DECLARATION OF JUDGE *AD HOC* KRESS

Representation of Myanmar — The Gambia's standing — Point of terminology — The Gambia as a "non-injured State" or as an "injured State" — Concept of préjudice juridique *— Similarity of the present case with the case concerning* Questions relating to the Obligation to Prosecute or Extradite (Belgium *v.* Senegal) *— No need to demonstrate the existence of a separate individual legal interest in order to establish the standing of a contracting State to the Genocide Convention to invoke before the Court the collective interest underlying the relevant obligations of that Convention — Question of the adoption of countermeasures in the case of a violation of an obligation* erga omnes (partes) *not before the Court in the present case — Distinction between the jurisdictional requirement of State consent to jurisdiction and the admissibility requirement of standing in the case of obligations* erga omnes (partes) *works both ways — Inapplicability of the requirement of the nationality of claims in the case of obligations* erga omnes (partes) *— Bangladesh as a "specially affected State"* vel non *— Inability of Bangladesh in the present case to dispose completely of the collective interest protected by the Genocide Convention — No need for use of the term* actio popularis *— Possible need for a balance between the protection of community interests and the risk of proliferation of disputes — Need to show particular sensitivity with a view to ensuring procedural fairness for all parties to proceedings in which the protection of community interests is invoked.*

I. Introduction

1. I voted in favour of all the points contained in operative paragraph 115 of the Judgment. I also concur with the essence of the Court's reasoning. In the following declaration, I shall first make a few observations regarding the change in Myanmar's representation during these proceedings. I shall then elaborate on the Court's reasoning with respect to The Gambia's standing. This will be done in the spirit of contributing to the transparency of judicial reasoning regarding a legal issue which lies at the intersection of procedure and substance and which is of considerable importance[1].

[1] On the particular significance of the transparency of reasoning in contexts of the present kind, see A. Nollkaemper, "International Adjudication of Global Public Goods: The Intersection of Substance and Procedure", *The European Journal of International Law (EJIL)*, Vol. 23, 2012, p. 790.

II. Myanmar's Representation in the Present Proceedings

2. In paragraph 8 of the Judgment, the Court notes that Myanmar replaced H.E. Ms Aung San Suu Kyi as Agent and H.E. Mr. Kyaw Tint Swe as Alternate Agent. The Judgment, however, does not describe the factual background of this replacement. The change in Myanmar's representation during these proceedings was, in fact, one of the consequences of events that took place after the declaration of the state of emergency by the armed forces of Myanmar.

3. These events caused grave concern in the international community. On 4 February 2021, the Members of the United Nations Security Council "expressed deep concern at the declaration of the state of emergency imposed in Myanmar by the military on 1 February and the arbitrary detention of members of the Government, including State Counsellor Aung San Suu Kyi and President Win Myint and others" and "called for the immediate release of all those detained"[2]. This call was reiterated in a statement made by the President of the Security Council on 10 March 2021[3].

In resolution 75/287, adopted on 18 June 2021, the General Assembly of the United Nations,

> "*[e]xpressing grave concern* about the declaration of the state of emergency by the Myanmar armed forces on 1 February 2021 and subsequent actions taken against the elected civilian Government, which also impact regional stability, and stressing its continued call upon Myanmar to act in accordance with the principle of adherence to the rule of law, good governance, the principles of democracy and constitutional government, respect for fundamental freedoms and the promotion and protection of human rights, as also provided for in the Charter of the Association of Southeast Asian Nations,
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> *[e]xpressing deep concern* about the arbitrary detention and arrest of President Win Myint, State Counsellor Aung San Suu Kyi, and other government officials and politicians, human rights defenders, journalists, civil society members, foreign experts and others,
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> *[s]trongly condemning* the use of lethal force and violence, which has led to injuries and fatalities in many cases, against peaceful demonstrators, as well as members of civil society, women, youth, children and others, expressing deep concern at restrictions on medical personnel, civil society, labour union members, journalists and media workers, and people who protect and promote human

[2] Security Council Press Statement on Situation in Myanmar, 4 February 2021, UN press release SC/14430.

[3] UN doc. S/PRST/2021/5.

rights, and calling for the immediate release of all those detained arbitrarily,

. . . . . .

1. *[c]all[ed] upon* the Myanmar armed forces to respect the will of the people as freely expressed by the results of the general election of 8 November 2020, to end the state of emergency, to respect all human rights of all the people of Myanmar and to allow the sustained democratic transition of Myanmar, including the opening of the democratically elected parliament and by working towards bringing all national institutions, including the armed forces, under a fully inclusive civilian Government that is representative of the will of the people;

2. *[a]lso call[ed] upon* the Myanmar armed forces to immediately and unconditionally release President Win Myint, State Counsellor Aung San Suu Kyi and other government officials and politicians and all those who have been arbitrarily detained, charged or arrested, including to ensure their rightful access to justice, and to engage and support the Association of Southeast Asian Nations constructively with a view to realizing an inclusive and peaceful dialogue among all stakeholders through a political process led and owned by the people of Myanmar to restore democratic governance".

4. At the opening of the oral pleadings on 21 February 2022, the President of the Court observed that "the parties to a contentious case before the Court are States, not particular governments". She added that "[t]he Court's judgments and its provisional measures orders bind the States that are parties to a case" (CR 2022/1, p. 11). While I take no issue with this statement, I note that it fails to explain the grounds that led the Court to act upon the replacement described in paragraph 8 of the Judgment. That lack of explanation could give the impression that the replacement was a matter of course. This, however, was not the case, as can be seen, for example, from the fact that on 1 February 2022 the "National Unity Government" announced that it had appointed H. E. U Kyaw Moe Tun, the Permanent Representative of Myanmar to the United Nations in New York, as the Agent of Myanmar in the case[4]. Nor was the replacement self-explanatory from a legal perspective, as the laconic formulation of paragraph 8 of the Judgment might suggest; this is perhaps most immediately apparent from the wording of the sixth

[4] Announcement (2/2022) — Myanmar withdraws all preliminary objections to the International Court of Justice hearing on the genocide case, 1 February 2022, available at: https://gov.nugmyanmar.org/2022/02/01/announcement-2-2022-myanmar-withdraws-all-preliminary-objections-to-the-international-court-of-justice-hearing-on-the-genocide-case/.

preambular paragraph and the second operative paragraph of above-mentioned General Assembly resolution 75/287.

5. In my opinion, under such circumstances, for the Court to proceed in the way that it did is less than satisfactory. On a more general level, I have been left wondering whether it might be appropriate for the Court to reflect on how it deals with factual and legal difficulties in identifying the government of a given State for the purposes of representation in proceedings before the Court, with a view to exploring possible improvements in this regard in the future.

III. The Gambia's Standing

6. In paragraphs 106 to 113 of the Judgment, the Court applies the concept of obligation *erga omnes partes* to the relevant obligations of the Genocide Convention in order to explain The Gambia's standing in the case. Here too, I agree with the essence of the Court's reasoning. However, in view of the considerable significance of this aspect of the Judgment, I wish to elaborate on it a little further.

1. A Point of Terminology

7. I shall begin with a point of terminology. In the present case, The Gambia alleges the violation of an obligation *erga omnes partes*, but it does not claim to have been specially affected by that violation. While Myanmar refers to The Gambia as a non-injured State (CR 2022/1, p. 28, paras. 7-8 (Talmon)), The Gambia describes itself as an injured (though not specially injured) State (Written Observations of The Gambia on the Preliminary Objections Raised by Myanmar (hereinafter "Written Observations of The Gambia"), paras. 3.9 and 3.52). In order to better understand the Parties' divergent uses of the term "injured State", it is helpful to refer to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"). Articles 42 and 48 of the ILC Articles on State Responsibility distinguish between an "injured State", on the one hand, and a "State other than an injured State" which is entitled to invoke the responsibility of another State resulting from that State's violation of an obligation *erga omnes (partes)*, on the other.

8. Myanmar's qualification of The Gambia as a "non-injured" State is in line with the ILC's use of that term: pursuant to the ILC Articles on State Responsibility, The Gambia is a non-injured State because the obligations whose breach it invokes do not fall under any of the cases listed in Article 42 of those Articles, and, in particular, because The Gambia is not specially affected within the meaning of Article 42 *(b)* (i).

9. For The Gambia, however, the violation of an obligation *erga omnes partes* "necessarily injures *omnes partes*" (Written Observations of

The Gambia, para. 3.9). The Gambia thus understands the concept of injury as encompassing injury in a purely normative sense. This wider understanding of the concept of injury was also mentioned during the ILC's work on State responsibility. The reasons in support of accepting the notion of *préjudice juridique* are perhaps most clearly articulated in a study published by Brigitte Stern soon after the adoption of the ILC Articles on State Responsibility. In a similar way to The Gambia in the present proceedings, Stern maintains the following:

> "It seems curious, to say the least, that certain States may be able to invoke the responsibility of another State if they have not been injured. If a State is a beneficiary of an obligation that has been breached, I do not see how it could be considered not to be an injured State."[5]

10. In its jurisprudence to date, the Court has not adopted the ILC's distinction between an "injured State" and a "State other than an injured State" which is entitled to invoke the responsibility of another State resulting from that State's violation of an obligation *erga omnes (partes)*. It has 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* (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68)[6]. Stern has usefully stated the following about an understanding of the term "legal interest" which extends to all instances covered by Articles 42 and 48 of the ILC Articles on State Responsibility: "In simple terms, the legal interest of some States is not the same as the legal interest of others: for some, the legal interest is in ensuring that their rights are not violated; for others, it is in ensuring compliance with the law."[7]

11. In the present Judgment, the Court's use of terms is in keeping with its previous jurisprudence: it has still not adopted the ILC's distinction between an "injured State" and a "State other than an injured State" which is entitled to invoke the responsibility of another State resulting

[5] B. Stern, "Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des Etats", *Annuaire français de droit international (AFDI)*, Vol. 47, 2001, p. 24. *[This and all subsequent quotations from the foregoing publication have been translated by the Registry.]*

[6] The ILC explicitly recognizes the difference between the Court's use of the term "legal interest" and its own use of that term in paragraph 2 of its commentary on draft Article 48:

> "Although the Court [in the *Barcelona Traction* case] noted that 'all States can be held to have a legal interest in' the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as 'interested States'. The term 'legal interest' would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests." (*Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part 2, p. 126.)

[7] B. Stern, *op. cit.*, p. 24.

from that State's violation of an obligation *erga omnes (partes)*; in fact, it has refrained from using the concept of "injured State" at all (see paragraph 106 of the Judgment). This approach is not only sensible for reasons of judicial economy. It is also welcome because the Court's use of the term "legal interest" in a broader sense conveys the community dimension of the concept of obligation *erga omnes (partes)*, and does so in essentially the same way as the concept of *préjudice juridique*. In the words of Stern,

> "recognizing legal injury would have been an even more meaningful step towards a community-based vision than the approach that was adopted, for States would not only have the right to act on behalf of the international community, but could *act on their own behalf by virtue of the fact that they are fundamentally affected by the future of the collective*, i.e. their legal interests are concerned by any violation of an essential norm for the international community, on account of their intimate participation in that community"[8].

2. *A Few Reflections on the Concept of Obligation* Erga Omnes (Partes) *and Its Application in the Present Case*

12. I shall now turn from terminology to the substance of the matter. One argument put forward by Myanmar in order to deny The Gambia's standing consists in attempting to make a distinction between the "common" interest in the accomplishment of the high purposes of the Genocide Convention, on the one hand, and the "individual legal interest" of every State party in compliance with the relevant obligations under the Convention, on the other (CR 2022/1, pp. 28-29, paras. 8-13 (Talmon)). The Court responds to this argument in paragraph 108 of the Judgment and, in doing so, relies on its ruling in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68).

13. Indeed, Myanmar is unsuccessful in its attempts to distinguish between the present case and the one between Belgium and Senegal for the purposes of the present proceedings. While it is true, as argued by Myanmar, that the content of the obligation at issue in the *Belgium* v. *Senegal* case is different to that of the obligation in question in the present case (CR 2022/1, p. 36, para. 49 (Talmon)), this has no bearing: in their crucial respect — the structure of the legal relationship that they establish — the obligations in question do not differ in any meaningful way. Both have been established in the pursuit of a common (or collective) interest and may thus be called collective obligations. And, contrary to Myanmar's assertions (Preliminary Objections of the Republic of the Union of Myanmar (hereinafter "Preliminary Objections of Myanmar"), para. 242), the Court's Judgment in *Belgium* v. *Senegal* cannot be set

[8] B. Stern, *op. cit.*, p. 29; emphasis added.

aside because Belgium also claimed to have a special interest, as the Court recalls in paragraph 108 of the present Judgment. Indeed, the Court explicitly stated in its Judgment in the *Belgium* v. *Senegal* case that the question whether Belgium had such a special interest was immaterial to its determination (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 450, para. 70).

14. In addition, to distinguish between "common interest" and "individual interest" in the way the Court was asked to do by Myanmar would be to fail to take due account of the fact that the international community is not fully institutionalized and that, as a result, individual States have an important function in allowing the "common interest" to be provided with judicial protection[9]. As Brigitte Stern has astutely observed:

> "Indeed, if the existence of collective interests is recognized in the absence of the personification of the international community, it can be considered that each of its constituent parts — i.e. each of the States making up the community — is a custodian of these collective interests and is responsible for ensuring that they are respected by all other States. After all, we speak of *erga omnes* obligations and not *erga totum* obligations!"[10]

15. States may of course decide not to vest the attainment or preservation of a common interest with judicial protection when drafting a convention to one of those ends. But such a decision cannot be presumed. 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. On the contrary, the standing of each contracting State to invoke before the Court a common interest such as that established by the Genocide Convention must be presumed, unless the provisions of the relevant convention indicate otherwise. The approach to the question of standing that the Court chose to adopt in its 1966 Judgment in the *South West Africa* cases is understood by one learned observer to amount to a "presumption against the existence of treaty-based enforcement rights irrespective of individual injury"[11]. If such an overly broad presumption is indeed the judicial message of the Court's 1966 Judgment in the *South West Africa* cases, the

[9] Reference may be made here to G. Scelle's early idea of a *dédoublement fonctionnel* of the State organ in charge; G. Scelle, "Règles générales du droit de la paix", *Collected Courses of the Hague Academy of International Law*, Vol. 46, 1933-IV, p. 358.

[10] B. Stern, *op. cit.*, p. 16.

[11] C. J. Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge University Press (CUP), 2005, p. 69.

present Judgment further consolidates the Court's subsequent departure from the stance it adopted in 1966.

16. This 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 *erga omnes partes*. In view of the fact that the obligations said by The Gambia to have been violated by Myanmar are central to the fulfilment of the common interest underlying the Genocide Convention, the Court was not required to consider the question whether it might be justified to deny the *erga omnes partes* character of an obligation that is markedly peripheral to the fulfilment of a convention's common interest. In particular, the Court did not have to address the question raised by Myanmar (CR 2022/1, p. 30, para. 22 (Talmon)) as to whether the obligation to provide effective penalties for persons guilty of genocide enshrined in Article V of the Genocide Convention possesses an *erga omnes partes* character. However, it must be added here that the question as to whether any obligation enshrined in the Genocide Convention could be devoid of an *erga omnes partes* character should be approached with great caution.

17. In order to establish The Gambia's standing in the present case, the Court was also not required to elaborate in more detail on what it takes for an obligation, enshrined in a convention, to "transcend the sphere of the bilateral relations of the States parties"[12] so as to acquire an *erga omnes partes* character. More specifically, it was not necessary for the Court to look more closely at the concept of "common interest" (or collective interest) as a prerequisite for the presumption mentioned in paragraph 15 above that an obligation possesses an *erga omnes partes* character[13]. For this specific purpose, the common interest must extend beyond the shared interest that all States parties have in the preservation of the legal régime established by a multilateral treaty, because such an interest also exists in instances of what Judge Simma, writing in his scholarly capacity, has called a "multilateral treaty bilateral in application"[14]. The Court referred to a common interest of this kind in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* (*Judgment, I.C.J. Reports 1980*, pp. 42-43, para. 92), for example[15]. The Court has previously made it

[12] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", *YILC*, 2001, Vol. II, Part Two, pp. 126-127, commentary to Article 48, para. 7.

[13] For a helpful typology, see I. Feichtner, "Community Interest", R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. II, Oxford University Press (OUP), 2012, pp. 479-481, paras. 13-25.

[14] B. Simma, "From Bilateralism to Community Interest in International Law", *Collected Courses of the Hague Academy of International Law*, Vol. 250, 1994, p. 336, para. 92.

[15] P. d'Argent, "Les obligations internationales", *Collected Courses of the Hague Academy of International Law*, Vol. 417, 2021, pp. 61-62, para. 77.

abundantly clear that the Genocide Convention serves a much more pronounced common interest in that it recognizes and protects a fundamentally important common value[16]. In particular, the Court has already affirmed that the Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose" and that "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Moreover, the Court has already determined that the outlawing of genocide has given rise to obligations not only *erga omnes partes* but towards the international community as a whole, i.e. obligations *erga omnes* (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33-34). In this connection, it may be added that the interest of the international community as a whole is of such weight that the prohibition of genocide constitutes a peremptory norm of general international law (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64). Beyond this, the commission of genocide directly engages the criminal responsibility of the individual concerned under customary international law[17]. Hence, the outlawing of genocide, in addition to establishing obligations incumbent on States towards the international community as a whole, has created obligations for individuals, compliance with which is sanctioned by virtue of a *jus puniendi* that serves, once again, an interest of the international community as a whole. Against this background, the Court was not required, in the present case, to consider the outer limits of the concept of "common interest" for the purpose of recognizing obligations *erga omnes (partes)*.

18. The fact that the Genocide Convention itself opens up a number of different avenues through which to act in the pursuit of the common interest, and that international law, more broadly, envisages even more such avenues, is illustrative of the particular weight of the common interest in question rather than an argument against The Gambia's standing in the present case. While the entitlement of a State party to invoke the responsibility of another State party for an alleged violation of an obligation *erga omnes partes* under the Genocide Convention is not the only way to act in the relevant common interest, a State's entitlement to seek judicial protection before the Court significantly complements the other avenues through which it may uphold that interest.

[16] In this regard, see I. Feichtner, *op. cit.*, p. 481, para. 22.

[17] See United Nations General Assembly resolution 96 (I) of 11 December 1946, entitled "The Crime of Genocide", para. 1.

3. The Institution of Judicial Proceedings and the Adoption of Countermeasures

19. Another argument put forward by Myanmar to deny The Gambia's standing consists in contending that the right to invoke the responsibility of another State must not be confused with the "fundamentally different" right to enforce such a responsibility "by bringing a case before the Court" (Preliminary Objections of Myanmar, para. 218). In response to this argument, the Court observes, in paragraph 108 of the Judgment, that "[r]esponsibility for alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court". To this, it may be added that Myanmar's attempts, for the purposes of its argument, to assimilate the institution of proceedings before the Court to the adoption of countermeasures (Preliminary Objections of Myanmar, para. 228) is misplaced in view of the clearly distinct character of these two courses of action. It is true that it is neither uncommon nor wrong to say, as Myanmar does (*ibid.*, para. 218), that "bringing a case before the Court" constitutes a form of "enforcing" the international obligation allegedly violated by the respondent State. In the present context, however, this use of the term "enforcement" in so wide a sense as to encompass adjudication lends itself to misunderstanding, if the significant differences that exist between adjudication and coercion are not highlighted at the same time[18]. In this context, it bears emphasizing that the question of the adoption of countermeasures in the event of a violation of an obligation *erga omnes (partes)* was not before the Court in the present case.

4. The Jurisdictional Requirement of Consent and the Admissibility Requirement of Standing

20. At this juncture of the analysis, it is useful to recall that, according to the Court's earlier jurisprudence, the distinction between the jurisdictional requirement of State consent to jurisdiction and the admissibility requirement of standing also applies in the case of an obligation *erga omnes (partes)* (see, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64). This distinction works both ways: just as the existence of obligations *erga omnes partes* does not preclude the entering of a reservation to a compromissory clause contained in a convention, neither does

[18] For a similarly broad use of the term "enforcement", but with due regard for the significant differences between what he calls "public interest litigation" and "coercive responses", see C. J. Tams, "Individual States as Guardians of Community Interests", U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, OUP, 2011, pp. 382-392.

the possibility to enter a reservation to a compromissory clause contained in a convention preclude the characterization of obligations contained in the same convention as applying *erga omnes partes*[19].

21. In the latter case, the option to enter a reservation simply means that every State party to the convention concerned is in a position to prevent, by way of a reservation, its responsibility for the violation of an obligation *erga omnes partes* being invoked through the institution of proceedings before the Court, without this in any way contradicting the *erga omnes partes* nature of the obligation in question (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, declaration of Judge Donoghue, pp. 588-589, paras. 16-17; but see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, separate opinion of Judge Xue, p. 34, para. 6).

22. In recognizing The Gambia's standing, the Judgment does nothing to depart from this jurisprudence. Therefore, Myanmar's reference to the Court's previous observation that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29, quoted in Preliminary Objections of Myanmar, para. 219), while being correct in and of itself, is immaterial to the question of The Gambia's standing.

5. A Few Reflections on Myanmar's Reference to Paragraph 91 in Barcelona Traction

23. In paragraph 109 of the Judgment, the Court rightly states that "[f]or the purpose of institut[ing]. . . proceedings before the Court, a State does not need to demonstrate that any victims of an alleged breach of obligations *erga omnes partes* under the Genocide Convention are its nationals".

24. In support of its argument to the contrary, Myanmar refers to the Court's previous observation that, "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 47, para. 91).

25. I do not consider this observation in *Barcelona Traction* to have been worded in a felicitous manner: because of its broad formulation, it could be construed as suggesting that the human rights obligations

[19] For a useful exposition of the legal situation, see P. Urs, "Obligations *erga omnes* and the question of standing before the International Court of Justice", *Leiden Journal of International Law*, CUP, Vol. 34 (2), 2021, pp. 518-520.

enshrined in universal instruments do not possess an *erga omnes partes* character. If interpreted in such a manner, it would, however, be difficult to reconcile this passage in the *Barcelona Traction* Judgment with the Court's earlier pronouncement in the same Judgment that "the principles and rules concerning the basic rights of the human person" are obligations *erga omnes* (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33-34)[20]. Moreover, if interpreted in such a manner, the observation in paragraph 91 of the *Barcelona Traction* Judgment would be contrary to the position adopted by the Human Rights Committee of the United Nations in General Comment No. 31, which is worded in the following terms:

> "While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."[21]

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[20] B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, A. Pedone, 1973, pp. 85-87.

[21] General Comment No. 31 (80), The Nature of the General Legal Obligation

Paragraph 91 of the *Barcelona Traction* Judgment should therefore not be interpreted so as to deny the possibility that human rights obligations enshrined in universal instruments possess an *erga omnes partes* character. Instead, it should be understood as an imperfectly worded reference to the limitations that exist under certain universal human rights instruments with a view to the possibility of instituting judicial proceedings for an alleged violation[22]. When viewed in this way, it becomes clear that Myanmar's reference to paragraph 91 of the *Barcelona Traction* Judgment fails to appreciate that the Genocide Convention is different from two of the main universal instruments to which the Court alludes — namely, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights — in at least one important respect. Article IX of the Genocide Convention provides for a compromissory clause. For this reason, the Genocide Convention is, for the purposes identified by Myanmar, much more comparable, as regards the inapplicability of the nationality of claims rule, with the regional human rights instrument explicitly mentioned by the Court in the *Barcelona Traction* case:

> "It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim." (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 47, para. 91.)

It should be noted in passing that, with respect to the human rights obligations enshrined in the European Convention on Human Rights, Henri Rolin spoke of obligations *erga omnes* as early as 1956[23].

Imposed on States Parties to the Covenant, adopted on 29 March 2004, 2187th meeting, UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, pp. 1-2, para. 2.

[22] F. Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales*, Presses universitaires de France (PUF), 2004, pp. 77-78; in the same sense, see "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, 13 April 2006, UN doc. A/CN.4/L.682 and Add. 1, *YILC*, 2006, Vol. II (2: Addendum), p. 82, paras. 399-400.

[23] H. Rolin, "Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'Homme", *Revue hellénique de droit international*, Vol. 9, 1956, p. 8.

6. A Few Reflections on Paragraph 113 of the Judgment (Myanmar's Argument Based on Bangladesh's Reservation to Article IX of the Genocide Convention)

26. With respect to Myanmar's argument based on Bangladesh's reservation to Article IX of the Genocide Convention, the Court observes in paragraph 113 of the Judgment that Bangladesh has faced a large influx of refugees. The Court goes on to say the following: "However, this fact 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 and therefore does not preclude The Gambia's standing in the present case." This sentence is as correct as it is condensed.

27. There are three possible explanations for this sentence. The first is that Bangladesh, despite having faced a large influx of refugees, does not have a special legal interest entitling it to invoke Myanmar's responsibility for alleged violations of the Genocide Convention and that any question of Bangladesh's standing taking priority over the standing of The Gambia thus does not arise. The second possible explanation is that Bangladesh does have a special legal interest but that The Gambia's standing is not dependent on that of Bangladesh. The third possible explanation is a cumulation of the previous two, i.e. that Bangladesh does not have a special legal interest but, even if it did, The Gambia's standing would not be dependent on that of Bangladesh. The Judgment is silent in respect of these three possible explanations. However, since I deem the legal questions concerned to be important, I wish to offer my views on them.

28. When addressing the question as to whether Bangladesh has a special legal interest entitling it to invoke Myanmar's responsibility for alleged violations of the Genocide Convention, it is useful to consider the concept of "specially affected State", even though the Court does not make use of it in the present Judgment. Judge Simma, once stated in respect of Article 60, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties — where this concept appears — that "the use of the term 'a party specially affected by the breach' gives rise to very intricate problems that were taken up again by the International Law Commission in the course of its work on State responsibility"[24]. Indeed, the intricacies that arise in applying the above-mentioned term in the present case reveal themselves on a closer reading of the ILC's commentary on the concept of "specially affected State" within the meaning of Article 42 *(b)* (i) of the ILC Articles on State Responsibility. The ILC has the following to say about the meaning of the concept of "specially affected State":

> "Like article 60, paragraph 2 *(b)*, of the 1969 Vienna Convention, subparagraph *(b)* (i) does not define the nature or extent of the spe-

[24] B. Simma, *op. cit.*, p. 350, para. 101.

> cial impact that a State must have sustained in order to be considered 'injured'. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."[25]

The references in this citation to the factual circumstances of the individual case are of fairly little assistance when there is no criterion guiding the identification of the relevant factual circumstances. The one criterion that the ILC does offer is that of "the object and purpose of the primary obligation breached", and this is indeed a helpful criterion. If applied to the present case, it gives rise to the question whether the influx of refugees into Bangladesh is a consequence of the type that the prohibition of genocide is specifically intended to prevent. One can also put the same question in slightly different terms: does the flight of large numbers of human beings under genocidal attack to a particular State turn that asylum State into a direct victim of genocide? The answer is far from obvious. If the object and purpose of the prohibition of genocide is simply to prevent protected groups of human beings from being destroyed, then the answer has to be in the negative. In that event, only those groups and the human beings composing them could be direct victims of genocide[26]. But what if one were to go further and say that 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 is also an object and purpose of the prohibition of genocide[27]? In that event, Bangladesh would have to be considered a direct victim and hence a State specially affected by Myanmar's alleged genocide. This is a step I am very reluctant to take given the Court's previous ruling that the Genocide Convention "was adopted for a *purely* humanitarian and civilizing purpose" and that "[i]n such a convention the contracting States do *not* have *any* interests *of their own*" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; emphasis added)[28]. I therefore harbour considerable doubt as to whether Bangla-

[25] *YILC*, 2001, Vol. II, Part Two, p. 119, para. 12.

[26] For the proposition that "not every obligation in the collective interest will have a primary victim", see J. Crawford, *State Responsibility: The General Part*, CUP, 2013, p. 546.

[27] One could also ask the question, not relevant here, whether in a case where a State commits genocide to the detriment of a protected group of persons with foreign nationality, the national State of the targeted group should be considered a direct victim of the genocide, in addition to the targeted group itself and the human beings composing it.

[28] I should perhaps underline that the hesitation that I have just expressed concerns only the question whether one or more States facing a large influx of refugees as a result of the commission of genocide is hereby specially affected by the breach of the prohibition of genocide. It is a different question, and one not to be addressed here, whether States that face a large influx of refugees as a result of the commission of genocide by another State may

desh should be considered a "specially affected State" within the meaning of Article 42 *(b)* (i) of the ILC Articles on State Responsibility. For the same reasons, I am doubtful as to whether Bangladesh — to use to the terminology of the Judgment — has a special legal interest in invoking Myanmar's responsibility for an alleged genocide.

29. Yet even if Bangladesh had such a special legal interest as a consequence of the influx of refugees to that country, in my view, this would not make The Gambia's standing in the present case dependent on that of Bangladesh, and it is ultimately on the basis of this consideration that I agree with the conclusion set out by the Court in paragraph 113 of the Judgment. In the event of a violation of an obligation *erga omnes (partes)*, it is, in my view, generally doubtful whether a State with a special legal interest — or, to use the terminology contained in Article 42 *(b)* (i) of the ILC Articles on State Responsibility, a specially affected State — could ever, on its own, dispose of the relevant collective interest completely[29]. The present case, however, does not call for a statement of such generality. This is because there are two different categories of obligations *erga omnes (partes)*[30]. The first kind of obligations *erga omnes (partes)* are characterized by the fact that the collective interest at stake is mediated through the special legal

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be in a position to invoke that State's responsibility for the breach of another international obligation in order to claim reparation from that State and recover the costs incurred in connection with its reception of and care for the human beings concerned. This latter question has received some useful attention in the international legal doctrine; see, for example, C. Tomuschat, "State Responsibility and the Country of Origin", in: V. Gowland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Legal Issues*, Martinus Nijhoff Publishers, 1996, p. 71; W. Czapliński and P. Sturma, "La responsabilité des Etats pour les flux de réfugiés provoqués par eux", *AFDI*, Vol. 40, 1994, pp. 160-162; H. R. Garry, "The Right to Compensation and Refugee Flows: A Preventative Mechanism in International Law?", *International Journal of Refugee Law*, Vol. 10, 1998, pp. 103-106; L. T. Lee, "The Right to Compensation: Refugees and Countries of Asylum", *The American Journal of International Law (AJIL)*, Vol. 80, 1986, pp. 553-560. It may be added that a similar distinction must be borne in mind with respect to the situation mentioned in the preceding footnote, where a State commits genocide to the detriment of a protected group of persons with foreign nationality. If one did not consider the national State of the targeted group to be a direct victim of the genocide, in addition to the group itself and the human beings composing it, this would not prevent the national State invoking, through the exercise of diplomatic protection, the other State's responsibility for the mistreatment of aliens.

[29] See also G. Gaja, "The Protection of General Interests in the International Community: General Course on Public International Law (2011)", *Collected Courses of the Hague Academy of International Law*, Vol. 364, 2012, p. 104; Pok Yin S. Chow, "On Obligations *Erga Omnes Partes*", *Georgetown Journal of International Law*, Vol. 52, 2021, p. 501.

[30] Not infrequently, reference is made to a third category of obligations *erga omnes (partes)*, the relevant obligations being called "interdependent". This type of obligation *erga omnes (partes)* cannot by definition give rise to the question of priority because, in the case of a violation, all States to which the obligation is owed are affected in a material sense. For a more detailed analysis of this type of international obligation, see P. d'Argent, *op. cit.*, pp. 82-84.

interest of at least one State. The prohibition of the use of force is one example of this type of obligation *erga omnes (partes)*[31]. In the event of a breach of this obligation, the collective interest comes into play through the violation of the special legal interest of at least one direct victim State. In this case, it is not completely misplaced to raise the question whether the State with the relevant special legal interest might be in a position to dispose of the relevant common interest completely. Yet this has no bearing in the present case. Indeed, the obligation *erga omnes partes* at issue here is of a different kind: in the case of the prohibition of genocide, 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. Thus no State is in a position to dispose of the relevant collective interest completely. For this last reason alone, The Gambia's standing in the present case is not dependent on that of Bangladesh.

30. In light of the foregoing, the Court was right to conclude in paragraph 113 of the Judgment that it need not decide whether Bangladesh's reservation to the Court's jurisdiction may be assimilated to a waiver of a relevant claim, a question I would be strongly inclined to answer in the negative. There was even less need for the Court to decide whether a waiver of responsibility is even possible in the case of a violation of a rule of peremptory character[32].

7. In Response to Myanmar's Concerns regarding Possible Wider Ramifications of Admitting The Gambia's Standing in the Present Case

31. In its submissions, Myanmar also voiced concern with respect to the possible wider ramifications of granting The Gambia standing in the present case. It spoke of the danger of "a potentially unmanageable proliferation of disputes" that would result from the Court's admission of what Myanmar has termed The Gambia's "naked form of *actio popularis*" (Preliminary Objections of Myanmar, para. 214). Myanmar also pointed to possible unfortunate procedural consequences, emphasizing, in particular, the possibility, as a result of the *inter partes* effect of the *res judicata* principle pursuant to Article 59 of the Statute of the Court, of repeated applications being brought against the same State (*ibid.*, paras. 344-347).

(a) *On the term* actio popularis

32. As a matter of terminology, I note Myanmar's reference to the

[31] J. Crawford, *op. cit.*, p. 546.

[32] On this question, see *YILC*, 1966, Vol. II, p. 240, para. 5; C. J. Tams, "Waiver, Acquiescence and Extinctive Prescription", in: J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, OUP, 2010, p. 1042.

concept of *actio popularis*. The Court mentioned this term in a well-known dictum contained in paragraph 88 of its Judgment in the *South West Africa* cases *(Ethiopia* v. *South Africa*; *Liberia* v. *South Africa)* (*Judgment, I.C.J. Reports 1966*, p. 47, para. 88) and, not infrequently, the concept is also used by academic writers in connection with the institution of judicial proceedings relating to the alleged violation of an obligation *erga omnes (partes)*[33]. Indeed, it is not far-fetched and may even be useful to consider the Roman law *acquis* with respect to *actiones popularis*[34] when it comes to the question of the institution of judicial proceedings for the alleged violation of an obligation *erga omnes (partes)*[35]. It has, however, also been observed that it is difficult to identify one overarching principle governing the different *actiones popularis* under Roman law[36] and it has been questioned whether the institution of judicial proceedings for the alleged violation of an obligation *erga omnes (partes)* reflects any such principle strongly enough so as to justify the use of the term in that context[37]. In this situation, the Court should remain cautious about using the term *actio popularis* in connection with the institution of judicial proceedings for the alleged violation of an obligation *erga omnes (partes)*. As this latter concept is now well entrenched in the Court's jurisprudence, there is also no need to recognize the term *actio popularis* as a term of art in that context[38]. A very similar sentiment seems to underlie the following statement which was made by Judge Jessup in his

[33] For just a few examples, see F. Ahmadov, *The Right of* Actio Popularis *before International Courts and Tribunals*, Leiden/Boston, Brill/Nijhoff, 2018, pp. 199-201; G. Gaja, *op. cit.*, pp. 110-112; C. J. Tams, "Individual States as Guardians of Community Interests", in: U. Fastenrath et al. (eds.), *op. cit.*, pp. 384 and 387; G. Abi-Saab, "Que reste-t-il du 'crime international'?", in: N. Angelet et al. (eds.), *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Bruylant, 2007, p. 83 (observing that the concept of *actio popularis* bears a resemblance to the concept of *da'awa al hisbah* in Islamic law); W. J. Aceves, "*Actio Popularis* — The Class Action in International Law", *University of Chicago Legal Forum*, Vol. 2003, p. 357.

[34] For this *acquis*, see A. Halfmeier, *Popularklagen im Privatrecht*, Tübingen, Mohr Siebeck, 2006, pp. 29-42; F. Voeffray, *op. cit.*, pp. 6-12; M. Wlassak, "Actio", in: G. Wissowa (ed.), *Pauly's Real-Encyclopädie der Classischen Altertumswissenschaft. Neue Bearbeitung*, J. B. Metzlerscher Verlag, 1894, columns 318-320.

[35] F. Voeffray, *op. cit.*, p. 5.

[36] A. Halfmeier, *op. cit.*, p. 43. It is also not readily apparent that the legal evolution which has taken place at the level of national jurisdictions subsequent to Roman times, could have given rise to a sufficiently clear common understanding of *actio popularis* as a legal concept; see F. Voeffray, *op. cit.*, p. 384.

[37] For a negative answer, see A. Vermeer-Kunzli, "A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*", *International and Comparative Law Quarterly*, Vol. 56 (3), 2007, p. 571; for a more positive view, see F. Voeffray, *op. cit.*, p. 386.

[38] For the same conclusion, see "Troisième question: La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats, treizième séance plénière: mardi 12 septembre (après-midi)", Institut de droit international, *Yearbook*, Vol. 63 (II), 1990, Deliberations, p. 256 (Roberto Ago).

powerful dissenting opinion to the Court's 1966 Judgment in the *South West Africa* cases:

> "I agree that there is no generally established *actio popularis* in international law. But international law has accepted and established situations in which States are given a right of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest." (*(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, dissenting opinion of Judge Jessup, pp. 387-388.)

It is thus with good reason that the Court has refrained from calling The Gambia's course of action an *actio popularis*.

(b) *On a potential proliferation of disputes*

33. Myanmar's concern regarding "a potentially unmanageable proliferation of disputes" is too abstract and speculative to lend itself well to judicial treatment. Nevertheless, I wish to offer a few observations in response. First of all, as has been noted by learned observers, States have hitherto, in the absence of a special interest of their own, been rather reluctant to institute judicial proceedings for the alleged violation of an obligation *erga omnes (partes)*[39]. In the present proceedings, Myanmar has itself submitted that "[i]n the 71 years since the Genocide Convention entered into force, no State has ever tried to bring a claim before the Court concerning a violation of the Convention that did not affect its own interests as a State or those of its nationals" (CR 2022/1, p. 31, para. 24 (Talmon)). Despite what Myanmar suggests, this is not, without further evidence, "indicative that parties do not generally consider themselves to have standing to request the Court to declare that another contracting State is responsible for violations of the Convention in the absence of any individual prejudice to themselves" *(ibid.)*. In my view, it is likely that the sparsity of relevant State practice is, at least partly, explained by non-legal considerations of restraint. Myanmar is of course right to say that the situation might change in the future. But it would have been wrong had the Court, impressed by the concern about an increase of litigation, left the fundamental community interest at issue in the present case without the judicial protection which is due to it under the applicable law[40]. This does not mean closing one's eyes to the possibility that, as stated by Judge Crawford in his scholarly capacity, it may be necessary in the future to "strike a balance between the collective interest in compliance with basic community values and the countervailing

[39] A. Nollkaemper, *op. cit.*, p. 791; C. J. Tams, "Individual States as Guardians of Community Interests", in: U. Fastenrath et al. (eds.), *op. cit.*, pp. 387-388.

[40] For a thoughtful criticism of what he calls "procedure as avoidance", see A. Nollkaemper, *op. cit.*, p. 789.

interest in not encouraging the proliferation of disputes"[41]. In fact, it is not impossible to see, as one learned writer has suggested[42], in cases of the protection of a community value (see paragraphs 20-22 above), the consensual nature of the Court's jurisdiction as one element of a legal architecture that aims to strike such a balance.

(c) *On the possible need for procedural adjustments and the need to ensure procedural fairness for all parties to the proceedings*

34. Finally, Myanmar's reference to Article 59 of the Statute of the Court, while also too far removed from the legal issue of The Gambia's standing to require an answer in the Judgment, does usefully highlight the possibility that the integration of the protection of community interests into the Court's procedural framework may pose certain challenges. The greater reason that such challenges may arise or may already have given rise to "teething problems"[43] lies in the fact that the law governing the Court's proceedings was formulated with a view only to the settlement of traditional bilateral disputes between States and thus reflects — to borrow a term from the title of Judge Simma's magnificent Hague lectures[44] — the "bilateralism" of an earlier configuration of the international legal order[45].

35. On the possible need to consider procedural adjustments in order to address problems resulting from the tension just highlighted, Judge Weeramantry, as early as 1997, offered the following memorable reflection:

> "We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation." (*Gabčíkovo-Nagymaros*

[41] J. Crawford, *op. cit.*, p. 553.

[42] S. Villalpando, "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law", *EJIL*, Vol. 21 (2), 2010, p. 414.

[43] F. I. Paddeu, "Multilateral Disputes in Bilateral Settings: International Practice Lags behind Theory", *The Cambridge Law Journal*, Vol. 76 (1), 2017, p. 4.

[44] B. Simma, *op. cit.*; for another study helpfully developing a panorama of the gradual recognition of community interests and the need for their protection in the international legal order, see S. Villalpando, *op. cit.*, pp. 387-419.

[45] A. Nollkaemper, *op. cit.*, p. 771.

Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, separate opinion of Vice-President Weeramantry, p. 118.)

Article 59 of the Statute of the Court may be seen as a procedural rule in point[46], and how best to deal with a large number of requests to intervene in proceedings for the protection of community interests is another question of potential relevance[47]. This is not the place to consider such issues more closely. Instead, and by way of conclusion, I wish only to make the general observation that it is important to show particular sensitivity with a view to ensuring procedural fairness for all parties to proceedings instituted for the protection of community interests. It is certainly important to provide collective interests, and in particular the core interests of the international community as a whole, with international judicial protection. Yet it is also necessary never to lose sight of the fact that the respondent State whose responsibility for the violation of an obligation *erga omnes (partes)* has been invoked through proceedings before the Court may not be responsible for the alleged violation.

(Signed) Claus KRESS.

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[46] For some initial thoughts, see P. Urs, *op. cit.*, p. 522. It may be worth recalling that, under Roman law, it would appear that an *exceptio rei iudicatae* precluded a subsequent *quivis ex populo* bringing a second *actio popularis* with respect to the same subject-matter; see A. Halfmeier, *op. cit.*, p. 38.

[47] For one suggestion, see G. Gaja, *op. cit.*, pp. 121-122.