time of the dispute. For example, key international environmental treaties, including the Water Convention, the United Nations Framework Convention on Climate Change, and the Vienna


249. Treaties that allow for mandatory ICJ jurisdiction are mainly regional ones, such as the Agreement for Establishment of a Commission for Controlling the Desert Locust in the Near East.


Convention for the Protection of the Ozone Layer, all require mutual consent of the parties before submitting a dispute to the ICJ or resorting to arbitration. As a result, it is unlikely that _erga omnes partes_ standing will be used to enforce these treaties at the ICJ, as it would require the defendant State to consent to jurisdiction.

The United Nations Convention on the Law of the Sea (UNCLOS), however, provides parties with several mechanisms to resolve disputes arising from the Convention, including the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and other arbitral tribunals. Twenty-five States have, by means of declaration, already accepted the ICJ’s jurisdiction over disputes arising from this convention. Therefore, UNCLOS is a potential candidate for States to pursue environmental concerns using _erga omnes partes_ standing. Moreover, it is worth noting that, while _erga omnes partes_ standing has been adopted thus far only by the ICJ, it is possible that other international tribunals (such as ITLOS) could decide to follow the ICJ’s example and extend _erga omnes partes_ standing to disputes before them.

An analysis of UNCLOS suggests that it may have some provisions that create a right to _erga omnes partes_ standing. First, UNCLOS arguably protects a common interest. The Convention “lays down a comprehensive regime of law and order in the world’s oceans and seas establishing rules governing all uses of the oceans and their resources.” Importantly, the Convention’s preamble emphasizes the notion that “the problems of ocean space are closely interrelated and

---


254. See, e.g., Eric De Brabandere, The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea, 15 L. & PRAC. INT’L CTS. & TRIBUNALS 24, 26 (2016) (“Despite the absence of any rule on binding precedent in international law generally, references to previous cases of both the Permanent Court of International Justice (PCIJ) and the ICJ, and increasingly also external case-law, that is case-law from other courts and tribunals, in the decisions of the ICJ and the International Tribunal for the Law of the Sea (ITLOS) are a widespread phenomenon.”).

need to be considered as a whole.”\textsuperscript{256} Furthermore, the preamble notes:

\textit{[T]}he codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation[, and] friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world.\textsuperscript{257}

The emphasis of the Convention’s object and purpose on the universal character of issues related to the law of the sea as well as the international goals of the Convention itself suggests that it would likely satisfy the common interest requirement of \textit{erga omnes partes} standing. Furthermore, some scholars have argued that environmental obligations are \textit{erga omnes} obligations, although the ICJ has not yet found environmental protection to be a \textit{jus cogens}, or peremptory, norm.\textsuperscript{258}

Second, several provisions within the Convention can be said to have been incorporated to achieve the purported common interest and thus meet the relevance requirement. These provisions include many of the articles under Part XII of the Convention: Protection and Preservation of the Marine Environment. Section 5 of Part XII, for example, concerns the “international rules and national legislation to prevent, reduce[,] and control pollution of the marine environment.”\textsuperscript{259} Among other obligations, it requires States to “adopt laws and regulations to prevent, reduce[,] and control pollution of the marine environment from land-based sources” in Article 207\textsuperscript{260} and by “dumping” in Article 210.\textsuperscript{261} Importantly, UNCLOS also requires States to enforce these laws. For instance, Article 213 requires States

\textsuperscript{256} UNCLOS, \textit{supra} note 253, pmbl.

\textsuperscript{257} \textit{Id.}


\textsuperscript{259} UNCLOS, \textit{supra} note 253, \textsection 5.

\textsuperscript{260} \textit{Id.} art. 207.

\textsuperscript{261} \textit{Id.} art. 210.
to “enforce their laws and regulations adopted in accordance with [A]rticle 207.”\textsuperscript{262} A State’s failure to adopt legislation protecting its marine environment, or failure to enforce the required legislation, might reasonably be considered enough to frustrate a treaty’s object and purpose.

Like UNCLOS, the new high seas treaty adopted by the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction also provides parties with several dispute resolution mechanism options, including the ICJ and ITLOS, rendering it a potential candidate for \textit{erga omnes partes} standing as well.\textsuperscript{263} The agreement, which was developed within the framework of UNCLOS, serves to “protect[], care[ ] for[,] and ensure[ ] responsible use of the marine environment, maintain[ ] the integrity of ocean ecosystems[,] and conserve[ ] the inherent value of biodiversity of areas \textit{beyond national jurisdiction}.”\textsuperscript{264} The treaty’s objective is to “ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.”\textsuperscript{265} As with UNCLOS, the treaty’s object and purpose emphasizes the international character of the issue and the need for international cooperation to fulfill the treaty’s purpose. In fact, it specifically references the “principle of the common heritage of humankind” as guiding the achievement of the Agreement’s objectives.\textsuperscript{266} Therefore, it would likely satisfy the common interest requirement of \textit{erga omnes partes} standing.

Furthermore, several provisions were incorporated to achieve this common interest and thus are likely to meet the relevance requirement. For example, Part IV of the draft agreement requires States parties to conduct specific types of environmental impact assessments when they have planned activities in marine areas within

\begin{itemize}
\item \textsuperscript{262} Id. art. 213.
\item \textsuperscript{264} Id. at pmbl. (emphasis added).
\item \textsuperscript{265} Id. art. 2.
\item \textsuperscript{266} Id. art. 7(b).
\end{itemize}
their national jurisdiction. Article 53 also states that parties “shall take the necessary legislative, administrative[,] or policy measures, as appropriate, to ensure the implementation of this Agreement.” These mandatory provisions, which are relevant to the common interest, render the new high seas treaty a potential candidate for erga omnes partes enforcement. Nevertheless, the extent of its impact will depend on the number of States that accept the ICJ’s jurisdiction as a dispute resolution mechanism.

III. THE FUTURE OF ERGA OMNES PARTES STANDING

The possibilities opened up by the Court’s recognition of erga omnes partes standing are significant. Yet this new development also presents some potential drawbacks and raises a number of procedural questions that, as yet, remain unanswered. The Court, States, and advocates before the Court should remain mindful of these concerns as this development continues to unfold.

A. Potential Drawbacks of Expanding Erga Omnes Partes Standing

Here, we outline three possible drawbacks to expanding erga omnes partes standing. First, an increase in disputes on the basis of erga omnes partes standing might lead States to reduce their willingness to join or remain in treaties that protect common interests that might give rise to such standing. Second, the expansion of erga omnes partes standing could potentially undermine the legitimacy of the Court, leading States to refuse to comply with its decisions. Third, the expansion of erga omnes partes standing could perpetuate inequities in the enforcement of international law. We address each concern in turn.

1. Reduced Commitments to Treaties That Protect Common Interests

Expanding erga omnes partes standing could discourage commitment to the very treaties that it promises to enforce. States may assess these recent cases and, rather than celebrate, decide that the

267. Id. arts 27–39.
268. Id. art. 53.
costs of membership in the treaties is higher than they expected and thus withdraw or, if permitted, add reservations to treaty provisions providing the ICJ with mandatory jurisdiction over disputes. After all, most human rights treaties offer little in the way of direct benefits to member States. And most treaties allow States to withdraw without cost, assuming they give the requisite notice. Hence, if the reputational risk of membership becomes significant due to an increased frequency of cases, it is possible that States may exit treaties, or key provisions of treaties, at greater rates. States might also decide to refrain from entering into new human rights treaties that provide for mandatory ICJ jurisdiction over disputes. This is the classic cost-of-commitment challenge that all treaties face, human rights treaties chief among them: the higher the costs of membership, the less likely States are to join a treaty, particularly where the treaty promises little direct benefit.\(^{269}\)

Thus far, however, the risk of prompting withdrawals from human rights treaties as a result of recognizing \emph{erga omnes partes} standing seems to be limited. Few States have withdrawn from ICJ jurisdiction specifically because of a lawsuit or an unfavorable judgment. The United States withdrew from the Court’s compulsory jurisdiction while a case filed against it by Nicaragua was pending.\(^{270}\) The United States also withdrew from the Optional Protocol for the Vienna Convention on Consular Relations in 2005 during the \emph{Avena and Other Mexican Nationals} case\(^{271}\) from the Optional Protocol on Compulsory Jurisdiction to the Vienna Convention on Consular and Diplomatic Relations in 2018 after the State of Palestine instituted proceedings against the United States for moving its Israeli embassy to Jerusalem;\(^{272}\) and from the Treaty of Amity with Iran in 2018 after Iran instituted proceedings for alleged violations as a result of the new sanctions.\(^{273}\) Similarly, France withdrew from the compulsory

\begin{itemize}
  \item 270. Text of U.S. Withdrawal From the Proceedings Initiated by Nicaragua in the International Court of Justice, N.Y. TIMES (Jan. 19, 1985), at 1.4. [https://perma.cc/S3QV-698J].
\end{itemize}
jurisdiction of the ICJ in January 1974, as a result of the Nuclear Tests Cases. Yet withdrawal remains highly unusual. Notably, Myanmar has remained a party to the Genocide Convention, despite the ICJ decision recognizing *erga omnes partes* standing by The Gambia.

By contrast, States have withdrawn from the International Criminal Court’s (ICC) jurisdiction in the shadow of enforcement actions against them. For example, the Philippines withdrew after the ICC prosecutor announced a preliminary examination into President Rodrigo Duterte’s “war on drugs.” Burundi also withdrew “after a scathing United Nations report that called for a criminal investigation likely to lead back to its leaders.” Other States, including The Gambia and South Africa, have also threatened to withdraw, “accusing the court of being hijacked by powerful western countries and acting as a proxy for foreign-led government change,” but ended up reversing their decisions.

The greater propensity of States to withdraw from the ICC than from the ICJ might result from the difference between the consequences of each court’s judgments. ICJ decisions carry significant moral and legal force, but the Court has no direct enforcement powers. Its decisions can be enforced through diplomatic relations, counter-measures, or, rarely, by requesting the


277. *Id.* (internal quotation marks omitted).

278. Note that “the only role the Court may play in the enforcement of its decisions is provided for by Article 61(3) stating that the Court can make compliance with the terms of a judgment a condition for admitting proceedings in revision, a provision never applied so far. It is not for the ICJ to indicate the mode of compliance with its judgments or to enforce its judgments.” Irène Couzigou, *Enforcement of UN Security Council Resolutions and of ICJ Judgments: The Unreliability of Political Enforcement Mechanisms*, in *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* 363, 373 (András Jakab & Dimitry Kochenov eds., 2017).
UN Security Council to force compliance. The ICC faces similar enforcement challenges, but likely more important than enforcement is the difference in the types of cases that the two courts entertain. ICJ cases are brought against the State as a whole. The ICC, by contrast, brings criminal cases against individuals, usually those in significant leadership positions. For government leaders, the risks associated with ICC judgments, which may result in prison sentences for them and their associates, might seem both more personal and more concrete.

At present, the reputational cost of withdrawing from treaties that permit erga omnes standing appears to outweigh the risk posed by the possibility of a lawsuit. Nevertheless, more expansive use of erga omnes partes standing could prompt withdrawals in the future or deter States from allowing for mandatory ICJ jurisdiction in new human rights treaties or other treaties that protect common interests. At first glance this might appear to be a negative consequence of the rise of erga omnes partes standing, but that may not be true in all cases. The drive to universal ratification of human rights treaties has not had the impact on human rights practices that was once hoped. While many States did ratify the core human rights treaties, that ratification was not always associated with improvements in human rights on the ground. Indeed, there is evidence that the opposite is sometimes true—States sometimes ratify human rights treaties to signal a commitment to human rights principles that is not borne out in practice. Worse, some States might substitute ratification of treaties for real improvements in human rights. This is particularly true of non-democratic States where domestic rule of law institutions are weak and thus do not permit enforcement of human rights commitments against the State. These are precisely the countries where erga omnes

279. *Id.* at 373–74. In some instances, ICJ decisions can also be enforced by other international organizations or by domestic courts. *Id.* at 376–77.

280. Indeed, we see some reluctance to mandate ICJ jurisdiction in relatively newer environmental treaties, which require both States to consent to ICJ jurisdiction before bringing a dispute to the Court. See, e.g., Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 22(1), June 17, 1999, 2331 U.N.T.S. 202; United Nations Framework Convention on Climate Change art. 14(2), May 9, 1992, 1771 U.N.T.S 107; Vienna Convention for the Protection of the Ozone Layer art. 11, Mar. 22, 1985, 1513 U.N.T.S. 293. All of these require mutual consent of the parties before submitting a dispute to the Court.

281. *See* Hathaway, *supra* note 21 (demonstrating that States sometimes ratify human rights treaties to signal a commitment to human rights principles and that non-democratic
partes standing may have the greatest impact. If they respond by withdrawing from the treaties, that response could deprive them of the expressive benefits they otherwise would have received from membership and could lead to greater pressure on them to take other, more genuine, steps toward reform.

In short, withdrawal from treaties by States that chronically violate them is not necessarily a drawback. It is, however, important to continue to monitor States’ responses to this development as *erga omnes partes* standing becomes more firmly established and, perhaps, expands to additional treaties in other areas of international law.

2. Challenges to the Legitimacy of the Court

Courts rely on their legitimacy to function effectively. An international tribunal is considered legitimate when its “authority is perceived as justified,” and it “possess[es] some quality that leads people (or states) to accept [its] authority . . . because of a general sense that the authority is justified.”282

Roger-Claude Liwanga and Casondra Turner observe that, “[o]ften, it is not just one quality but various qualities, that make an institution legitimate. As such, it is clear that the concept of ‘international tribunal legitimacy’ is likely multidimensional rather than mono dimensional.”283 Liwanga and Turner suggest assessing the ICJ’s legitimacy by looking to “legal, sociological, and moral elements.”284 Legal legitimacy refers to “the legal norms that establish the institution.”285 The ICJ’s legal legitimacy stems from its statute, the United Nations Charter, and other treaties where States have agreed

---


284. Id. at 416.

285. Id. at 418.
to submit their disputes to the Court. Moral legitimacy “entails that an institution is legitimate when its actions are morally justifiable or respect-worthy.” For example, Liwanga and Turner suggest that the Court’s decision to dismiss the DRC’s claims against Burundi and Rwanda in Armed Activities on the Territory of the Congo, since neither had submitted to the Court’s compulsory jurisdiction, was morally reprehensible, even if legally legitimate. Last, sociological legitimacy refers to whether “the population of the litigating States accepts or respects its authority.”

Using *erga omnes partes* standing to enforce human rights treaties has the potential to affect all three criteria. Legal legitimacy could be threatened if States reject the underlying legal logic of *erga omnes partes* standing (that is, if they find it inconsistent with their original consent to ICJ jurisdiction in the treaty). Moral legitimacy can be threatened given that the Court will be limited to adjudicating just the human rights disputes that are under its jurisdiction, which may not implicate the most urgent violations of human rights. Finally, sociological legitimacy can be threatened to the extent that States refuse to abide by the Court’s decisions.

Given the importance of State compliance not only for the Court’s legitimacy, but also for the effectiveness of *erga omnes partes* as an enforcement mechanism, this final concern—failure to comply—could be particularly damaging. Although it is undisputed that ICJ decisions are binding on States that are party to the dispute, State compliance has in the past been less than perfect. Scholarly assessments of the rate of compliance with ICJ decisions vary significantly. One study found that “only twenty-nine percent of all decisions issued by the [ICJ from] 1986 to 2004 were fully enforced by the parties involved.” The same study found that regional human rights courts similarly have low compliance rates. Others, however,
have found much stronger evidence for compliance.\(^{292}\) As former ICJ Justice Joan Donoghue summarized her view of the evidence, “compliance with ICJ judgments is quite good: there has been compliance with perhaps three-fourths of the Court’s judgments, depending on how one categorizes various situations.”\(^{293}\)

While the precise record is a matter of dispute, it is clear that compliance is not a given. In 2020, the Court ordered provisional measures in *The Gambia v. Myanmar*, ordering Myanmar to prevent acts of genocide against members of the Rohingya group, to ensure the preservation of evidence related to the allegations, and to provide reports to the Court on the actions taken to implement the order.\(^{294}\) Although Myanmar has at least partially complied with the reporting requirements,\(^{295}\) human rights groups have documented continued
abuses against the Rohingya minority since the order.\textsuperscript{296} Most recently, the Court has ordered provisional measures in several cases involving situations of armed conflict, including in \textit{Allegations of Genocide (Ukraine v. Russia)}\textsuperscript{297} and \textit{Application of the ICERD (Armenia v. Azerbaijan)}.\textsuperscript{298} In both, the parties failed to comply with the measures and the conflicts continue.

There is “no empirical research establishing that States parties failing to comply with the ICJ’s decisions do so because they principally reject the legitimacy of the ICJ.”\textsuperscript{299} Rather, there is evidence that “non-compliance or partial compliance with international tribunals’ decisions (including the ICJ) is linked to numerous variables,” including the “lack of precision within the Court’s ruling” and the “ politicization of the post-adjudicative phase, coupled with the lack of sanctions against defaulting States.”\textsuperscript{300} Formally, enforcement of ICJ decisions against non-compliant States is at the discretion of the Security Council.\textsuperscript{301} Therefore, “this means

\textsuperscript{296} World Court Rejects Myanmar Objections to Genocide Case, HUM. RTS. WATCH (July 22, 2022), https://www.hrw.org/news/2022/07/22/world-court-rejects-myanmar-objections-genocide-case [https://perma.cc/8D3A-XCQQ] (“Human Rights Watch and other groups have continued to document grave abuses against the 600,000 Rohingya remaining in Myanmar, contravening the provisional measures. The severe restrictions imposed on the Rohingya by the Myanmar authorities amount to the crimes against humanity of persecution, apartheid, and severe deprivation of liberty. Since the February 2021 coup, the military junta has placed even greater movement restrictions and harsher punishments on Rohingya for attempting to leave Rakhine State.”).

\textsuperscript{297} The Court ordered provisional measures on March 2022, requiring Russia to suspend its military operations on Ukrainian territory and asking both parties to ensure non-aggravation of the dispute. \textit{Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)}, Provisional Measures, 2022 I.C.J. 211, ¶¶ 81, 82 (Mar. 16).


\textsuperscript{299} Liwanga & Turner, \textit{supra} note 283, at 435–38.

\textsuperscript{300} Id.

\textsuperscript{301} Id. at 437.
that the enforcement of the ICJ’s decisions is not ‘automatic’; instead, it is subject to ‘political negotiation’ between State political leaders sitting at the Security Council.”

An increase in the rate of non-compliance—and thus the increase in the number of cases potentially subject to enforcement (or failure of enforcement) by the Security Council—could heighten the political valence of the Court. It is possible, if not probable, that ICJ judgments could be issued that would be harder to enforce against politically and economically powerful countries in the Global North. This could have serious implications for the Court’s legitimacy, particularly among countries in the Global South. Indeed, similar issues of selective justice have been the basis of major criticisms of the ICC and threatened its legitimacy.

3. Inequities in Enforcement

The expansion of reliance on ICJ enforcement for treaty enforcement could compound already existing inequities. Of particular concern is the divide between well-resourced States, often located in the West and Global North, and less well-resourced States, often located in the Global South.

According to one 2014 study, “oral proceedings before the International Court of Justice [...] are dominated by male

302. Id. (internal quotations and citations omitted).

303. See, e.g., Rosa Freedman & Ruth Houghton, Two Steps Forward, One Step Back: Politicisation of the Human Rights Council, 17 HUM. RTS. L. REV. 753, 753–54 (2017) (“Policisation [in the Human Rights Council] has been apparent through states advancing unrelated political objectives, groups shielding their allies from Council scrutiny and politically motivated attacks on some states that have obstructed similar action being taken on other, needed, situations.”); Rochelle Terman & Joshua Byun, Punishment and Politicization of the International Human Rights Regime, 116 AM. POL. SCI. REV. 385 (2022) (“Using data from the [United Nations] Universal Periodic Review, an elaborate human rights mechanism, we show that states tend to criticize their adversaries on sensitive issues that undermine the target regime’s power and legitimacy while addressing safer topics with friends.”).

304. See, e.g., The ICC at 20: Double Standards Have No Place in International Justice, AMNESTY INT’L (July 1, 2022, https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice [https://perma.cc/KB6V-NA37] (“As the International Criminal Court (ICC) marks its twentieth anniversary, Amnesty International has warned that the [C]ourt’s legitimacy risks being eroded by an increasingly selective approach to justice. The organization highlighted several recent decisions and practices which appear to demonstrate double standards and a willingness to be influenced by powerful states.”).
international law professors from developed States.” More than seventy percent of lawyers who appeared before the Court from 1999 through 2012 were nationals of Organisation for Economic Cooperation and Development (OECD) member States, and within the International Court of Justice Bar, “this disparity was more extreme.” Similar proportions hold with respect to the number of lawyers from high-income economies or States with very high human development. Notably, nearly seventy percent of lawyers were nationals of either the Western Europe and Other Group or the United States, and the most represented States are first the United States, followed by France and the United Kingdom. The professional background of these lawyers is also notable; nearly eighty percent of lawyers who have appeared before the Court were either academics or government lawyers, and within the International Court of Justice Bar, academics dominate. Representation before the Court is dominated by law firms from OECD countries. That is true even for non-OECD State parties. As a result, the discussion of human rights before the Court might not always fully reflect the perspectives of those closest to the problems at issue.

In addition, Court proceedings are costly. Even the Handbook on Accepting the Jurisdiction of the International Court of Justice, which understandably is enthusiastic about the Court, describes the Court as “a flexible, time-efficient—but costly—option.” Because administrative costs are borne by the United Nations, one important consideration, even if the use of erga omnes partes standing can promote human rights enforcement, is whether the expansion of this

306. Id. at 904–05.
307. Id. at 905.
308. Id.
309. Id. at 906–07.
310. Id. at 908.
312. Id.
314. Id.
legal doctrine is more effective than alternative uses for the money (e.g., increased human rights monitoring on the ground of at-risk States). The same analysis is likely applicable to “the costs incumbent on the Parties,” including “counsel, agents, experts, [and the] preparation of memorials and counter-memorials,” given that “the Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice may provide financial assistance.”315 If this source of funding is insufficient for States to cover their costs, then this raises an additional question: How many States will bring a case before the Court to challenge human rights abuses committed by another State that are not inflicting tangible costs on them? Relevantly, given the costs and the lack of direct harm, will wealthier States bring more *erga omnes partes* suits? More empirical research is necessary in order to make reasonable predictions here, but the issue that all of this implicates is that *erga omnes partes* may expand human rights enforcement in a selective way, which not only ties back to the concerns regarding legitimacy outlined in the prior section, but could reduce the effectiveness of *erga omnes partes* as a mechanism to improve human rights enforcement.

It is also important to acknowledge that “only states may be parties in cases before the Court.”316 Although some scholars have argued for greater involvement by non-State actors,317 it remains the case that for now, especially in non-advisory proceedings, non-State actors have a limited role. This is problematic because States may not have an incentive to bring (or refrain from bringing) suits against other States for a wide range of political, economic, and security reasons that have little to do with the legal validity of the case.

Indeed, at the Court itself, political pressure is both omnipresent and often asymmetrical. The Court has proven capable of rendering decisions despite such pressures.318 But it often seeks to avoid acutely political disputes or devise outcomes that do not place it

315. *Id.*

316. Statute of the International Court of Justice, *supra* note 141, art. 34(1).


in untenable political situations.\textsuperscript{319} Neil B. Nucup cites the example of the Kosovo Advisory Opinion,\textsuperscript{320} arguing that the Court “skirted the core issue of the dispute, namely Kosovo’s right to self-determination.”\textsuperscript{321} He contends that “[a]nother ramification of the political backlash from States is the tendency of the [Court] to render Solomonic judgments,”\textsuperscript{322} identifying as examples of this phenomenon Bosnian Genocide,\textsuperscript{323} where the Court “appears to have been overly lenient towards Serbia”;\textsuperscript{324} Oil Platforms,\textsuperscript{325} where “neither side actually won what it asked for (but also neither side totally lost)”; and Peru v. Chile, where, “rather than adopting the position of one of the parties,” the Court “split the pie” between Peru and Chile.\textsuperscript{326} It is almost certain that political pressures will emerge in cases involving erga omnes partes standing, and this could, in turn, affect the approach—and thus, returning to the points raised above, the legitimacy—of the Court.

B. Questions Raised by the Expansion of Erga Omnes Partes Standing

The potential expansion of erga omnes partes standing also raises a number of procedural questions. Notwithstanding their procedural nature, these issues will be of enormous consequence to how cases implicating erga omnes partes standing unfold. Here, we

\textsuperscript{319} Neil B. Nucup, Infallible or Final?: Revisiting the Legitimacy of the International Court of Justice as the “Invisible” International Supreme Court, 18 L. & PRACTICE INT’LCTS. & TRIBUNALS 145, 149–50 (2019).
\textsuperscript{320} Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).
\textsuperscript{321} Nucup, supra note 319, at 150.
\textsuperscript{322} Id.; see also Nienke Grossman, Solomonic Judgments and the Legitimacy of the International Court of Justice, in LEGITIMACY AND INTERNATIONAL COURTS 43, 59 (Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal & Geir Ulfstein eds., 2018) (arguing that a Solomonic ICJ “does not help the litigating parties better to comply with the law,” “may threaten perceptions of justified authority,” and may reduce the Court’s sociological legitimacy).
\textsuperscript{324} Nucup, supra note 319, at 150–51.
\textsuperscript{325} Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6).
\textsuperscript{326} Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. 3 (Jan. 27).
outline some of the key questions that the Court will have to resolve as this new tool is developed over time.

1. Evidentiary Challenges

States may face evidentiary challenges in cases based solely on \textit{erga omnes partes} standing. “\[E\]ven in cases where the evidence appears to be compelling, \[. . . \] \[t\]he types of legal controversies that are likely to inspire claims based on \textit{erga omnes partes} standing will often feature allegations of violence that are both widespread and difficult to prove.”\footnote{327} These types of claims will likely require a myriad of evidence; indeed, The Gambia’s 2020 Memorial included over 5,000 annexed pages of supporting materials.\footnote{328} At the same time, the fact that the alleged violations in a case relying on \textit{erga omnes partes} standing may lack a nexus to the State asserting the claim before the Court will render it extremely challenging for a State to secure access to the evidence necessary to build their case.\footnote{329} Documentary evidence, “the most common and certainly the most important type of evidence in litigation before the ICJ,”\footnote{330} will be difficult to obtain, and the Court has typically assigned less evidentiary weight to even detailed reports published by non-governmental organizations as compared to the United Nations.\footnote{331}

There are certainly some sources of evidence upon which the Court has relied that would prove useful in cases relying on \textit{erga omnes partes} standing. For example, the Court has relied heavily in the past on United Nations reporting such as country missions and special rapporteur reports,\footnote{332} and the evolution of \textit{erga omnes partes}

\begin{footnotesize}
\footnote{327}{Nawi Ukabiala, Duncan Pickard & Alyssa Yamamoto, \textit{Erga Omnes Partes Before the International Court of Justice: From Standing to Judgment on the Merits}, 27 ILSA J. INT’L & COMP. L. 233, 236 (2021).}


\footnote{329}{Ukabiala, Pickard & Yamamoto, \textit{supra} note 327, at 242.}

\footnote{330}{\textit{Anna Riddell & Brendan Plant, Evidence Before the International Court of Justice} 239 (2016).}

\footnote{331}{\textit{Id.} at 248–49.}

\end{footnotesize}
standing may coincide with an increased willingness to consider evidence presented before national courts, including those that exercise universal jurisdiction.\textsuperscript{333} Moreover, the Court has “extensive powers for obtaining evidence that could be of particular value in a case based on \textit{erga omnes partes} standing in which the applicant has limited access to evidence of events that occurred within the respondent’s territory.”\textsuperscript{334} Indeed, Article 49 of the Court’s Statute permits the Court to “call upon the agents to produce any document or to supply any explanations”; Article 50 authorizes the Court to “entrust any individual, body, bureau, commission, or other organization that it may select[] with the task of carrying out an [i]nquiry or giving an expert opinion”; and Article 44(2) even allows the Court to procure evidence itself from the spot of the alleged wrongdoing. The Court has generally been reluctant to use these powers, assuming a generally “reactive role.”\textsuperscript{335} Yet the Court could choose to modify its practices on the gathering and analysis of evidence if \textit{erga omnes partes} standing is used more frequently, increasing its willingness to rely on outside sources of evidence or even affording a State relying on \textit{erga omnes partes} standing “a more liberal recourse to inferences of fact and circumstantial evidence.”\textsuperscript{336}

The Court appears to be cognizant of this element of \textit{erga omnes partes} cases. As Priya Pillai emphasizes, the Court’s provisional orders measure requiring Myanmar to “ensure the preservation of evidence” and “submit a report to the Court on all measures taken” in connection therewith was “quite unusual.”\textsuperscript{337} The Court rarely assumes such a robust monitoring function,\textsuperscript{338} and the fact that it is doing so here likely reflects an understanding that \textit{erga omnes partes} standing is of little value if there is no evidence to be presented during the merits stage of a case. Indeed, it is telling that in the two cases relying solely on \textit{erga omnes partes} standing—the Rohingya

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{333} See Ukabiala, Pickard & Yamamoto, \textit{supra} note 327, at 248–49.
\item \textsuperscript{334} \textit{Id.} at 249.
\item \textsuperscript{335} JAMES GERARD DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE 73–126 (2016).
\item \textsuperscript{336} Corfu Channel (U.K. & N. Ir. v. Alb.), Judgment, 1949 I.C.J. 4, at 18 (Apr. 9).
\item \textsuperscript{338} See \textit{id.}.
\end{itemize}
\end{footnotesize}
genocide and the Syrian civil war—there is an independent United Nations investigative mechanism that has been collecting and consolidating evidence for years. Whether a State that is completely divorced from the alleged injuries suffered can build a case without a similar mechanism is yet to be seen.

2. Reparations

_Erga omnes partes_ standing also naturally gives rise to questions of what constitutes appropriate reparations. The declaration of rights that this new form of standing enables can serve as a focal point for advocacy and give victims a sense of justice even in the absence of monetary compensation or other forms of restitution. Yet this doctrinal innovation will also require the Court to answer novel and challenging questions of who is entitled to receive reparations and how those reparations will be distributed.

In its Application to the Court, The Gambia requested reparations “in the interest of the victims of genocidal acts who are members of the Rohingya group.” As discussed previously, Article 48 of ARSIWA specifically provides that third-party States can claim such reparations “in the interest of the injured State or of the beneficiaries of the obligation breached” in the context of the violation of _erga omnes partes_ obligations. Yet “the idea that a third state is entitled to claim reparation to the benefit of victims is something almost unknown in international practice.” Indeed, it is rare for the Court to award reparations at all with one recent example being the Court’s February 2022 reparations award in the aforementioned _Armed Activities_ (with which Uganda has timely complied thus far). That case drew sharp criticism from some international law scholars with


respect to the quantification of damage. Particularly in light of the evidentiary challenges presented in the previous section, it is apparent that the Court will likely have to address this issue head-on if a State relies on *erga omnes partes* standing to bring its claim before the Court.

Another practical challenge with respect to reparations is how the reparations will be received by the injured party or parties. In a case like *Armed Activities*, this issue is relatively simple: Uganda sends reparations to the Democratic Republic of Congo. This is significantly more complicated in a case like *The Gambia v. Myanmar*. Should the Court rule in favor of The Gambia on the merits of the case, how would compensation and other forms of restitution be handled? Would Myanmar pay reparations to The Gambia, and, if so, how would The Gambia allocate such reparations to the victims of Myanmar’s wrongful acts? Would there have to be a monitoring mechanism to ensure that The Gambia properly allocated the reparations paid to it by Myanmar? Or, alternatively, would Myanmar provide restitution, including compensation, directly to the victims? If so, would The Gambia assume a supervisory role? And, to what extent should Bangladesh, as a more specially affected State, be considered in the award of reparations? Should the award exclude any injury suffered by Bangladesh? Because *erga omnes partes* standing is such a recent innovation and reparations to individual victims are not often awarded in ICJ cases, how the latter might interact with the former remains to be determined.

3. Balancing Interests of Multiple States

Finally, a key issue that will likely emerge in cases involving *erga omnes partes* standing is the fact that both specially affected and non-specially affected States may have the ability, and desire, to intervene in high-profile human rights cases—as Canada did with the Netherlands’ proceedings against Syria. Indeed, since cases based

---

343. The Gambia is seeking an end to the genocide as well as various forms of restitution, including that Myanmar “compensate, and provide any additional forms of reparation, for any harm, loss or injury suffered by the Rohingya victims that is not capable of full reparation by restitution.” *The Gambia v. Myanmar* Judgment, *supra* note 12, ¶ 24 (quoting The Gambia’s Memorial).

on erga omnes partes standing “would presumably seek to enforce community values based on their status as such,” coalitions will likely be common if erga omnes partes standing continues to expand. 345

Indeed, the Gambia itself submitted its case against Myanmar on behalf of the fifty-seven Member States of the Organization of Islamic Cooperation. 346 There are obvious financial and diplomatic benefits to this, 347 but joint proceedings can also “complicate decision-making and present coordination challenges.” 348 Erga omnes partes standing, by making it easier for States to bring cases before the Court, would likely make it easier for a State to intervene.

The result of this is that the Court will have to consider how to balance the interests of different States with potentially competing concerns. In cases where the States are aligned in their goals and legal strategies, that will be relatively straightforward, but challenges may emerge if the opposite is true. Indeed, in some instances, the Court will likely need to consider how to balance the interests of different States—particularly if some are more directly injured than others.

Returning to the reparations discussion above, this problem may be particularly acute when there are decisions to be made about how to allocate resources among different groups, given that those groups are not themselves parties to the litigation.

This is one additional reason that it is possible, perhaps likely, that the Court will, in the short term at least, limit erga omnes partes standing to human rights treaties. The Court’s decision in The Gambia v. Myanmar appears to treat erga omnes partes standing as a gap-filler—permitting this somewhat unusual form of standing where no State would otherwise have standing to challenge the actions of the violating State. That approach makes clashes among States with different interests less likely. These conditions are most likely in the human rights context, where violations are often committed by States


348. Ukabiala, Pickard & Yamamoto, supra note 327, at 238.
against their own people rather than against other States or their citizens. Future developments in the case law will likely clarify the degree to which this is, indeed, a condition for *erga omnes partes* standing and thus, the extent to which this form of standing might be extended outside the human rights context.

**CONCLUSION**

The emergence of *erga omnes partes* standing is an extraordinary development in international law. It offers a partial answer to a longstanding dilemma that has long faced the field: How can international law obligations be enforced against States that refuse to comply? Ironically, this dilemma is a function of international law’s own success. When international law first emerged, the remedy for violations of international law was clear: States were permitted to go to war to enforce treaty obligations as well as customary international law. When unilateral decisions to go to war became illegal thanks first to the 1928 Kellogg-Briand Pact and then the 1945 United Nations Charter, States were no longer permitted to resort to force to enforce the law. That brought unprecedented peace and prosperity, with fewer interstate wars than at any other period in the last several hundred years. And it made it possible to create treaty commitments on a wide range of topics—from human rights to environmental law to trade and everything in between. States, after all, no longer had to fear that a misstep would lead to war. But that very same dynamic meant that States could make international legal commitments they could not keep without fear of enforcement. Human rights and environmental law have been two areas of international law that have been particularly susceptible to this challenge. States make sweeping promises and then too often bear few consequences for failing to live up to them.

The emergence of *erga omnes partes* standing at the ICJ offers a partial answer to this challenge. It allows States that are parties to a treaty to hold other States who are also parties to those treaties to account when they fail to live up to the core commitments embodied

---

in them. It does not provide a complete answer to the compliance problem faced by much of international law, but it offers an important new tool. The Court should continue to develop this tool, bearing in mind the potential drawbacks and challenges that this legal innovation raises. And the international law community should support this doctrinal innovation as well as continue at the same time to look for additional tools and techniques to ensure that international law lives up to its promise.