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Third Party Fundamental Human Rights *Erga Omnes* Obligations Claims Before The International Court of Justice: A Critique of the *The Gambia v Myanmar* Decision

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Abstract

Can states allegedly committing genocide on their own populace be held responsible in the International Court of Justice (ICJ) by a third-party on a fundamental human rights erga omnes *obligations claim? The ICJ recently released a procedural decision against Myanmar's preliminary objection to The Gambia's legal standing before them on a third-party fundamental human rights* erga omnes *obligations claim in* Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. This paper argues that the ICJ were correct in dismissing Myanmar's objection and deciding to allow the case to continue to the merits phase. This paper examines how the principles of third-party fundamental human rights* erga omnes *obligations claims have developed over the last 78 years in the context of genocide. Examining the past is essential to understanding the present and predicting the future. This paper's central critique of the ICJ's decision and of the present law regards the ICJ's failure to guide future Benches on the policy balancing act that is at the core of third-party fundamental human rights* erga omnes *obligation claims law. Guidance is required in balancing the policies of protecting the international community's common interests and preventing an unmanageable proliferation of disputes in the ICJ. Balancing these policies is crucial to developing the law justly while protecting the functioning of the ICJ.*

Word length

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Subjects and Topics

International law – Genocide – *Erga omnes* obligations – Fundamental human rights – Third-party claims.

I Introduction

On 22 July 2022, the International Court of Justice (ICJ) released its first-phase decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[1] This procedural decision examined Myanmar's preliminary objections regarding The Gambia's (Gambia) legal grounds to bring a claim against Myanmar in the ICJ for the alleged genocide of the Rohingya by Myanmar's state apparatus and military. They did not decide the merits of Gambia's allegations.

This paper critiques the ICJ's decision on Myanmar's preliminary objections to Gambia's legal standing to pursue Myanmar as a non-injured third-party to the alleged Rohingya genocide. The decision's legal question was whether a non-injured third-party state has legal standing to bring a case before the Court regarding another state's alleged violation of an *erga omnes* obligation against alleged fundamental human rights abuses, in this case the prohibition against perpetrating genocide. The majority found that third-party fundamental human rights *erga omnes* obligations claims can provide legal standing before the ICJ.[2] This paper's main argument is that the majority's decision was legally correct in the context of precedent, but it should have provided guidance on balancing the policy objectives of protecting the international community's common interests versus avoiding unmanageable dispute proliferation. Understanding *Gambia v Myanmar* and this paper's argument requires first understanding the law's development.

The paper first examines Article IX of the Genocide Convention, *South West Africa* decisions, *Barcelona Traction*, Article 48 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts, and *Belgium v Senegal*. [3]

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[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(The Gambia v Myanmar) (Preliminary objections)* [2022] GL 178.

[2] "Fundamental human rights" could mean various rights. This paper has based its meaning of "fundamental human rights" on the rights found in *Case concerning the Barcelona Traction, Light and Power Company, Limited (New Application:1962) (Belgium v. Spain) (Second Phase)* [1970] ICJ Rep 1970, at 34.

[3] Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951) art IX; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (*Preliminary Objections*) [1962] ICJ Rep 1962; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Merits)* [1966] ICJ Rep 1966; *Barcelona Traction,* above

These are central to the *Gambia v Myanmar* decision and the law's development in third-party fundamental human rights *erga omnes* obligations claims in genocide's context. It then analyses the *Gambia v Myanmar* majority decision, Judge *ad hoc* Kress's declaration, and Judge Xue's dissenting opinion. The paper then focuses on the ICJ's failure to guide future Benches on the aforementioned policy balancing act before concluding. The law has developed correctly, but the ICJ must confront this policy problem.

II The Development of Third-Party Fundamental Human Rights Erga Omnes Obligations Claims

Erga omnes means "towards all". States owe *erga omnes* obligations to the entire international community because a shared value has created a common interest.[4] Preventing genocide is an *erga omnes* obligation.[5] Genocide is the serious harming of a groups members, removing necessary life conditions, preventing births, forcefully transferring children, and killing of a particular group with the intention to destroy it partially or wholly.[6]

The five legal developments track the law's trajectory on third-party fundamental human rights – genocide specifically – *erga omnes* obligations claims.

A Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

The United Nations General Assembly (UNGA) declared genocide an international crime in 1946.[7] The UNGA unanimously agreed to form the Genocide Convention to prevent and punish genocide. 152 states are signatories of the Genocide Convention.

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n 2; *Articles on Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC 26 – 30; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Merits)* [2012] ICJ Rep 2012.

[4] *Barcelona Traction*, above n 2, at [33].

[5] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep 1996, at [31].

[6] Genocide Convention 1948, art II.

[7] *The Crime of Genocide* GA RES 96 (1946), art 96(1).

Article I codifies genocide as a crime against humanity and obligates signatories to prevent and punish it.[8] Article II defines genocide.[9] Article III states the punishable genocidal acts.[10] These form genocide's shared basic values and community interests. States can submit reservations against any Article. Reservations allow states to remain a signatory but bars any claim against them regarding the reserved Article.[11] Reservations dilute an Article's power but keep states in the convention.

International law's prelude to possibly allowing third-party fundamental human rights *erga omnes* obligations claims is Article IX's compromissory clause. It says:[12]

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the ICJ at the request of any of the parties to the dispute.

Article IX empowers states to bring genocide-related proceedings to the ICJ. The ICJ has the jurisdiction to release binding international law decisions as the UN's principal judicial organ.[13] The Genocide Convention's drafting history offers minimal guidance on Article IX's correct interpretation.[14] Its *travaux préparatoires* show Article IX provoked little controversy except for its relationship with the International Criminal Court's function in holding individual perpetrators of genocide criminally liable.[15] All signatories

[8] Genocide Convention 1948, art I.

[9] Genocide Convention 1948, art II.

[10] Genocide Convention 1948, art III.

[11] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 1951 at 22.

[12] Genocide Convention 1948, art IX.

[13] Statute of the International Court of Justice, art 1 established by the Charter of the United Nations, art 92.

[14] *Official Records of the Third Session of the General Assembly Part 1 Sixth Committee* UN Doc A/C.6/206 (27 September 1948) found in Hirad Abtahi and Philippa Webb *The Genocide Convention: The Travaux Préparatoires* (2 vol, Martinus Nijhoff Publishers, Boston, 2008), at 2007.

[15] *Sixth Committee Official Records*, above n 14, as discussed in Robert Kolb "Part VI Enforcing the Convention Through the United Nations, 20 The Compromissory Clause of the Convention" in Paola Gaeta (ed) *The UN Genocide Convention: A commentary* (Oxford Commentaries on International Law, Oxford, 2009) at 407.

agreed with the Secretariat's draft that states could bring a contentious case before the ICJ about disputes on the Genocide Convention's interpretation.[16]

Article IX's prima facie wording allows states directly injured by another's alleged Genocide Convention violation to bring a claim. However, Article IX's wording and drafting history are ambiguous *on* who the "contracting parties" or "parties to the dispute" are. Article IX's accidental ambiguity fails to definitively allow or forbid states from submitting third-party *erga omnes* obligations claims regarding alleged Article II or III violations on a state's own population.[17]

Article IX's ambiguity became apparent as *erga omnes* obligations law developed. Future ICJ cases and International Law Commission (ILC) Articles used it to develop the concept of third-party fundamental human rights *erga omnes* obligations claims to hold states legally accountable.[18]

B 1962 First Phase Decision and 1966 Second Phase Decisions of the South West Africa (Liberia and Ethiopia v South Africa) ICJ Judgment.

Ethiopia and Liberia instituted proceedings in 1960 against South Africa to prevent it from incorporating South West Africa as a territory in the first ICJ third-party *erga omnes* obligations claim. [19] The 1962 decision accepted the claimants were legally interested in South West Africa. However, the 1966 second phase decision decided against third-parties submitting *erga omnes* obligations claims.

South West Africa had become a South African League of Nations (LoN) mandate in 1920. Native South West Africans would be subject to South Africa's racist apartheid laws if South West Africa became a South African territory. The claimants alleged South

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[16] *Draft Convention on the Crime of Genocide* E/447 UN (26 June 1947) at 8.

[17] *Gambia v Myanmar*, above n 3, at [111] points out that Article IX only stipulates a "party to a dispute" can bring a claim without clarifying when a dispute may arise.

[18] Nina Jørgenson, "State Responsibility and the 1948 Genocide Convention" in Guy Goodwin-Gill and Stefan Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford Academic, Oxford, 1999) 273 at 290.

[19] *South West Africa (Ethiopia v South Africa; Liberia v. South Africa)* [1960] Application Institution Proceedings by the Government of Liberia; and *South West Africa (Ethiopia v South Africa; Liberia v. South Africa) (Institution of Proceedings)* [1960] ICJ Pleadings vol 1.

Africa had failed its mandatory duties and that UN mandates brought responsibilities to the whole international community. Ethiopia and Liberia argued they could bring a claim as UN Committee on South West Africa members on behalf of South West Africa's native population despite being uninjured themselves.[20]

South Africa objected to the ICJ's jurisdiction to hear the case, but these were rejected in the judgment's 1962 first-phase decision.[21] The majority decided the claimants had a dispute with South Africa because their legal interests in the mandate were founded on a global common interest.[22] Judge Jessup acknowledged treaties had previously recognised states' legal interests in humanitarian causes and provided procedures for states to uphold them.[23]

Unusually, the 1966 second-phase decision essentially reversed the 1962 decision. Judges like Judge Bustamante who had decided for the claimants were replaced with judges like Judge Fitzmaurice who decided for South Africa in 1966. The Bench was split 7-7, with President Spender casting the deciding declaration for South Africa.[24] The majority decided the legal question was whether mandates provided legal standing for third-parties to claim against a mandatary's internal conduct on the international community's behalf or if that was exclusively the UNGA's jurisdiction.[25] They decided their decision must follow the LoN's original 1920 intention for exclusive LoN Council jurisdiction and denied that non-injured third parties could submit an independent *erga omnes* obligations claim in international law. [26] The majority found Ethiopia and Liberia lacked legal rights

[20] *South West Africa (Ethiopia v South Africa; Liberia v. South Africa) (Institution of Proceedings)*, above n 19, at [16].
[21] *South West Africa (Preliminary Objections)*, above n 3, at p. 347.
[22] Abdul Hamid "The Rohingya Genocide Case (*The Gambia v* Myanmar): Breach of Obligations *Erga Omnes* and the Issue of Standing" (2021) 29(1) IIUMLJ 30 at 38.
[23] *South West Africa (Preliminary Objections)*, above n 3, at p.425 per Judge Jessup as discussed in Hamid, above n 22, at 43.
[24] *South West Africa (Merits)*, above n 3, at [37] per President Spender declaration.
[25] At [34].
[26] At [35].

or interests in South Africa's actions within the mandate and denied their legal standing.[27]

The 1966 majority did observe that a state's legal right or interest may be immaterial or intangible, and that right can be infringed without suffering a material injury.[28] Judge Jessup's dissenting opinion indicated the law's future direction when he declared: [29]

> …international law has accepted and established situations [where] states are given a right of action without showing individual prejudice or substantive interest as distinguished from the general [international community] interest.

C Case Concerning the Barcelona Traction, Light, and Power Company Ltd (New Application: 1962) (Belgium v Spain) Second Phase (1970)

Barcelona Traction was an international investment dispute whose facts did not require re-examining third-party *erga omnes* obligation claims law. Nevertheless, the majority dictated an obiter dictum that became integral to future decisions considering fundamental human rights *erga omnes* obligations claims by extending the possible legal standing of third-parties.[30]

Barcelona Traction centred on a dispute about a Canadian company (Barcelona Traction) with Belgian shareholders that operated in Spain.[31] Spain had forced Barcelona Traction to declare bankruptcy. The issue was whether Belgium had legal standing to bring a claim against Spain on the Belgian shareholders' behalf. Spain objected that they had no legal relationship in international law with Belgium on this matter. Belgium asserted Spain must follow good international commercial practices. The majority decided against Belgium for reasons irrelevant to this paper.[32]

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[27] At [99].
[28] At [44].
[29] At [44] per Judge Jessup.
[30] *Barcelona Traction*, above n 2, at [33] and [34].
[31] At [8].
[32] At [103].

What is relevant is the majority's obiter dictum about third-party fundamental human rights *erga omnes* obligation claims during their discussion on diplomatic protection. The obiter dictum was:[33]

> …an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, in contemporary international law, from the outlawing of acts of aggression, and of genocide, [and] from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

This recognises that fundamental human rights obligations can create enforceable duties to the whole international community. The obiter dictum identifies universality and solidarity as two key *erga omnes* obligations principles.[34] Basic morals in the international legal framework intrinsically create universally binding obligations on states.[35] Third-party states have legal standing by invoking *erga omnes* obligations responsibility to hold others accountable. Universality is secured through solidarity. All states are legally interested in protecting these rights because a violation's scale and gravity erode the entire international community's fabric.[36] Third-party claims to protect the international community's interests could include legal protection. The obiter dictum usefully – in my opinion – provided a list of fundamental human rights *erga omnes* obligations that hold a general legal interest in their protection. This clarified the initial scope for later cases to expand.[37]

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[33] At [33] and [34].

[34] Linda Ingeborga Kronberga "Genocide, State Responsibility, and Obligations *Erga Omnes* in the Case of *The Gambia v Myanmar* before the International Court of Justice" (Research Paper No.26, Riga Graduate School of Law, 2022) at 5.

[35] Maurizio Ragazzi *The Concept of International Obligations Erga Omnes* (Oxford Monographs in International Law, Oxford, 2000) at ch1 at 17 as discussed in Kronberga, above n 34, at 5.

[36] Kronberga, above n 34, at 5.

[37] *Belgium v Senegal*, above n 3, at [68]; *Gambia v Myanmar*, above n 1, at [107].

D International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts 2001

The ILC was tasked with reviewing the law of state responsibility.[38] The ILC's report formed sporadically from 1949 to 1995, and the UN instructed the ILC to make progress in 1996.[39] The ILC released the Draft Articles on the Responsibility of States for Internationally Wrongful Acts in August 2001, which discussed *erga omnes* obligations and *Barcelona Traction*.[40] The UN commended the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) on 12th December 2001.[41]

The relevant article is Article 48, paragraph (1), subparagraph (b). Article 48 is titled "Invocation of responsibility by a State other than an injured State". Paragraph (1)(b) says:[42]

> (1) Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (b) the obligation breached is owed to the international community as a whole.

The Draft Articles commentary states that Article 48(1)(b)'s objective was implementing Barcelona *Traction's* obiter dictum.[43] *"*International community as a whole" meant the same as *erga omnes* obligations. Both refer to a non-injured state's ability to invoke responsibility on the international community's behalf. The ILC did not list possible Article 48(1)(b) obligations. This was viewed as beyond the scope of codifying the rules of state responsibility.[44] The ILC expected third-party *erga omnes* obligation claims

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[38] *Summary Records and Documents of the First Session including the report of the Commission to the General Assembly* [1949] vol 1 YILC 49 and 50 at [32].

[39] *First Report on International Responsibility* [1956] vol 2 YILC 175 at [6]; and *Report of the International Law Commission on the Work of its Forty-Seventh session* GA Res 50/45 (1996), at art 3(b).

[40] *Report of the International Law Commission on the Work of its Fifty-Third Session (Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries)* [2001] vol 2, pt 2 YIL126 at [2].

[41] *Articles on the Responsibility of States for Internationally Wrongful Acts* GA Res 56/83 (2001).

[42] At art 48.

[43] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, above n 40, at 127 at [8].

[44] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, above n 40, at 127 at [9].

scope to be guided by *Barcelona Traction* and to potentially broaden as wide as including the collective interest in marine environmental protection. [45] States must only show the alleged intentional wrongful act breaches the international community's interests. The Draft Articles commentary indicates that Article 48(1)(b) intended to ensure ARSIWA would not handbrake the development of third-party fundamental human rights *erga omnes* obligations claims. While considering the ICJ's process was outside of Article 48's scope, it would have been helpful for the Draft Articles to comment on how they thought widening this concept's scope would affect the ICJ's ability to adjudicate promptly.[46]

Through ARSIWA, the ILC crystallised that third-party fundamental human rights *erga omnes* obligation claims existed in international law. All that was needed for *Gambia v Myanmar* was a ratio decidendi on sufficiently analogous facts.

E Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment, 2012

Belgium v Senegal was an extradition case, but the majority also examined third-party fundamental human rights *erga omnes* obligations claims law. Gambia and the ICJ decision used *Belgium v Senegal's* principles in *Gambia v Myanmar*.[47]

Hissène Habré (Former President of the Republic of Chad) had allegedly ordered the widespread use of torture and had taken political asylum in Senegal. Chadians were denied persecuting him in Senegal's courts. Chadians applied to take Habré to Belgian courts as they had universal jurisdiction to prosecute torturers, but Senegal refused to extradite Habré. [48] The case's main issue was whether Belgium could request that the ICJ

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[45] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, above n 40, at 127 at [9].

[46] While the ILC widened the scope of *erga omnes*, it cannot be taken to allow *actio popularis* actions as discussed in Alberto Costi and Conor Donohue "State Responsibility" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis NZ Limited, Wellington,2020) 509 at 557.

[47] *Belgium v Senegal*, above n 3, at [68] and [69]; and *The Gambia v Myanmar*, above n 1, at [107] and [108].

[48] Code of Criminal Procedure of the Kingdom of Belgium 1867 as amended in 2021 (Belgium), Preliminary Title, art 12*bis* Preliminary Title.

order Senegal to extradite Habré to Belgium because both states are UN Convention against Torture (UNCAT) parties. Neither state had reservations against the universal jurisdiction article.[49] A secondary question was whether Belgium (as a UNCAT party) sufficiently established legal standing for a third-party fundamental human rights *erga omnes* obligation claim. Belgium was not directly injured by Habré's torture or Senegal's failure to prosecute. Senegal was found to have a duty to extradite Habré.[50]

The majority decided the international community had a common interest in compliance with UNCAT's core obligations of preventing and punishing torture.[51] This created the *erga omnes* obligations that entitled UNCAT parties to make a claim regarding another's alleged breach, regardless of the alleged offender's nationality.[52] Complying with the obligation to punish torture is essential to fulfilling UNCAT's purpose, and all parties are legally interested in each other's compliance.[53] Belgium did not require special interests as it was sufficient that the entire international community was interested in Senegal's compliance.

The majority brought *Barcelona Traction*'s obiter dictum that legal standing on third-party *erga omnes* obligation claims could include fundamental human rights into their ratio.[54] The majority analogies the "humanitarian and civilising" provisions of UNCAT's core common interests with the Genocide Convention's purpose.[55] Both form obligations that all states owe to each other. Special interests in torture or genocide would often mean no state can make a claim as those actions are frequently perpetrated against a state's own

[49] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 4 February 1985, entered into force 26 June 1987), art 5(2).
[50] *Belgium v. Senegal*, above n 3, at [122].
[51] At [69].
[52] At [69].
[53] Hamid, above n 22, at 48.
[54] *Belgium v Senegal*, above n 3, at [68].
[55] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, above n 11, at 23 as quoted at [68].

citizens.[56] This observation influenced the ICJ's examination of Gambia's genocide claim.[57]

Judge Skotnikov noted that states can shield themselves from *erga omnes* obligations by applying a reservation to ICJ scrutiny.[58] The majority failed to stipulate how the policy of protecting the international community's common interests can be balanced with preventing an unmanageable dispute proliferation without weakening conventions and *erga omnes* obligations through increased Article reservations.

Abdul Hamid suggests a two-step test can be interpreted from this decision to identify when a human rights convention's obligations could be the subject to third-party *erga omnes* obligations claims.[59] Firstly, what is the purpose of the convention's objective, and what community interest is protected? Secondly, was the obligation at issue incorporated to fulfil this purpose? Only essential obligations to a fundamental human rights convention's object and purpose are *erga omnes* obligations open to a third-party claim.[60] A dispute on rights and obligations does not automatically grant the ICJ jurisdiction.[61] A human rights convention's minor obligations or a general international convention's obligation should not be *erga omnes* obligations open to third-party claims.[62]

The stage was set for a third-party fundamental human rights *erga omnes* obligations claim for an alleged genocide where neither the claimant nor the alleged perpetrator had an Article IX reservation.

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[56] At [69].

[57] *The Gambia v Myanmar,* above n 1, at [108].

[58] *Belgium v Senegal*, above n 3, at [15] per Judge Skontikov.

[59] Hamid, above n 22, at 48.

[60] Hamid, above n 22, at 51.

[61] *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem Rep Congo v Rwanda)* [2005] ICJ Rep 911 at [34] per Judge Simma as discussed in Hamid, above n 22, at 52.

[62] Hamid, above n 22, at 48.

III Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar), 2022

Gambia and Myanmar are prima facie the least connected parties in an *erga omnes* obligations claim yet.[63] The majority's decision to allow Gambia's claim incorporates all the law's development regarding third-party fundamental human rights *erga omnes* obligations claims. The majority decision, Judge *ad hoc* Kress's declaration, and Judge Xue's dissent all add to the law's intricate tapestry.

A Context

Gambia asserted that Myanmar's military and government's 2016 and 2017 "clearing operations" against their Rohingya minority breached Myanmar's Genocide Convention obligations.

The Rohingya are an ethnic Muslim minority from the Rakhine State in Myanmar, which has a Buddhist majority. Rohingyans have been the subject of persecution and discrimination since Myanmar's 1948 independence.[64] Significantly, the 1982 Citizenship Law did not list the Rohingya as a race that could become Myanmar citizens.[65] This made the Rohingyans stateless. Myanmar's military and state apparatus perform sporadic and violent "clearing operations" to clear the Rakhine State of Rohingyans by destroying their people and culture. 2016 and 2017's clearing operations were undertaken after some Rohingya attacked three police outposts.[66]

The Rohingya are not Gambian nationals, no clearing operation happened on Gambian soil, no Rohingyans took refuge in Gambia after the clearing operations, and the states are 11,570 kilometres apart. Gambia suffered no direct injury from Myanmar's actions.

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[63] Alex Jeffery "Geopolitics and Genocide: *The Gambia v Myanmar* at the International Court of Justice" (2023) 0(0) EPC: Politics and Space 1 at 5.

[64] The UN identified them as one of the most persecuted people in the world as discussed in Hamid, above n 22, at 31.

[65] Burma Citizenship Law 1982 (Myanmar), s 3.

[66] *Report of the Independent International Fact-Finding Mission on Myanmar* UN Doc A/HRC/42/50 (8 August 2019) at 6; and Hamid, above n 22, at 34.

Nevertheless, Gambia filed an ICJ claim against Myanmar on 11 November 2019 following an Organisation of Islamic Cooperation decision.[67] Gambia claimed the Genocide Convention's obligations are *erga omnes* obligations owed to the international community. Thus, Gambia argued it had legal standing as a third party to take Myanmar to the ICJ and requested the court hold Myanmar accountable for the alleged genocide. This was the first time a state brought a Genocide Convention *erga omnes* obligation claim to the ICJ to invoke the ICJ's jurisdiction for an alleged genocide committed by another state against that state's own citizens.[68]

Myanmar filed four preliminary objections against Gambia's claim.[69] On 22 July 2022, the ICJ released their procedural judgment on these. This paper examines Myanmar's preliminary objection to Gambia's legal standing to bring the case before the ICJ. The ICJ has not heard the case on the merits of Gambia's claim yet.

B Myanmar's Objection

Myanmar contended that Gambia did not have legal standing to bring this case before the ICJ on seven grounds. Gambia's claim would have been thrown out of the ICJ at this procedural stage if Myanmar had convinced the ICJ that Gambia had no legal standing before them. Being investigated for genocide is politically damaging for a state. Myanmar aimed to prevent Gambia's claim from reaching the merits stage of the judgment.

Myanmar's strongest arguments questioned unsettled law. Firstly, the territorial principle that only specially affected states can submit an ICJ claim applies.[70] The ICJ lacks the jurisdiction to hear third-party claims, and Gambia is a third-party to the Rohingya issue. Thus, Myanmar argued that Gambia should be excluded from submitting a claim as a "non-injured party". Secondly, *Belgium v Senegal* is distinguished. Belgium had

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[67] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Pleadings)* [2019] GL 178, at 2.

[68] Jeffery "Geopolitics and Genocide: *The Gambia v Myanmar* at the International Court of Justice", above n 63, at 5.

[69] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Preliminary Objections of Myanmar Pleadings)* [2021] GL 178.

[70] *The Gambia v Myanmar*, above n 1, at [93].

considered itself an injured state through UNCAT's Article X universal jurisdiction.[71] The Genocide Convention has no analogous provision, and Gambia did not claim to be directly injured by Myanmar's actions. Thirdly, Article IX's wording and structure prevent "non-injured states" from an ICJ claim. Article IX does not say "Any Contracting Party", preventing Gambia from claiming on the international community's behalf.[72] Finally, Article 44(a) of ARSIWA negates some *erga omnes* obligations due to its nationality qualification.[73] Gambia has no claim as the Rohingya are not Gambian nationals. Myanmar also argued that Article IX's drafting history shows no consensus that any state should be able to invoke Article IX.[74] Myanmar argued that the original intentions of the Genocide Convention's signatories must be adhered to, and these had not considered this issue. This ignores the law's development since 1948 but was a persuasive factor for Judge Xue's dissenting opinion.

Myanmar's final arguments were defences if the ICJ found Gambia had a third-party fundamental human rights *erga omnes* obligations claim. None of the three judges' decisions found these to be overly relevant. Myanmar argued that Gambia invoking political state responsibility in the UNGA on an *erga omnes* obligation basis does not translate into individual legal standing before the ICJ.[75] The second was that any right Gambia has to make a claim as a third party is prevented by Bangladesh's reservation to Article IX.[76] Bangladesh was the only possible "injured party" because of the influx of Rohingya refugees. The ICJ decided neither defence was relevant because once ground for a state to submit a claim was found, that state has legal standing. Another state's hypothetically stronger claim does not prevent a current claim before the ICJ.[77]

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[71] At [95]; and Convention Against Torture, art 5.

[72] At [96].

[73] At [98].

[74] At [97]; and *Preliminary Objections of Myanmar Pleadings*, above n 69, at [274].

[75] At [94]

[76] At [99].

[77] At [113]; and Statute of the International Cout of Justice, art 26(3) dictates that cases are only heard and determined between the requested parties.

C Gambia's Defences

Gambia disputed Myanmar's objections and defended that all states had standing before the ICJ on genocidal *erga omnes* obligations grounds. Gambia included the development of the law in their defence. This made it easier for the ICJ to accept their arguments over Myanmar's. Gambia's defences had a common strand in that deciding against Gambia would prevent minority protection against genocidal state actors.[78]

Gambia's first defence was that the international community has a common interest in ensuring compliance with the Genocide Convention's purpose and objective.[79] The common interest means any state is entitled to invoke another's responsibility to comply with it by submitting a claim, as compliance benefits everyone. Secondly, the Court's jurisdiction is not limited to "specially affected" states.[80] The ICJ allowed Belgium to submit an *erga omnes* obligation in *Belgium v Senegal* and found it irrelevant to decide whether Belgium was "specially affected" or not. This was crucial for Gambia as Gambia had minimal grounds to argue they were a "specially affected" state.[81] Thirdly, Article IX's ordinary meaning does not support that states must be a "specially injured state".[82] Article IX's interpretation encompasses any dispute between any states if the dispute is related to the interpretation, application, or fulfilment of the Genocide Convention, including Gambia's claim. Article IX's accidental ambiguity allowed for Gambia's claim. Fourthly, Article IX's drafting history shows an intention to allow any dispute to be taken to ICJ.[83] A narrow Article IX interpretation undermines the Genocide Convention's effectiveness in preventing states from committing genocide against minorities. Fifthly, ARSIWA's Article 44(a) should not be considered. It is contrary to the Genocide Convention's objective and purpose.[84] Enforcing a strict nationality qualification

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[78] Priya Pillai "The Gambia v. Myanmar – International Court of Justice Judgment on Preliminary Objections" (22 July 2022) OpinioJuris <http://opiniojuris.org/2022/07/22/the-gambia-v-myanmar-international-court-of-justice-judgment-on-preliminary-objections/> at 18.

[79] At [100].

[80] At [101].

[81] The states are separated by over 11,000 kilometers and two oceans.

[82] At [102].

[83] At [103].

[84] At [104].

precludes Gambia or any other state from holding Myanmar responsible. Finally, Bangladesh waiving its Article IX rights has no bearing on Gambia's ability to lay a claim.[85] The Court's jurisdiction over a dispute between two states under the Genocide Convention depends only on whether either party has an Article IX reservation against ICJ jurisdiction. Neither Gambia nor Myanmar have such a reservation.

D Judgments

The ICJ decided 15 votes to one against Myanmar's preliminary objection to Gambia's legal standing.[86] The majority decision was supported by President Donoghue, Vice-President Gevorgian, Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Noltie, Charlesworth, and Gautier JJ. They upheld that Gambia does have standing to bring a third-party genocide *erga omnes* obligations claim before the ICJ and soundly rejected Myanmar's arguments. Interestingly, Judge *ad hoc* Kress released a supporting declaration despite being Myanmar's ICJ judge. Judge Xue released the sole dissenting opinion.

1 Majority Decision

The majority decided that Gambia had standing before the ICJ on a third-party *erga omnes* obligations claim regarding Myanmar's alleged genocide of the Rohingya.[87] This procedural decision did not examine if Myanmar had committed genocide. Their decision used the principles established throughout the previous 78 years to clarify the scope of third-party fundamental human rights *erga omnes* obligation claims. The majority especially came to their decision through developing the principles established in *Belgium v Senegal*. The Genocide Convention does not have a universal jurisdiction clause like UNCAT, but this decision also found that the Genocide Convention's purpose and core obligations were analogous to UNCAT.[88]

[85] At [105].
[86] At [115].
[87] At [114].
[88] At [108].

The majority implicitly applied Hamid's *Belgium v Senegal* inferred test to the facts of *Gambia v Myanmar* to reach their decision.[89] Hamid's first limb is satisfied because the Genocide Convention's objective and community interest is genocide's prevention and punishment.[90] The second limb is satisfied as the obligation at issue is holding Myanmar responsible for its "clearing operations" of the Rohingya. This is closely related to the purpose of punishing genocide.[91] *Belgium v Senegal* found that a human rights convention's purpose and common interest must be examined to establish if its obligations created standing for a third-party fundamental human rights *erga omnes* obligations claim.[92]

The *Gambia* majority affirmed that third-party fundamental human rights *erga omnes* obligation claims were possible when a convention had a "purely humanitarian and civilising objective", and the obligation in dispute was central to the convention's core.[93] They examined how a community interest at the convention's core can change the requirement that a state's actions specially injure another state for a claim before the ICJ.[94] The legal relationship between states regarding genocide is that states do not have their own interests.[95] States are only interested in accomplishing the purposes of the Genocide Convention's *raison d'être*.[96] The Genocide Convention's high purpose and common interest is genocide prevention and punishment. The Genocide Convention's common interest means:[97]

> …any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes* partes. Responsibility for an alleged breach of obligations *erga omnes* partes under the Genocide Convention may

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[89] Hamid, above n 22, at 48.
[90] Genocide Convention, art 1.
[91] Genocide Convention, art 1.
[92] *Belgium v Senegal*, above n 3, at [68].
[93] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, above n 11, at 23 as mentioned in *The Gambia v Myanmar*, above n 1, at [113].
[94] Kronberga, above n 34, at 18.
[95] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, above n 11, at 23.
[96] At 23.
[97] *The Gambia v Myanmar*, above n 1, at [107].

> be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated.

The creation of *erga omnes* obligations provides the foundations for third-parties legal standing before the ICJ in these cases.[98] In line with its common theme, they emphasise that special interest requirements often prevent any state from making a claim to prevent or punish an alleged intrastate genocide.[99] Gambia has no direct disadvantage from Myanmar allegedly committing genocide on the Rohingya. However, ignoring Myanmar's alleged breaches of the common interest erodes the Genocide Convention's humanitarian purpose and endangers the indirect benefits for all states.

The majority rejected Myanmar's claim that ARSIWA's Article 44(a) created a nationality qualification that would block Gambia's claim.[100] In third-party *erga omnes* obligations claims, states do not have to prove that any genocide victims are their nationals. Article 44(a) applies to diplomatic protection, where states can take other states to the ICJ for various reasons because the state harmed a person of their nationality.[101] The ICJ previously found that diplomatic protection's scope includes intentional human rights violations.[102] *Gambia v Myanmar's* majority decided that invoking a state's responsibility for genocide under an *erga omnes* obligations breach is distinct from a state's right to claim diplomatic protection, and the nationality rule does not need to apply to these claims.[103]

Article IX's wording is decided as not adding additional conditions to invoke responsibility or admitting a claim before the ICJ.[104] Myanmar had asserted that "…at the request of any parties to the dispute" limited the potential claimants to those directly involved in the alleged events. However, the decision found that this does not limit whom

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[98] At [108].
[99] At [108].
[100] At [109].
[101] *Report on the International Law Commission on the Work of its Fifty-Eighth Session (Draft Articles on Diplomatic Protection with Commentaries)* [2006] vol 2, pt 2 YILC 26 at art 1.
[102] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Preliminary Objections)* [2007] ICJ Rep 2007 at [39].
[103] *The Gambia v Myanmar*, above n 1, at [109].
[104] At [110].

the parties to the disputes are for an alleged *erga omnes* breach amongst parties to the Genocide Convention.[105] Article IX's provision does not state that disputes before the ICJ are only possible between the state breaching the convention and a specially affected state.[106] It only articulates that parties to a dispute can bring the dispute to the ICJ. This is not an exclusionary provision over who the disputed parties are but a clarifying statement that the ICJ is where a dispute is to be brought. The court reached this conclusion by noting no debate was had on this issue at the Genocide Convention's drafting.[107]

This flows to the final point that Bangladesh's Article IX reservation does not limit Gambia's legal standing.[108] Bangladesh has suffered an influx of Rohingya refugees, which has directly injured them because they have had to bear the financial cost of their care.[109] Bangladesh may hypothetically have a stronger claim than Gambia as a "specially affected" state. Bangladesh has an Article IX reservation they have chosen not to set aside to take a case against Myanmar. However, a hypothetical Bangladeshi direct injury claim does not prevent a present Gambian third-party genocide *erga omnes* obligations claim. The ICJ is concerned with the claim before it, not hypothetical claims.[110]

The majority's decision appears to be correct. It follows precedent and is a legally accurate interpretation of the law. *Belgium v Senegal* was sufficiently analogous to the present facts to expand its principles into this case.[111] The ICJ had not been required to state if Belgium was a specially interested party due to the common interest of UNCAT obligations. *Belgium v Senegal* had specifically mentioned that the *erga omnes* nature of

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[105] At [107] and [111].

[106] At [111].

[107] At [111]; and *Official Records of the Third Session of the General Assembly Part 1 Sixth Committee*, above n 14, UN Doc A/C.6/206.

[108] At [99] and [113].

[109] It costs Bangladesh an estimated $80'000'000 per month to host the Rohingya refugees according to Ibrahim Hossain Ovi "How much does it cost to house Rohingya refugees?" (13 September 2017) Dhaka Tribune <https://www.dhakatribune.com/bangladesh/125562/how-much-does-it-cost-to-house-rohingya-refugees>.

[110] *The Gambia v Myanmar*, above n 1, at [111].

[111] At [108]; and Statute of the International Cout of Justice, art 26(3).

UNCAT's core obligations could be carried into the Genocide Convention.[112] Thus, the ICJ could use *Belgium v Senegal* to accept Gambia's claim. The ICJ was not required to state whether Gambia was a "specially interested party" because of the conceptual link between the Genocide Convention's purpose of preventing genocide and Gambia's claim of preventing and holding Myanmar accountable for alleged genocide. *Belgium v Senegal* was a judgment on the merits of Belgium's claims, and this is a procedural judgment, but the ICJ accurately deemed that its legal principles could be transported.[113] The common interest factor is relevant in both cases. Gambia has no direct disadvantage from Myanmar allegedly committing genocide on the Rohingya. However, ignoring Myanmar's alleged breaches of the common interest erodes the Genocide Convention's humanitarian purpose and endangers the indirect benefits for all states. The base principle that fundamental human rights *erga omnes* obligations entitle all states to hold others legally responsible remains.

The distinction between Article 44(a)'s diplomatic protection in ASRIWA and an *erga omnes* obligations claim is also correct. The two concepts' focus differs and does not necessarily negate the other. Diplomatic protection can be claimed for various offences, but legal standing requires a nationality factor.[114] Legal standing on a fundamental human rights *erga omnes* obligation claim is broader as any state party to the convention could be a potential claimant, but *erga omnes* obligations open to third-party claims are fairly rare. The relevant provision for the *Gambia v Myanmar* facts is Article 48(1)(b), as it allows third parties to invoke responsibility on behalf of the international community.[115] Regarding Article IX, this writer believes had it been desired to be an exclusionary provision, Article IX could have said: "…at the request of a directly injured party to the dispute". It did not, so the ICJ rightly concluded that the parties to a dispute could not be limited according to Myanmar's assertion. Finally, it would deny access to justice and

[112] *Belgium v Senegal*, above n 3, at [68].

[113] At [68]; and *The Gambia v Myanmar*, above n 1, at [108].

[114] *Draft Articles on Diplomatic Protection with Commentaries*, above n 101, art 2 has no restriction on diplomatic protection if its qualification requirements are followed.

[115] *Articles on the Responsibility of States for Internationally Wrongful Acts 2001*, above n 3, at art 48(1)(b).

prevent the Genocide Convention's purpose if states could be refused legal standing before the ICJ because a geographically closer state reserves against ICJ jurisdiction.

The majority erred in not guiding future ICJ Benches on the policy balancing act between protecting the international community's common interests versus preventing an unmanageable proliferation of disputes. This is a legal and policy issue that future Benches require guidance on. Part IV examines this in detail.

2 Judge ad hoc Kress's declaration.

Judge Kress was Myanmar's *ad hoc* judge on the ICJ Bench. Nonetheless, he concurred with the majority that Gambia did have standing in this case in his declaration.[116] He found that it was unnecessary for Gambia to prove any individual legal interest to establish legal standing before the ICJ in this third-party genocide *erga omnes* obligations claim.

Judge Kress agreed that *Gambia's* legal relationships were sufficiently analogous to *Belgium v Senegal* and thus have the same legal obligations.[117] The pursuit of collective interests is a collective obligation of individual states.[118] There is no distinction in international law between the international community's common interest in genocide prevention and an individual state's legal standing before the ICJ.[119] A legal framework to pursue collective community interests and enforce their obligations has been created through *Belgium v Senegal* and *Gambia v Myanmar*. The fact that *Belgium v Senegal* examines torture and *Gambia v Myanmar* examines genocide is irrelevant, as the legal framework is the same. Finding a separate legal standing is unnecessary once an international community interest has been established.

He clarified that a human rights common interest could create *erga omnes* obligations claimable by a third party in the ICJ if it protects a fundamental common value tied to the

[116] *The Gambia v Myanmar*, above n 1, at [6] per Judge *ad hoc* Kress.
[117] At [13] per Judge *ad hoc* Kress
[118] At [13] per Judge *ad hoc* Kress.
[119] At [14] per Judge *ad hoc* Kress.

convention's purpose.[120] The Genocide Convention's fundamental common value is protecting the continued existence of vulnerable groups, and its purpose is endorsing fundamental humanitarian and civilising principles to prevent genocide.[121] Breaches of *erga omnes* obligations must be brought to the international community's attention. This could be through a state holding an individual criminally responsible for commissioning genocide or a third-party fundamental human rights *erga omnes* obligations claim against a state.

Judge Kress's declaration is not perfect, but it is a useful and predominantly sound clarification of the law that supplements the majority decision. Judge Kress helpfully considers the policy of protecting the international community's interests. This is analysed in Part IV of this paper.

3 Judge Xue's dissenting opinion.

Judge Xue disagreed with the majority. She found that Gambia had no legal standing before the ICJ.[122] Judge Xue is a Chinese judge who reflects China's conservatism toward ICJ expansion. [123]

The issue to her depended on whether general *erga omnes* obligations enforceability existed in 1948. She argued that the signatories would not have considered *erga omnes* obligations in the Genocide Convention's formation, and the majority's interpretation of *"*…at the request of any of the parties to the dispute" unduly expands Article IX's scope.[124] Article IX must be interpreted through the Genocide Convention's signatories' original intentions.[125] Factors to consider when doing this are the Genocide Convention's

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[120] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 11, as mentioned at [17] per Judge *ad hoc* Kress.

[121] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 23 as mentioned at [17] per Judge *ad hoc* Kress.

[122] *The Gambia v Myanmar*, above n 1, at [1] per Judge Xue.

[123] She previously dissented to expanding *erga omnes* obligations in *Belgium v Senegal*, above n 3, at [18] per Judge Xue.

[124] *The Gambia v Myanmar*, above n 1, at [16] per Judge Xue.

[125] At [16] per Judge Xue.

origin, character, objective, the UNGA and individual state's objectives in 1948, and the relationship between each Article and the overall objective.[126]

The concept of e*rga omnes* obligations had not been established at the 1948 Genocide Convention drafting and thus could not be found within any of those factors.[127] Furthermore, the UNGA accepted India's amendment to Belgium and Britain's Article IX submission to change Article IX's wording from "…any High Contracting Parties" to "…parties to the dispute" to limit further "disputes" scope.[128] The drafters would have had "disputes" ordinary international law meaning of direct state-v-state disputes in their minds.

This writer believes her legal reasoning is unconvincing because she seems to ignore all post-1948 developments. Specifically, she decided that *Belgium v Senegal* could not be considered a precedent because Belgium was a "specially affected state", and UNCAT allowed universal jurisdiction.[129] This ignored that the ICJ had said Belgium's standing was irrelevant and that the ICJ specified that the Genocide Convention was analogous to UNCAT. [130] Her warning of unmanageable dispute proliferation if these claims are over-indulged is valid.[131] Her points are examined when considering the policy of preventing unmanageable dispute proliferation.

IV The Policy Balancing Act: The International Community's Common Interests v Preventing Unmanageable Dispute Proliferation

The ICJ's primary role is to ensure that states respect international law. The ICJ must be aware of the positive and negative implications of accepting third-party fundamental human rights *erga omnes* obligations claims. These claims require a delicate policy

[126] At [18] per Judge Xue.

[127] At [18] per Judge Xue.

[128] *Official records of the 3rd session of the General Assembly* UN Doc A/C/SR.103 9 (12 November 1948) at 437 – 438 mentioned at [20] per Judge Xue; and Genocide Convention 1948, art 9.

[129] At [37] per Judge Xue.

[130] *Belgium v Senegal*, above n 3, at [68].

[131] At [39] per Judge Xue and discussed in Xiao Mao "Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case" (2022) 21(3) CJIL 589 at 592.

balancing act between protecting the international community's common interests versus preventing an unmanageable dispute proliferation in the ICJ.

The law needs clear guidance on balancing these competing policy objectives, which the majority failed to provide. Judge *ad hoc* Kress and Judge Xue briefly examine one side of this balancing act.[132] This writer views them as the most important but underdeveloped sections of their decisions. The ICJ overbalancing in either direction would negatively affect the ICJ, international law, and the international community's common interests. Over-restriction could prevent legally valid claims from being heard on genuine fundamental human rights breaches, but under-restriction would handbrake the wheels of justice by clogging the ICJ. Most, if not all, human rights conventions include non-reciprocal *erga omnes* obligations.[133] Many general multilateral conventions and treaties have non-reciprocal obligations central to their objectives.[134] The ICJ must demarcate between third-party fundamental human rights *erga omnes* obligation claims that should be heard to protect the international community's common interests and those that will unjustly clog the wheels of justice.[135] Future ICJ Benches require guidance that *Gambia v Myanmar* failed to provide. This paper will analyse the balancing act for the ICJ as it is central to the policy and law of third-party fundamental human rights *erga omnes* obligations claims.

A Protecting the International Community's Common Interests

One side of the policy balancing act is protecting the international community's common interests. International law's conceptual foundation is state-to-state relations with individual states' interests and injuries as its key tenets. However – as mentioned earlier – the international community has common interests protected by international conventions.[136] The function of community interest litigation is to promote the realisation

[132] At [33] per Judge *ad hoc* Kress, at [39] per Judge Xue.
[133] Hamid, above n 22, at 49.
[134] Hamid, above n 22, at 49.
[135] Hamid, above n 22, at 51.
[136] Genocide Convention 1948, art 1.

of the community's values.[137] This can be difficult as community interest litigation assumes the existence of a "value-homogenized community" and the "centrality of adjudication" in the law's understanding and function.[138] General international law has neither, and it is difficult to definitively determine the international community's common interests.[139] However, the international community's common interests may not have to derive from every state's consent but from the values found in international conventions.[140] All states directly or indirectly benefit when the community interests are protected because of the stability they provide. Individual states who violate the legally protected common interests indirectly affect the whole international community's ability to enjoy the interest's benefit, even without any "specially affected" states of the violation.

No state could hold Myanmar to account following traditional state-v-state ICJ disputes for the alleged internal genocide of the Rohingya.[141] However, Myanmar's alleged actions affect the stability of the international system and erode minority protections. Third-party fundamental human rights *erga omnes* obligation claims can protect the international community's common interests. They can also provide a voice for persecuted sub-state groups like the Rohingya, who cannot represent themselves before the ICJ.[142] The inability of any other state to submit a direct injury claim for Myanmar's alleged internal genocide was central to the majority's reasoning to allow Gambia's claim.[143] Regardless of what will happen in the merits stage, had the ICJ barred itself from any investigation of the alleged breaking of *erga omnes* obligations, other states might have been empowered to erode protections of their vulnerable minorities.

Judge *ad hoc* Kress and Md Rizwanul Islam view it as a relatively low risk that states will arbitrarily make ICJ claims to protect communities that are not their nationals to

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[137] Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 606.
[138] At 606.
[139] At 601.
[140] At 602.
[141] Kronberga, above n 34, at 1.
[142] Statute of the International Cout of Justice, art 34.
[143] *The Gambia v Myanmar*, above n 1, at [108].

purposely clog the ICJ.[144] States are diverse entities that must balance competing socio-economic, legal and political considerations before committing the resources to make an ICJ claim.[145] States have previously been unenthusiastic to claim on *erga omnes* obligations violations without a special interest in the violation.[146] Gambia's claim is the first such claim for genocide since the Genocide Convention's formation, and it is unlikely that many more states will go through the effort on behalf of unconnected third-parties. States often do not make ICJ claims even when they are the victims of an international law violation themselves.[147] Judge *ad hoc* Kress did not adequately confront the risk of proliferation in enough depth, but this writer does concur that the non-legal practical realities of the cost and time of a claim will likely stop most third-party fundamental human rights *erga omnes* obligations claims before they are ever submitted to the ICJ.[148] States are unlikely to waste their time and resources treading the same ground as a previous claim or on a vague allegation.

A rise in third-party fundamental human rights *erga omnes* obligations claims could be a symptom of increased access to justice instead of meaning states are abusing the ICJ.[149] Alleged genocides on a state's own minority may now be claimed against where justice was formerly unattainable. This would be a positive development and empower the ICJ to protect the international community's common interests.

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[144] Md Rizwanul Islam "Not an Overreach of the Court's Jurisdiction, Putting *Erga Omnes* into Motion: In Partial Response to Xiao Mao's Comment on the ICJ's Judgment on the Preliminary Objections in The *Gambia v. Myanmar*" (2022) 21(3) CJIL 611 at [7].

[145] At 613.

[146] *The Gambia v Myanmar*, above n 1, at [33] per Judge *ad hoc* Kress.

[147] Islam "Not an Overreach of the Court's Jurisdiction, Putting *Erga Omnes* into Motion: In Partial Response to Xiao Mao's Comment on the ICJ's Judgment on the Preliminary Objections in The *Gambia v. Myanmar*", above n 144, at [7].

[148] *Bosnia v Serbia* took 15 years from first filing a case against Serbia in 1993 to issuing the final judgments on the merits in 2007.

[149] Islam "Not an Overreach of the Court's Jurisdiction, Putting *Erga Omnes* into Motion: In Partial Response to Xiao Mao's Comment on the ICJ's Judgment on the Preliminary Objections in The *Gambia v. Myanmar*", above n 144, at [7].

B Preventing Unmanageable Dispute Proliferation

The other policy consideration is preventing a potentially unmanageable proliferation of disputes. Unrestricted third-party fundamental human rights *erga omnes* obligations claims would handbrake the ICJ's ability to fulfil its primary role as a state-v-state dispute arbiter and erode trust in the ICJ. This point is the strongest of Judge Xue's reasons for dissent.[150] She correctly warns that the meaning of "common interests" becomes more ambiguous the wider *erga omnes* obligations are accepted to exist.[151] This is already happening. Belgium's legal standing in *Belgium v Senegal* was accepted based on UNCAT's universal jurisdiction clause. [152] The Genocide Convention has no universal jurisdiction, but the majority decided in Gambia's favour on a general statement that it was in the international community's common interest and that the Genocide Convention had a "civilising and humanitarian purpose".[153] Xiao Mao noted that states being inferred to have standing before the ICJ from a community common interest alone entails risks of subjectivity and overreach.[154] The definition of the community interest's scope and what type of interests sufficiently establish standing is unclear.[155] The phrase "common interest" is in multiple multilateral conventions, but that does not mean all obligations within those are *erga omnes* obligations that are – or should be – enforceable by a third party before the ICJ.[156] Common interests are identifiable in everything from lesser human rights to disarmament or environmental protection.[157] Widening third-party

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[150] *Gambia v Myanmar*, above n 1, at [39] per Judge Xue.

[151] JA Carrillo-Salcedo "Review of The Concept of International Obligations *Erga Omnes* by M. Ragazzi" (1998) 92(4) AJIL 791 at 792.

[152] Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 592.

[153] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, above n 11, at 23 as mentioned in *Gambia v* Myanmar, above n 1, at [113].

[154] Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 596.

[155] At 596.

[156] At 597.

[157] *The Gambia v Myanmar*, above n 1, at [39] per Judge Xue; Jonathan Black-Branch "Obligations *Erga Omnes*: The Missing Link for Nuclear Nonproliferation and Disarmament Compliance" in *The Treaty on the Prohibition of Nuclear Weapons: Legal Challenges for Military Doctrines and Deterrence Policies* (Cambridge University Press, Cambridge, 2021) 340 at 354; *Draft Articles on Responsibility of States for*

fundamental human rights *erga omnes* obligations claims that much endangers the ICJ's legitimacy. States could abuse the legal system by taking other states to the ICJ for frivolous or politically motivated reasons, even if no real dispute exists between them.[158] States could also abuse the system by re-litigating the same allegation as another state's previous claim with the same evidence if Myanmar – or a similar state – wins at the merits stage.[159] This is prima facie possible as ICJ decisions only bind that case's parties.[160] Even an influx of genuine but vague claims would severely inhibit the ICJ's ability to function by slowing litigation. There is a danger that this will cause states to leave conventions or make reservations against compromissory clauses to avoid being bogged down in litigation.[161] There is also a danger of state vigilantism. Prosper Weil warned:[162]

> …that any state, in the name of higher values as determined by itself, could appoint itself the avenger of the international community. Thus, under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with the loftiest of intentions.

These could all mean that international conventions ultimately fail to protect the international community or alleged victims because fewer states accept ICJ jurisdiction. This is why Judge *ad hoc* Ser in *Belgium v Senegal* called allowing third-party fundamental human rights *erga omnes* obligations claims as the ICJ pulling a "rabbit out

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Internationally Wrongful Acts with Commentary, art 48 commentary at 127; and Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 596.

[158] *The Gambia v Myanmar*, above n 1, at [39] per Judge Xue; and Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 597.

[159] Islam "Not an Overreach of the Court's Jurisdiction, Putting *Erga Omnes* into Motion: In Partial Response to Xiao Mao's Comment on the ICJ's Judgment on the Preliminary Objections in The *Gambia v. Myanmar*", above n 144, at [10]; and Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 599.

[160] Statute of the International Cout of Justice, art 59.

[161] Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 597.

[162] Prosper Weil "Towards Relative Normativity in International Law?" (1983) 77(3) AJIL 413 as discussed in Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 597.

of a hat" and making blunt legal overstatements that inappropriately contravene international law.[163]

C Walking the Policy Tightrope

These policy objectives are of the utmost importance. Keeping the policy objectives balanced requires a nuanced approach to determine when third-party fundamental human rights *erga omnes* obligations claims have legal standing before the ICJ.[164] Judge *ad hoc* Kress suggested that a convention's *erga omnes* obligations available to potential third-party claims should correspond to the *erga omnes* obligations individuals can be held individually criminally responsible for.[165] Only conduct that can be held individually criminally responsible can be the basis for third-party standing to submit a general *erga omnes* obligations claim, like commissioning genocide or acts prohibited under Article III.[166] This could simplify the concept of when a state may be liable, but it may lead to situations where states are inappropriately held to account for an individual's violation of a convention or vice versa.

Xiao Mao suggests that states who bring these cases before the ICJ must prove they do not act for themselves, and all directly impacted states have delegated their power to bring a case before the Court.[167] The binding force of a decision in such litigation should not be limited to the parties before the Court but to all parties.[168] Xiao's solution could prevent frivolous relitigating. However, this solution depends on the definition of "involved state", which is an ambiguous phrase. It is questionable how it would fit into facts involving non-state minorities like the Rohingya.

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[163] *Belgium v Senegal*, above n 3, at [44] per Judge *ad hoc* Ser.

[164] Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 597.

[165] *Gambia v Myanmar*, above n 1, at [17] per Judge *ad hoc* Kress; and Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 599.

[166] Mao "Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case", above n 131, at 599; and Genocide Convention 1948, art 3.

[167] Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 608.

[168] At 609.

The ICJ must be careful not to over-indulge in third-party fundamental human rights *erga omnes* obligations claims. These claims must remain grounded in international law and not edge into general international morals advocacy. That must be left to bodies like the UNGA. States can only be held accountable in the ICJ if they have broken international law. The ICJ must build off the tests in *Belgium v Senegal* and *Gambia v Myanmar* to develop the appropriate scope and qualifications. Judge *ad hoc* Kress mentioned that not every human rights obligation international law recognises is an *erga omnes* obligation.[169] They must be clear when a human rights obligation is an *erga omnes* obligation that could be subject to these types of third-party claims. The ILC seemed fine for the law's scope to widen significantly. However, this writer supports keeping the scope of topics for claims close to *Barcelona Traction's* list of fundamental human rights and for the ICJ to bring Hamid's *Belgium v Senegal* test into a ratio. It is possible that some reform of the ICJ will be required to handle these claims if they increase in frequency.[170]

The ICJ should have provided clear guidance on handling this balancing act between policy objectives. I agree with the ICJ allowing Gambia's claim to continue to the merits stage, but they should have addressed this issue instead of leaving it to a future ICJ Bench.

V Conclusion

This paper examined and critiqued the ICJ's decision on Gambia's legal standing before the ICJ in *Application of the Convention of the Prevention and Punishment of the Crime of Genocide.* First, we examined five key legal developments that preceded this decision. These were Article IX of the Genocide Convention, *South West Africa* decisions, *Barcelona Traction*, ARSIWA's Article 48, and *Belgium v Senegal*. They established the framework for *Gambia v Myanmar*. The legal question in *Gambia v Myanmar* was whether *erga omnes* obligations for alleged fundamental human rights abuses provide

[169] *The Gambia v Myanmar*, above n 1, at [16] per Judge *ad hoc* Kress.

[170] Like reforming the ICJ's judge's role from adversarial to investigative, as discussed in Mao "Public-Interest Litigation before the International Court of Justice: Comment on *The Gambia v Myanmar* Case", above n 131, at 609.

legal standing for a non-injured third-party state before the ICJ. The majority decided that Gambia had legal standing before them as a third-party. Judge *ad hoc* Kress's declaration provided supporting clarifications, such as when a common interest enforceable by a third-party claim could be created. Judge Xue's dissent provided the views of states and judges who oppose this legal development. Gambia's claim will continue to the merits stage.

Allowing Gambia's claim was the correct legal decision by the ICJ. Precedents supported it, and the decision fit within the law's evolution. However, the ICJ majority failed to guide future ICJ Benches on balancing the policies of protecting the international community's common interests against preventing unmanageable dispute proliferation. Judge Kress and Judge Xue briefly touched on either side of the balancing act but failed to analyse both sides adequately. The balancing act is fundamental to the future of third-party fundamental human rights *erga omnes* obligations claims. Not offering guidance on how to weigh these objectives was a significant failure of this decision. A future case will have to fill this hole.

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