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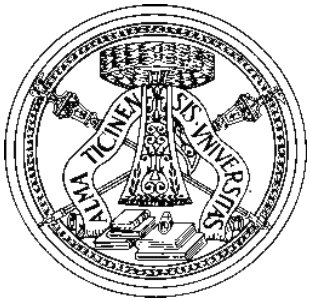

BETWEEN THEORY AND PRACTICE: THE RISE OF *ACTIO POPULARIS* IN THE INTERNATIONAL LEGAL SYSTEM

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INTRODUCTION

Since the establishment of the modern international community, international law has been a closed system, made up on bilateral relationships between sovereign states. However, following the horrors of the Second World War, this paradigm began to change. International law has been more centred on the construction of a "community of values", with the ratification by many members of the international community of Treaties and Conventions whose purpose is safeguarding fundamental human rights.

Some of these human rights have earned such relevance that they have reached the legal status of *jus cogens*, meaning peremptory norms of international law which can never be derogated. While *jus cogens* represents the legal nature of these norms, they are often crystallised in Treaties and Conventions and are referred to as obligations *erga omnes (partes)*, as established by the International Court of Justice (ICJ) in the 1970 Judgment on the *Barcelona Traction* case. Given the fundamental relevance of these obligations, they are owed to the international community as a whole.

The problem with the obligations *erga omnes (partes)* governed in these Treaties and Conventions was that, in most cases, States could not be held accountable for their violation through standard means. In fact, breaches of these obligations are mostly perpetrated by one State towards its own citizens, without directly injuring any other State. These characteristics exclude both the mechanism of diplomatic protection —because a State would not protect its own citizens against its own actions— and legal methods, such as binding arbitration or adjudication by international courts, which traditionally require an "injured State" to seek enforcement.

However, after decades of works, the International Law Commission published in 2001 the *Articles on the Responsibility of States for International Wrongful Acts (*ARSIWA). Article 48 of the ARSIWA governs the possibility for non-injured States to hold other States responsible for serious breaches of international law, such as breaches of *erga omnes (partes)* obligations.

Specifically, this norm enabled, for the first time, claims of *actio popularis* before the ICJ. *Actio popularis* is a legal framework originally designed in Roman Law to allow citizens to initiate a legal action in defence of the public interest. Similarly, Article 48 of the ARSIWA allows non-injured States to initiate legal actions (provided that all the necessary conditions are met) against a State which breached one or more obligations owed to the entire international community, with the purpose of safeguarding the common interest.

This thesis focuses on the development of *actio popularis* in international law.

The first chapter traces the development of the international community, from the post-Westphalian order to establishment of the "community of values".

The second chapter explores the history of the project which led to the 2001 ARSIWA, with a specific focus on Article 48.

The third chapter discusses the legal framework of *actio popularis*, from its origins in Roman Law to its current design before the ICJ. Moreover, it analyses the application of the framework before other regional courts (i.e., the European Court of Human Rights, the Court of Justice of the European Union, the Inter-American Court of Human Rights and in the African Human Rights System).

The fourth chapter focuses on the current, practical application of claims of *actio popularis* before the ICJ. In 2019, with the case *The Gambia v. Myanmar*

on the Application of the Genocide Convention, there was the first case of pure *actio popularis* before the Court, which has already confirmed its *prima facie* jurisdiction and the Gambia's standing. Following this precedent, other cases have been presented before Court, which has already confirmed its jurisdiction and the Applicants' standing. These cases are *South Africa v. Israel* and *Canada and The Netherlands v. Syria*. All the three cases were brought before the ICJ by non-injured States. Nevertheless, they acted to safeguard the common values of the entire international community and to hold accountable those states which, without their intervention, would have breached norms of the Genocide Convention or the Convention against Torture without facing legal consequences. These three cases are deeply analysed in chapter 4, which concludes with a reflection on the importance of this development for the future of international law.

CHAPTER I
EVOLUTION OF THE INTERNATIONAL COMMUNITY AND THE RISE OF UNIVERSAL VALUES

1.1 International Community: evolution from the traditional to the current architecture

1.1.a "Traditional" International Community

Many authors date the origin of the modern international system to the Peace of Westphalia of 1648. The Peace of Westphalia marked the end of the Thirty Years' War in the Holy Roman Empire and is composed of two treaties: the Treaty of Münster and the Treaty of Osnabrück. The first was signed by the Holy Roman Empire and the King of France, while the second was signed between the Holy Roman Empire and the Queen of Sweden.[1] Relevant scholars, such as Leo Gross, have affirmed that the peace of Westphalia represents the "starting point of development of international law".[2]

In his piece *The Peace of Westphalia 1648-1649*, Leo Gross underlines the relevant features brought by the Peace that allowed the development of the international system. These elements include:

i. the laicisation of international law, affirming the principle of toleration through the declaration of equality between Catholic and Protestant

[1] Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth", *International Organization*, vol. 55, no. 2 (2001), p. 266.

[2] Leo Gross, "The Peace of Westphalia, 1648-1948", *The American Journal of International Law*, vol. 42, no. 1 (1948), pp. 20-41.

states;

ii. the declaration that the peace concluded between the states (Holy Roman Empire, France and Sweden) must remain in force and must be protected by those who threaten it;

iii. the institution of rules for the peaceful settlement of disputes between states;

iv. the formulation of individual and collective sanctions against aggressors.

Moreover, Gross underlines that the Peace of Westphalia marks the end of the Medieval order, which was based on the division of spiritual and temporal realms governed respectively by the Pope and the Emperor. This Medieval order was hierarchical, composed of single political entities on one side and the emperor on the other side. In contrast, the Westphalian Order officially marked the adoption of a new set of ideas, based on the co-existence of multiple states equal to one another. The states recognised each other, each sovereign in their territory and free from any external authority.

Not all scholars agree with Gross's vision that the Peace of Westphalia marked a critical turning point in international relations. For example, Osiander, building on the historical elements which originated the Thirty Years' War, affirms that scholars used the Peace of Westphalia to justify the development of elements typical of the modern international system, such as territoriality, sovereignty, equality, and non-intervention. However, Osiander underlines that the actual content of the treaties composing the Peace of Westphalia did not materially set the ground for such concepts. Therefore, he created the term "Westphalian Myth", in order to stress how the Peace of Westphalia was exploited to (incorrectly) justify the creation of certain concepts of international relations.[3]

[3] Osiander, "Sovereignty, International Relations, and the Westphalian Myth", p. 264-266.

Moreover, other authors, such as Fassbeneder, underline that the "Peace of Westphalia" represents, on one hand, the crystallisation of practices occurring long before 1648, and on the other, the partial development of practices that would affirm themselves 200 years later.[4] Another relevant criticism concerning the Westphalian narrative is that the Peace of Westphalia was so narrow in terms of states taking part in it (the Holy Roman Empire, France and Sweden) that some scholars define it more as a "local affair" than a European agreement.[5]

Nevertheless, it is undeniable that the peace of Westphalia is part of a gradual process of development of the International Community which both antedates and continues beyond the year 1648.[6]

Symbolically, the Peace of Westphalia represents an International Community as an inter-State system, based on states' co-existence. This system was based solely on the "synallagmatic" (i.e. bilateral) relations established between two states at a time. This international society was anarchical, as there was no overarching international institution guarding and managing the relationships between states. The most relevant regulating element of this system was *territorial sovereignty*, which guaranteed each State full jurisdiction over its own territory, as delimited by internationally recognised borders. The acquisition of sovereignty originated from the principle known as "*cuius regio, eius religio*" ("whose realm, his religion") according to which states could no longer intervene in other states on the basis of religion. States thus assumed sovereignty over their territories, first in terms of

[4] Bardo Fassbender, "Westphalia, Peace of (1648)", in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011).

[5] Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (London/New York: Verso, 2003).

[6] Gross, "The Peace of Westphalia, 1648-1948", p. 27.

religion and later on other internal affairs.[7] Moreover, the Peace of Westphalia marked the adoption of other important provisions, such as the right of states to negotiate its own treaties and the regulation of intercourses between states.[8] The international system shaped during these centuries was defensive, aimed at the co-existence of states. It did not deny the use of war as a general principle, but it limited the cases according to which the use of force was justified. Indeed, following the Peace of Westphalia, relevant reforms were introduced in war practices, such as the exchange of prisoners or the restriction of soldiers' lawlessness.

Starting in the 18th and 19th centuries, it is possible to witness the rise of international law as we regard to today, originating from the cooperation between states. The diplomatic system was recognised as a matter of modern international society during the Congress of Vienna of 1815, following the French Revolution. The Congress marked the international recognition of, and will to, respect the *principle of the balance of powers*, that recognised the equality of States, the reciprocal independence and the respect of each other's sovereignty, guaranteeing States' survival. The balance between European states was maintained, during the first years following the Congress of Vienna, through the means of "*diplomacy by conference"*, wanted by the Foreign Minister of the United Kingdom, Castlereagh. The idea of "diplomacy by conference" allowed for the creation of the "*Concert of Europe*", according to which the most powerful European states agreed to act in harmony to maintain peace and the re-founded European order.[9] The Congress of

[7] George Lawson, "The Rise of Modern International Order", in John Baylis, Steve Smith, and Patricia Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 1997), p. 6.

[8] John W. Foster, "The Evolution of International Law", *The Yale Law Journal*, vol. 18, no. 3 (1909), pp. 149-164.

[9] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 4th ed. (London: Macmillan, 2012), pp. 3-73.

Vienna and its principles contributed to maintain the balance in Europe for some decades (despite many tensions) given that the first inter-state conflict after 1815 was the Crimean War in 1853.

On occasion of the Congress of Paris in 1856, the representatives of the states taking part agreed to a declaration on leading principles of maritime international law. The text was signed not only by the member states represented in the Congress, but by other states as well. Some states, such as the US and Mexico, did not sign the text, but still complied with its rules in practice.[10]

Starting from the 1860s, States started codifying common norms, mostly regarding laws in wartime. Another relevant step was done in 1871 during the London Conference, where it was declared that States must respect the engagements of signed treaties, and only the consent of the contracting parties can allow for their modification.[11] Moreover, international public and private unions and congresses dealing with different topics, such as economics, politics and social issues, began to be created.

In 1899, the First Hague Peace Conference took place. It was convened by Tsar Nicholas II to seek means of international discussion, peaceful settlement of disputes, and to end the development of aggressive armaments. While the actual limitation of arms production could not be implemented, the United Kingdom and the United States pushed for the creation of a "Permanent Court of Arbitration" to manage judicial arbitrations, especially on the interpretation of treaties. Moreover, states taking part in this conference agreed on two conventions, three declarations

[10] Amos S. Hershey, "History of International Law Since the Peace of Westphalia", *The American Journal of International Law*, vol. 6, no. 1 (1912), pp. 57-58.

[11] *Ivi.*, p. 52.

and several wishes.[12]

In 1907, the Second Hague Peace Conference was held, even if the tension between states was increasing dramatically. Although the Second Peace Conference did not meet all expectations, it was still a success. The content of the First Peace Conference was re-confirmed until the next Peace Conference. Moreover, states agreed on 13 more conventions, some recommendations and wishes.[13]

It is very relevant to keep in mind that the developments and adoption of common legal instruments were extremely Eurocentric. On a global level, European countries were the most powerful states in that period of time. Nevertheless, already during the 19th century, the rise of the United States started to raise doubts about European hegemony. The First World War marked the end of the "European Era" with the rise of new superpowers.

1.1.b The crisis of the Westphalian order

The first decades of the 20th century were characterised by several events which caused a deterioration of the traditional Eurocentric system. The aftermath of the First World War highlighted the declining role of Europe as a superpower while emphasising the central role of the United States. The creation of the Union of Soviet Socialist Republics (i.e. USSR or Soviet Union) in 1917, not only marked

[12] *Ivi.*, pp. 57-58.

[13] 1) Convention for the pacific settlement of international disputes; 2) Convention respecting the employment of force, for the recovery of contract debts; 3) Convention relative to the opening of hostilities; 4) Convention regarding the laws and customs of land warfare; 5) Convention regarding the rights and duties of neutral powers and persons in case of war on land; 6) Convention relative to the status of enemy merchant ships at the outbreak of hostilities; 7) Convention relative to the conversion of merchant ships into war ships; 8) Convention relative to the laying of submarine mines; 9) Convention respecting bombardments by naval forces in time of war; 10) Convention for the adaptation of the principles of the Geneva convention (of 1906) to maritime warfare; 11) Convention relative to certain restrictions oni the exercise of the right of capture in maritime warfare; 12) Convention relative to the establishment of an International Prize Court; 13) Convention respecting the rights and duties of neutral powers in naval war.

the rise of a new superpower, but also challenged the traditional international ideology. Indeed, the Soviet Union was characterised by a partial rejection of the affirmed international law, arguing its roots lay in capitalism, thus opposing to socialism. Moreover, the final waves of colonialism took place, soon followed by the deterioration of colonialism.[14]

At the end of the First World War, a first attempt was made to create an intergovernmental organisation for common security through the establishment of the League of Nations (LoN). The LoN originated under the proposal of the US President Woodrow Wilson. Nevertheless, the United States decided not to take part into the LoN because of domestic matters. The League of Nations was founded in 1919 and it was composed of 42 member states. The League of Nations did not drastically change the international system as established by the peace of Westphalia. In particular, it did not prohibit the war and use of force. However, it introduced a relevant rule regarding the initiation of wars: before resorting to armed force, the parties had to bring the dispute before a court, such as the newly established Permanent Court of International Justice (PCIJ), in an attempt to settle the dispute by peaceful means. The use of force was permitted only three months after the publication of the judgment, and only if the Parties did not comply with it.[15] Nevertheless, the LoN presented several flaws, including that it did not deny the use of coercive measures other than war, it left states a large margin of discretion, and it lacked an enforcement system.

Moreover, states maintained a very "individualist" attitude, being more concerned with domestic interests than with the maintenance of the International Community.

[14] Antonio Cassese, *Diritto internazionale* (a cura di Micaela Frulli), 4a ed. (Bologna: Il Mulino, 2021), pp. 97-99.

[15] *Ivi.*, pp. 358-364.

In an attempt to overcome the flaws of the LoN, in 1928 France and the United States, through the Pact of Paris (also known as "General Treaty for Renunciation of War as an Instrument of National Policy" or "Kellogg-Briand Pact"), tried to introduce the principle of renunciation of war in absolute terms. Again, this pact allowed states too much discretion and was too "abstract" to be applied effectively.[16]

The end of the Second World War was the real turning point of the change. After the atrocities that occurred in the period before and during the conflict, many states agreed on adopting general norms to re-shape the International Community and on establishing international institutions with the power to effectively control and protect the international system. In the aftermath of the conflict, on the 26 June 1945, following the Conference of United Nations for International Organisation, 51 states adopted the Charter of the United Nations, creating the Organisation of the United Nations (UN). The United Nations is an inter-governmental organisation, based on an international treaty concluded by the voluntarily participation of states.[17] The preamble of the Charter begins: "We, the People of the United Nations". This expression stresses the dramatic step forward made by the UN, signifying a genuine consideration of the member states as part of the same community. The focus of the Charter is to shape the International Community on cooperation among states, not merely on their co-existence.

The purposes of the Charter are stated in Article 1. The primary goal is the maintenance of international peace and security through "effective collective measures" and "the adjustment or settlement of international disputes or situations

[16] *Ivi.*, pp. 51-56.

[17] Jean-Pierre Cot, "United Nations Charter", in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011).

which might lead to a breach of the peace". Another purpose concerns the development of "friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples". Moreover, other common goals are the cooperation among member states in solving problems, promoting respect for human rights, and the harmonisation of the actions of members in reaching these common goals. Article 2 affirms the principles that member states and the UN must follow while pursuing the common purposes. These principles include the sovereign equality of States, good faith, the settlement of international disputes by peaceful means, refraining from the threat or use of force, assisting the work of the United Nations in any action taken in accordance with the Charter, the duty to ensure that non-member states act in accordance with the principles as far as is necessary to maintain international peace and security, and principle of non-intervention in the domestic affairs of states.[18]

The institutional framework established by the United Nations was immediately tested by the nuclear bombings of Hiroshima and Nagasaki and the beginning of the Cold War, which essentially divided the world into two parts with very different ideologies. The opposition of the Soviet Union made it difficult for the UN to work as it was originally intended. Nevertheless, the United Nations carried on its work on parallel tracks, mostly driven by the General Assembly which, starting in 1948, began placing human rights at the centre of UN policy.[19]

1.1.c Development of the "community of values"

Traditionally, human rights were considered an international matter only in the context of inter-State violations, meaning that if the rights of a citizen of a certain

[18] *Ibid.*

[19] Cassese, *Diritto internazionale*, pp. 57-61.

State were violated by another State, it was the citizen's own State that could demand compensation for the violation through a diplomatic claim. However, no State could tell another how to treat its own citizens internally. This paradigm shifted dramatically after the Second World War, when the atrocities committed by Nazi Germany and the Communist Soviet Union emerged publicly.[20] These facts led to the establishment of two Tribunals, the Nuremberg International Military Tribunal (to persecute major European war criminals) and the Tokyo Tribunal (to persecute major Far East war criminals), with the objective of trying individuals for crime against peace (i.e. aggression), war crimes, and crimes against humanity (connected with aggression or war crimes). In particular, the Nuremberg Judgment stressed the responsibility of individuals who violated the international law of war, underlining that this type of law continually adapts to the changing world. Moreover, it stressed for the first time that international obligations are owed to individuals because of their human worth, not merely as citizens of a certain State.[21]

The first international text on human rights was the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948. The day after, the United Nations adopted the Universal Declaration of Human Rights (UDHR). Similar instruments were adopted at a regional level: the American Declaration of the Rights of Man in 1948 and the European Convention on Human Rights in 1950. More recently, in 1981 it was the turn of the African Charter on Human and People's Rights, followed in 1994 by the Arab Charter on Human Rights.

[20] Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007), pp. 1-29.

[21] Andrew Clapham, *Human Rights: A Very Short Introduction*, 2nd ed. (Oxford: Oxford University Press, 2015), pp. 27-63.

The 1948 UN Universal Declaration on Human Rights was not intended to freeze the enumeration of human rights. On the contrary, it served as the starting point for the development of a large set of human rights pertaining to many different fields. From 1948 to the present, the UN has adopted more than 300 legal instruments on the protection of human rights.[22; 23]

These instruments, adopted by many of the member states of the United Nations, created a set of common values accepted by the International Community, marking a shift from the classical Westphalian paradigm, which had confined international law to inter-State relations. This shift marked a structural transformation of the International Community: from an order centred on state coexistence to one grounded in cooperation, shared values and in the protection of human dignity.

1.2 Peremptory norms to safeguard international order

1.2.a Jus Cogens

As the protection of fundamental rights became entrenched in both universal and regional instruments, certain core principles emerged as non-derogable expressions of the most essential values of the International Community. These principles take the name of peremptory norms (or *jus cogens*). The International Law Commission (ILC), an institution created by the General Assembly of the

[22] *Ibid.*

[23] Among the most relevant, it is important to mention: the International Convention on the Elimination of All Forms of Racial Discrimination (adopted in 1965), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention of the Elimination of All Forms of Discrimination against Women (1981), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and their Families (1990), the International Convention on the Rights of Persons with Disabilities (2006) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006), UN Declaration on the Rights of Indigenous People (2007).

United Nations in 1947 through the Resolution 147 (II), was the first institution to consider *jus cogens* in its work. The elaboration of the Vienna Convention on the Law of Treaties (VCLT) of 1969 was based on the work of the ILC. For the first time, in Articles 53, 64, and 66, the text of an international legal instrument introduced norms on *jus cogens* establishing that: a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law; if a new peremptory norm emerges, any existing treaty conflicting with it is considered void and terminates; and if a dispute arises regarding the application of these articles and the parties do not jointly decide arbitration, it is automatically referred to the International Court of Justice (ICJ).[24]

The introduction of *jus cogens* in the VCLT was the result of a negotiating process. The first Special Rapporteur to affirm that a treaty must be considered invalid if its object is not lawful was Hersch Lauterpacht. Subsequently, the term *jus cogens* appeared in the Third Report of the Special Rapporteur Gerald Fitzmaurice, using it to define the legality of the object of the treaty and to establish that a treaty contrary to norms of *jus cogens* must not be enforceable. Many people contributed to the draft of *jus cogens* into the VCLT, such as the Special Rapporteur Humphrey Waldock, who introduced the possibility to modify a norm of *jus cogens* by a subsequent norm of international law of the same nature. Moreover, he attempted to create a catalogue of norms of *jus cogens*.[25]

During the drafting of the VCLT, the nature and definition of *jus cogens* sparked intense debate. Strong support for the concept came, in particular, from former colonies and socialist States. The former viewed the introduction of *jus cogens* as

[24] United Nations, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (1969).

[25] Krzysztof Niewęgłowski, "The emergence of *jus cogens* in the Vienna Convention on the Law of Treaties", *Zeszyty Prawnicze BAS*, no. 2(74) (2022), pp. 49-65.

way to continue the fight against colonialism and imperialism. They perceived peremptory norms as a powerful tool to protect their sovereignty against the "unequal treaties" that had often been imposed by Western colonial powers. The latter believed that *jus cogens* norms served as a useful means to crystallise the "rules" of co-existence between Eastern and Western countries, regardless of their different economic and social systems.[26] These principles were affirmed publicly in several occasions by the States, such as by the Representative of Sierra Leone, Romania, Ukraine and Mali at the Conference which led to the adoption of the VCLT in 1969. It is relevant to note that, with the dissolution of colonial empires, most of the new members of the UN which entered in the Organisations during the 1960s were former colonies and developing countries. Therefore, the claims on *jus cogens* made during the Conference represented the ideas and the positions of the majority of UN members.[27]

However, some Western countries were sceptical. They feared that the introduction of such a vague concept as *jus cogens* could threaten the stability of treaty relations.

At the end, States were able to reach a compromise. Western States understood the necessity to accept the position of the majority and agreed to introduce the substantive notion of *jus cogens* (Article 53 of the VCLT) on the condition to adopt a norm that safeguarded the respect of the treaties. This condition led to the adoption of Article 66 (a), which establishes the compulsory jurisdiction of the ICJ to determine the validity of treaties conflicting with peremptory norms.[28]

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[26] Cassese, *Diritto internazionale*, pp. 238-240.

[27] *Ibid.*

[28] Paola Gaeta, Jorge E. Viñuales, and Salvatore Zappalà, *Cassese's International Law*, 3rd ed. (Oxford: Oxford University Press, 2020), chapter 10.

Article 53 of the VCLT defines peremptory norms as:

«[…] a peremptory norm of general international law is a norm accepted and recognized by the International Community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character».[29]

As stated, *jus cogens* norms have non-derogable force, meaning they cannot be abrogated in toto or in part. They can, however, be modified through the adoption of other norms of *jus cogens*. Modification of such norms implies only a broadening of the scope of the norm of *jus cogens*, not a restriction.[30]

The ILC, in its 2022 Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law, stressed in Conclusion 2 the importance of peremptory norms as the reflection and protectors of the fundamental values of the International Community, being universally applicable and hierarchically superior to other norms of international law.

Moreover, in Conclusions 4 to 8, the ILC elaborates on the two necessary criteria for the identification of a peremptory norm.

First, the norm must be a norm of international law. Peremptory norms are mostly identified in customary international law. The possibility to identify *jus cogens* norms in treaties has been under great debate. Nevertheless, it is not the source from which *jus cogens* norms originate to grant them the status of peremptory norms; that status is intrinsic in the norms themselves because it is directly

[29] United Nations, *Vienna Convention on the Law of Treaties*, Art. 53.

[30] Claudio Corradetti, "*Jus cogens* and the Moral Presuppositions of Public International Law", *Etica & Politica / Ethics & Politics*, vol. XXVII (2025), pp. 501-517.

connected to the value(s) the norm aims to protect. The International Community might decide to crystallise *jus cogens* norms by consensual law-making (e.g. multilateral treaties), such as in the instance of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[31]

Second, the norm must be accepted and recognised by the International Community of States as whole as one from which no derogation is permitted. In other words, it is essential to prove that the application of the norm is accompanied by international practice (point 1) and by opinio juris, as underlined by the ICJ in its 20 July 2012 judgment in the *Belgium v. Senegal* case.[32] This implies the belief that the practice not only reflects a norm of international law, but that it is also believed that such norm cannot be derogated.[33] The ILC specifies that it is necessary to have proof of the acceptance and recognition by a large and representative majority of States; acceptance and recognition by all States is not required, nor is it required by other actors. The evidence of acceptance and recognition may take various forms, including (but not limited to) public statements, official publications, government legal opinions, and diplomatic correspondence. In the case of jus cogens norms, it is possible to state that they are identified because of a particular quality of opinio juris that implies a moral engagement, otherwise not needed in other cases of customary law formation. States' behaviour is accompanied by the moral assessment given to opinio juris, which in turn explains the reasons for the practice itself.[34]

Additionally, the ILC highlights in Conclusion 9 subsidiary means for determining

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[31] *Ibid.*

[32] *Belgium v. Senegal*, Judgment, I.C.J. Reports 2012, p. 422.

[33] Cassese, *Diritto internazionale*, pp. 299-314.

[34] Corradetti, "*Jus cogens* and the Moral Presuppositions of Public International Law", pp. 501-517.

the peremptory character of norms: decisions of international courts and tribunals (in particular of the ICJ), decisions of national courts, the works of expert bodies established by States or international organizations, and the teachings of the most highly qualified publicists.

On a general note, it is difficult to find agreement among the members of the International Community on all norms that should be regarded as peremptory. In particular, the requirement of opinio iuris might be difficult to identify in practice of states.

Nevertheless, the ILC, in Conclusion 23 of its Draft Conclusions, presents a "non-exhaustive" list of norms that have achieved *jus cogens* status:

i. the prohibition of aggression;
ii. the prohibition of genocide;
iii. the prohibition of crimes against humanity;
iv. the basic rules of international humanitarian law;
v. the prohibition of racial discrimination and apartheid;
vi. the prohibition of slavery;
vii. the prohibition of torture;
viii. the right of self-determination.

In addition to a core of *jus cogens* norms that cannot ever be derogated (such as the prohibition of genocide, torture, and slavery), scholars identify a set of norms that can be restricted only under special circumstances (e.g., in time of emergencies, the prohibition of the use of force can be restricted by the right to self-defence).[35]

[35] Cassese, *Diritto internazionale*, pp. 299-314.

In short, peremptory norms emerge from the opinio juris of states, which accompanies the practice of these norms with a certain moral assessment. *Jus cogens* norms cannot be derogated but only modified by a subsequent norm of the same character, which can only enlarge the scope of protection. Peremptory norms define the sphere of international public order through the protection of the fundamental values of the International Community. This protection falls within two different areas: safeguarding the individual human members of the International Community (e.g., prohibition of torture) and protecting member states (e.g., right to self-determination).

The relevance of peremptory norms has been underlined throughout this chapter. However, the mere existence of non-derogable norms is not sufficient to guarantee their respect. To guarantee the respect of these norms, the existence and proper enforcement of a regime which establishes consequences for their violation is essential. For this purpose, the ILC in 2001 adopted the text "Responsibility of States for Internationally Wrongful Acts", establishing a peculiar regime of international state responsibility that arises from "a serious breach by a State of an obligation arising under a peremptory norm of general international law".[36] This regime will be analysed in detail in the following chapter.

[36] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Annex to General Assembly Resolution 56/83 of 12 December 2001.

CHAPTER II
SAFEGUARDING INTERNATIONAL VALUES: RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

2.1 The Project of the International Law Commission (ILC)

2.1.a The Project of the International Law Commission (ILC): History

In 2001, the International Law Commission (ILC) adopted the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). This document, composed of 59 articles, establishes the international norms concerning the responsibility of States for wrongful acts. It covers situations in which a State breaches international norms, the procedures to address such violations, and the applicable consequences.

The development of this document spanned approximately four decades, starting in the 1950s and concluding in 2001. Five Special Rapporteurs worked on the project during this period.

The first Special Rapporteur, who worked on the Articles between 1956 and 1961, was the Cuban jurist F.V. García-Amador. He focused his work on State responsibility in general, paying particular attention to the injury to aliens and their property. García-Amador's project was considered excessively ambitious, as he attempted to draft articles containing a long list of substantive obligations of States. [37]

[37] James Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts", *UN Audiovisual Library of International* Law, 2001, (accessed 15 December 2025), available at https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf

For this reason, in 1962, the ILC decided to shift its attention to determining general rules to govern the international responsibility of States. The second Special Rapporteur was the Italian Professor Roberto Ago, who worked on the Articles from 1969 to 1980. The ILC adopted 35 articles during these years, which now comprise the Part One of the ARSIWA. Professor Ago introduced the crucial distinction between "primary rules" and "secondary rules". The former are the obligations imposed on States by international legal instruments other than the ARSIWA (e.g., Treaties, Conventions, Customary Law). The latter arise only when a Primary Obligation is breached. They do not define the obligation itself but govern the consequences of the breach (e.g., reparation, cessation, non-repetition). As Special Rapporteur, Professor Ago worked on State Responsibility with the specific aim of codifying these Secondary Rules.[38]

From 1980 to 1986, the work was led by the Dutch Special Rapporteur Willem Riphagen, who elaborated on the definition of the "injured state". He was followed by the Italian Gaetano Arangio-Ruiz from 1988 to 1996. Arangio-Ruiz adopted the first comprehensive text of the Draft of Articles, contributing mainly to the sections on the consequences of international crimes, reparations, countermeasures and dispute settlement.

The last special rapporteur was the Australian James Crawford, who reviewed the existing text and produced the second draft, which was adopted in 2001 with commentaries. The UN General Assembly subsequently took note of the Articles during its fifty-sixth session.[39]

The structure of the final text is as follows:

[38] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", *American Journal of International Law*, vol. 96, no. 4 (2002), pp. 874-890.

[39] Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts".

I. Part I (articles 1-27): Describes what is the international responsibility of a State, defining when an act is internationally wrongful and when responsibility can or cannot be invoked;

II. Part II (articles 28-41): Governs the content of the international responsibility of the State, including cases of serious breaches of obligations under peremptory norms;

III. Part III (article 42-54): Describes the implementation of State Responsibility, including invocation and countermeasures;

IV. Part IV (55-59): Contains general provisions on the document as a whole.

2.1.b The Project of the International Law Commission (ILC): legal nature

As discussed in the previous section, the ARSIWA constitutes a set of secondary rules of State responsibility. These rules establish the conditions under international law for attributing responsibility to a State for wrongful acts or omissions, as well as the legal consequences originating from such breaches.[40]

The ARSIWA is considered the authoritative text on the international responsibility of States. Regarding its legal nature, although it was not adopted as a binding treaty, it is considered the codification and crystallisation of norms of customary international law. Consequently, the ARSIWA is considered as a cornerstone of the international legal order and it is frequently cited by leading scholars and international judicial bodies, most notably as the International Court of Justice

[40] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

(ICJ).[41]

2.1.c The Authority of the Project

Although the ARSIWA has not been formally adopted as a binding treaty, its authoritative status within the international legal order is undisputed. The Articles are widely regarded as a restatement of customary international law, achieved through a long process of codification and subsequent judicial endorsement.[42] As Special Rapporteur James Crawford observed, the decision to present the project as a set of articles annexed to a General Assembly resolution, rather than a formal convention, allowed the text to maintain its integrity and influence without being subjected to the political compromises of a diplomatic conference.[43]

The authority of the ARSIWA is further cemented by its "constitutional" role in the international legal system. Scholars like Bruno Simma have noted that the Articles provide a stable framework for the "secondary rules" of international law—those governing the consequences of a breach—thereby ensuring the coherence of the system as a whole.[44] This judicial and academic consensus has transformed the ARSIWA from a an instrument of "soft law" into a primary point

[41] Katja Creutz, "The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal", *EJIL: Talk!* (2021), (accessed 5 December 2025), available at https://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/

[42] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge: Cambridge University Press, 2002), pp. 28-30.

[43] Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', pp. 874-890.

[44] Bruno Simma and Dirk Pulkowski, 'Leges Speciales and Self-Contained Regimes', in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 139-141.

of reference for international courts and tribunals.

The International Court of Justice, for instance, has repeatedly applied the Articles. The Court began referring to the Draft Articles even before their final adoption. In its 1997 Judgment on the Gabčíkovo -Nagymaros Project (Hungary/Slovakia), the ICJ referred to the Draft Articles four times.[45] Subsequently, the final text of the ARSIWA has been used in numerous Judgments and Advisory Opinions, including the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*[46; 47], the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion[48] and the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* Advisory Opinion.[49]

2.2 Articles on Responsibility of States for Internationally Wrongful Acts: Part I

2.2.a Principles of International Responsibility

Chapter 1 (articles 1-3) of Part I of the ARISWA establishes the fundamental parameters for determining if a State is internationally responsible for breaching

[45] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

[46] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, I.C.J. Reports 2005, p. 168.

[47] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Reparations, Judgment, I.C.J. Reports 2022, p. 13.

[48] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. *136.*

[49] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.

international law through its actions or omissions.

Article 1 establishes the basic principle that «every internationally wrongful act of a State entails the international responsibility of that state»[50]. However, before analysing the specific requirements, it is necessary to distinguish the types of responsibility that may arise. There is a general agreement that, depending on the international obligation violated, it is possible to distinguish two different forms of State responsibility. Ordinary responsibility arises in case of a violation of norms commonly applicable between states (e.g., bilateral treaties). Aggravated responsibility arises in the case of serious breaches of peremptory norms of general international law (*jus cogens*), which aim at safeguarding the common values of the international community as a whole.[51]

The main distinctions between these violations lies in the seriousness of the breach itself and in the scope of obligations violated, moving beyond the simple injury of reciprocal obligations to the breach of core values of the entire international community.

Historically, Professor Ago, during its role as Special Rapporteur, introduced a distinction between international delict (referring to breaches of general international law), and crime of State (referring to violations of *jus cogens*). Although this distinction did not crystallise in the final version of the Articles, this conceptual distinction laid the foundation for the current ARSIWA, which governs

[50] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 1.

[51] Cassese, *Diritto internazionale*, pp. 372-383.

the consequences of both ordinary and aggravated violations[52].

Regarding the constitutive elements of the wrongful act, Article 2 clarifies when a State's action or omission is considered an internationally wrongful act. This occurs when two elements are met:

1. the subjective element: this condition is met when there is a conduct (action or omission) attributable to the State according to International Law;
2. the objective element: the condition is met when this conduct constitutes a breach of an international obligation of the State.[53; 54]

Finally, article 3 establishes the supremacy of international law over domestic law when characterising an act as internationally wrongful. It states that an act is internationally wrongful if it breaches an international obligation, regardless of its hypothetical legality in the State's domestic law.[55]

2.2.b Conducts attributable to a State

Chapter II (articles 4-11) defines the specific circumstances under which conduct is attributable to a State:

First, according to Article 4, actions accomplished by legislative, executive and judicial organs of the Central Government of the State or of its territorial units are

[52] Diego Uribe Bustamante, "The Inter-American Court of Human Rights' Expansion of Jus Cogens and the Missing Piece of the Puzzle: Aggravated State Responsibility", *CIL Blog* (2020), (accessed 16 December 2025), available at https://cil.nus.edu.sg/blogs/the-inter-american-court-of-human-rights-expansion-of-jus-cogens-and-the-missing-piece-of-the-puzzle-aggravated-state-responsibility/

[53] Cassese, Diritto internazionale, pp. 374-383.

[54] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 2.

[55] *Ivi.*, Art. 3.

considered actions of the State. This includes people and entities holding a position within these organs according to domestic law (e.g., parliamentarians, ministers, armed forces).[56] A notable case illustrating this principle is the Rainbow Warrior Affair between New Zealand and France (1986). French authorities carried out a set of nuclear tests in the Mururoa Atoll in French Polynesia in the second half of the 20th century. To protest these activities, the NGO Greenpeace sent its vessel, Rainbow Warrior, to Auckland, New Zealand. On 10 July 1985 an explosion sunk the ship, killing one person. France initially denied any involvement but confirmed that the ship had been sunk by agents of the French Directorate General of External Security ('DGSE') under orders. The UN Secretary-General's Ruling confirmed that the fact that the French Defence Minister and intelligence agency knew of the operation was sufficient to hold France liable for the acts of the agents; New Zealand did not need to prove who actually authorized the specific sinking.[57; 58]

Article 7 further specifies that the conduct is attributable to the State even if the organ, person, or entity acts ultra vires, exceeding its authority or disobeying instructions.[59]

Acrticle 5 affirms that the conduct of a person or entity which is not part of a State organ, but exercises elements of governmental authority according to domestic law, is considered an action attributable to the State when the person is exercising

[56] *Ivi.*, Art. 4.

[57] *Rainbow Warrior* (*New Zealand v. France*), Ruling of the Secretary-General, 6 July 1986, UNRIAA, vol. XIX, p. 199.

[58] Cristina Hoss and Jason Morgan-Foster, "Rainbow Warrior, The", in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2025).

[59] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 7.

that authority.[60]

While the previous point regards private people authorised by law to exercise public authority, Article 8 also attributes to States the conduct of private persons acting under the factual control of the State (i.e. in accordance with instructions, directions or control provided by the State).[61] This might be the case of paramilitary groups. The ICJ affirmed this principle in the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) case (1986). Nicaragua accused the US of controlling the contras, a term used to describe a rebel group fighting against the official Nicaraguan Government. Contras caused great material damage, loss of life, killing of civilians, rapes and tortures. In paragraph 109 of the Judgment, the ICJ established that to consider the United States responsible for contras actions under Article 4 (conduct of a State organ), it was necessary to prove that contras were "completely dependent" on the US, and that the US were "completely in control" of the group, at such a point that the contras could be considered a de facto organ of the US. The Court specified that support and assistance from the US, even if heavy, did not reach this level of dependence and control.[62]

Moreover, in paragraph 115, the ICJ established the parameters in order to test the applicability of Article 8 (effective control), according to which the US could have been considered responsible for contras' conduct if it was proved that the US was in effective control over the military or paramilitary operations in which the

[60] *Ivi.*, Art. 5.

[61] *Ivi.*, Art. 8.

[62] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 109.

alleged violations were committed.[63] The ICJ confirmed this high threshold in its 2007 Judgment in the *Bosnia and Herzegovina v. Serbia and Montenegro* case. The Court reaffirmed the Nicaragua standard, rejecting broader interpretations: it is necessary to prove that "effective control" was exercised in respect of each specific operation and not merely from the general support given to an armed group.[64]

Article 9 establishes that responsibility extends to the conduct of a person or group of people exercising elements of governmental authority in the absence or default of the official authorities and, in general, when circumstances call for the exercise of this authority.[65] This might be the case of private citizens defending or taking control of their city if the police or the governmental organs have fled.

Moreover, Article 6 governs that the actions or omissions of an organ of a State A placed at the disposal of a State B to exercise elements of governmental authority of State B, is considered an act attributable to State B.[66] The conduct is attributable to the State even if the organ, person or entity act ultra vires.[67]

Article 10 clarifies that the conduct of a movement, insurrectional or of another type, which succeeds in becoming the new Government of a State is considered an act of that State. Similarly, the conduct of a movement which establishes a new State in part of the territory of a pre-existing State or in a territory under its

[63] *Ivi.*, p. 14, para. 115.

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43, para. 399.

[65] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 9.

[66] *Ivi.*, Art. 6.

[67] *Ivi.*, Art. 7.

administration, is considered an act of the new State.[68]

Lastly, Article 11 states that any conduct which is not attributable to a State under the mentioned parameters, but which is acknowledged and adopted by the State itself as its own, is considered an act of that State.[69] The ICJ affirmed this principle in its Judgment in the *United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*) of 1980. The Court held Iran responsible for the occupation of the United States Embassy and the detention of its diplomatic and consular staff as hostages by student militants, because Ayatollah Khomeini publicly acknowledged and approved the fact stating in an interview that the occupation had been "done by Our nation". Subsequently, the militants were hired as agents of the Iranian State.[70]

2.2.c Breach of an international obligation

Chapter III (articles 12-15) determines the existence of a breach of an international obligation. A breach of an international obligation exists when a State, bound by the obligation, fails to act in conformity with its requirements[71;72]. The breach is distinguished based on its temporal character. It has instantaneous character, when the breach occurs at the moment when the act is performed, even if its effects persist over time. It has continuing character when the breach extends over the entire period during which the act continues and remains not in conformity with

[68] *Ivi.*, Art. 10.

[69] *Ivi.*, Art. 11.

[70] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3, para. 74.

[71] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 12.

[72] *Ivi.*, Art. 13.

the international obligation.[73]

A highly relevant case regarding continuing breach is the aforementioned Rainbow Warrior Affair between New Zealand and France (1986). Under the Ruling of the UN Secretary-General, the two French agents considered responsible for the sinking of the Rainbow Warrior were to be transferred to the isolated French military base of Hao, in the Pacific Ocean, for a period of three years. The two governments agreed that the agents were not permitted to leave the island for any reason, "except with the mutual consent of the two governments".[74] However, France repatriated both agents early, without New Zealand's consent: Major Mafart was evacuated in 1987 due to alleged medical grounds (which were later contested), and Captain Prieur was repatriated in 1988 due to pregnancy and her father's health. Neither returned to Hao. The case was brought before the France-New Zealand Arbitration Tribunal, which pronounced its judgment on 30 April 1990. The Tribunal concluded that the failure to return the agents to the island constituted an «uninterrupted and continuing breach» for the entire duration they were absent from Hao when they should have been detained there.[75]

Lastly, article 15 establishes that the breach can also consist of a composite act, meaning a series of wrongful actions or omissions attributable to the State. In this case, the breach extends over the entire period starting from the first of the actions or omissions of the series and lasts for as long as these actions or omissions are

[73] *Ivi.*, Art. 14.

[74] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements*, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, Decision of 30 April 1990, UNRIAA, vol. XX, p. 217.

[75] *Ibid.*

repeated and remain not in conformity with the international obligation.[76]

Finally, Chapter 4 (articles 16-19) governs the specific situation where a state is responsible in connection with the act of another States. This might happen when:

I. a State aids or assists another State in the commission of an internationally wrongful act (with knowledge of the circumstances);[77]

II. a State directs, controls or coerces another in breaching an international obligation.[78; 79]

2.2.d Circumstances precluding wrongfulness

Chapter V (articles 20-27) of Part I of the ARSIWA lists the specific circumstances which preclude the wrongfulness of the conduct of the State that would otherwise be considered responsible for a breach of an international obligation.

First, valid consent given by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State, provided the conduct remains within the limits of that consent.[80]

Moreover, the wrongfulness of an act is ruled out if the act constitutes a lawful measure of self-defence.[81] The ICJ, in the *Oil Platforms* (*Islamic Republic of Iran*

[76] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 15.

[77] *Ivi.*, Art. 16.

[78] *Ivi.*, Art. 17.

[79] *Ivi.*, Art. 18.

[80] *Ivi.*, Art. 20.

[81] *Ivi.*, Art. 21.

v. United States of America) Case, adjudicated on attacks made by the United States on Iranian offshore oil production installations. The US claimed to be attacking in "self-defence". The Court stressed that acts of self-defence must respect the criteria of necessity and proportionality.[82] Referencing the Military and Paramilitary Activities in and against Nicaragua Case, the ICJ underlined that necessity, in the case of self-defence, means the measure must be the intended to protect essential security interests and must be strictly 'necessary' for that purpose.[83] Moreover, the Court stressed that self-defence acts must be proportionate to the armed attack against which the State is defending itself.[84]

Furthermore, wrongfulness is precluded if the act constitutes a legitimate countermeasure taken against another State in response to an internationally wrongful act.[85] The ICJ clarified in *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*) that countermeasures, to be justifiable, must meet certain conditions: first, they must be taken in response to a previous international wrongful act of another State and must be directed against that State; second, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it.[86]

Another exception applies in cases of force majeure. Wrongfulness is precluded when the State cannot perform its obligations due to unforeseen events or irresistible force beyond the control of the State. It cannot be invoked if the

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[82] *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), Judgment, I.C.J. Reports 2003, p. 161, para. 73.

[83] *Ivi.*, p. 161, para. 43.

[84] *Ivi.*, p. 161, para. 51.

[85] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 22.

[86] *Gabčíkovo-Nagymaros Project*, Judgment, pp. 55-56, paras. 83-84.

situation of force majeure was caused by State invoking it or if the State assumed the risk for the occurrence of that situation.[87] During the aforementioned Rainbow Warrior case, France tried to justify its transfer of Major Mafart out of Hao without New Zealand's consent by citing force majeure (specifically, the critical health conditions of the agents). However, the France-New Zealand Arbitration Tribunal, recalling the work of the ILC, highlighted that force majeure is «generally invoked to justify involuntary, or at least unintentional conduct […] which makes it 'materially impossible' for it to act in conformity with the obligation». The Tribunal concluded that the test of applicability of force majeure is of absolute and material impossibility. Adverse circumstances that merely make compliance more difficult do not justify its invocation.[88]

Moving to a further case, wrongfulness is precluded in cases of distress, where the author of the act has no other reasonable way, in a situation of distress, to save their own life or the people entrusted to their care. Distress cannot be invoked if the situation of distress was caused by State invoking it or if the act creates an equal or greater peril.[89]

Moreover, wrongfulness is precluded by necessity. This means the act represents the last resort to safeguard an essential interest against a grave and imminent peril, and does not seriously impair an essential interest of the State(s) towards which the obligation exists, or of the international community as a whole.[90] In the *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), Hungary tried to invoke "ecological necessity" to abandon a treaty with Slovakia. Nevertheless, while the

[87] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 23.

[88] *Rainbow Warrior* (1990), Decision of 30 April 1990, UNRIAA, vol. XX, pp. 252-253, paras. 76-77.

[89] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 24.

[90] *Ivi.*, Art. 25.

ICJ affirmed that "ecological risk" can in some cases constitute a ground for necessity, it was not applicable in Hungary's case. In its judgment, the ICJ clarifies that the grounds to invoke necessity are exceptionally narrow. It is necessary to demonstrate that an essential interest is a risk because of an imminent and grave peril, that the actions undertaken are the only way to safeguard such interest and that they do not impair an essential interest of another State. Moreover, the State invoking necessity must not have contributed to the occurrence of the state of necessity.[91]

Lastly, the ARSIWA establishes that nothing in the Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[92] In other words, this provision ensures that peremptory norms (*jus cogens*) — such as the prohibition of aggression, genocide, or torture — maintain their absolute character. No State can justify a breach of these fundamental values by invoking circumstances like necessity or countermeasures, as the protection of the international community's core interests prevails over any individual State justification. This Article endures that fundamental values cannot be set aside under any justification. In this sense, the Article confirms the hierarchical superiority of *jus cogens* within the international legal order. Since these norms protect the essential interests of the international community as a whole, their breach remains an internationally wrongful act even if committed under pressure of necessity or force majeure.

[91] *Gabčíkovo-Nagymaros Project*, Judgment, pp. 37-41, paras. 44, 51-52.

[92] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 26.

2.3 Articles on Responsibility of States for Internationally Wrongful Acts: Part II

2.3.a Legal consequences of an International Wrongful Act: ordinary responsibility

Chapter I (articles 28-33) of Part II of the ARSIWA codifies the legal consequences for a State that has violated international obligations. The first principle is that the legal consequences of the wrongful act do not affect the continued duty of the responsible State to perform the obligation breached, as stated in Article 29.[93]

The first obligation for the state which breached the obligation is cessation (Article 30). The responsible State has to cease the act, offering assurances and guarantees of non-repetition.[94] Moreover the breaching State is responsible for making full reparations of the injury caused, including material and moral damages (Article 31).[95]

A practical application of these principles is found in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion given by the ICJ on 9 July 2004. The Court found that Israel's construction of the wall constituted a breach of its obligations under international law. The Court advised Israel «to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory» and «to dismantle forthwith the structure therein situated".[96] Crucially, the Court highlighted that the obligation to cease the

[93] *Ivi.*, Art. 29.

[94] *Ivi.*, Art. 30.

[95] *Ivi.*, Art. 31.

[96] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 15.

violation was not merely a negative obligation (i.e., to stop constructing the Wall), but also a positive one (i.e., the necessity to dismantle the existing structure). Furthermore, the ICJ highlighted the obligation for Israel to pay reparations for the damage caused to all the natural or legal persons concerned. In particular, the Court emphasised that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[97]

Reparation can take three forms, either singly or in combination.

The primary form is restitution. It is the obligation to re-establish the situation which existed before the wrongful act was committed, provided this is materially possible and this does not involve more burdens than benefits.[98]

Where restitution does not compensate for the damage caused, the responsible State is under obligation of compensation. This covers any financially assessable damage, including loss of profits.[99]

Finally, if the injury cannot be fully repaired by restitution or compensation, as it typically happens in cases of moral injuries, the State is obliged to give satisfaction. Satisfaction is the acknowledgement of the breach (through expression of regret, formal apologies, etc…) from the responsible State. Satisfaction must be fulfilled in a not-humiliating form for the responsible State and must not be disproportionate to the injury.[100]

2.3.b Legal consequences of serious breaches of obligations under

[97] *Ivi.*, p. 13.

[98] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 34.

[99] *Ivi.*, Art. 35.

[100] *Ivi.*, Art. 36.

peremptory norms of general international law: aggravated responsibility

As mentioned in paragraph 2.2.a “Principles of International Responsibility”, the ARSIWA introduced a fundamental distinction between ordinary responsibility and aggravated responsibility of States, based on the seriousness of the breach and the scope of the obligations violated.

While ordinary responsibility requires the responsible State to make full reparations to the injured State (as explained in the previous section 2.3.a “Legal consequences of an International Wrongful Act: ordinary responsibility”), Chapter III (articles 40-41) of Part II establishes the specific regime for serious breaches of obligations under peremptory norms of general international law (*jus cogens*).

First, Article 40 defines the threshold: a breach of a peremptory norm is considered “serious” if it involves a gross or systematic failure by the responsible State to fulfil the obligation.[101]

Article 41 clarifies the special consequences that arise from the breach. In such cases, consequences concern all States, not just the one injured by the breach. All States have a duty not to recognize the situation created by the breach, nor to render aid or assistance in maintaining the situation. Contrarily, they have a duty to cooperate through lawful means to end any serious breach.[102]

It is relevant to note the main distinctions between ordinary and aggravated responsibility. While the former focuses on bilateral reparation between the

[101] *Ivi.*, Art. 40.

[102] *Ivi.*, Art. 41.

responsible State and the injured State, the latter focuses on the gravity and nature of the breach, implicating the international community as a whole. As underlined by the ICJ in its Advisory Opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), the purpose of norms of *jus cogens* «is purely humanitarian and civilising». The Court clarified that in such Conventions, States do not have individual interests of their own, but rather a common interest to preserve the "high purposes" of the international community.[103] Therefore, given that States agree to peremptory norms to protect these collective values, the reaction to their violation involves the entire international community.

A practical application of these consequences can be observed in the aforementioned Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion (2004). In that instance, the ICJ, after establishing the breach of peremptory norms (specifically, the right to self-determination and rules of international humanitarian law), set out the legal consequences for States other than Israel. The Court declared that:

«Given the character and the importance of the rights and obligations involved [...] all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to cooperate with a view to putting an end to the alleged violations and to ensuring that reparation will be made».[104]

The Court also highlighted that the violations made by Israel included certain

[103] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15, at p. 23.

[104] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, p. 196, para. 146.

violations *erga omnes* (obligations owed to the international community as a whole).

2.3.c Obligations *erga omnes* and obligations *erga omnes partes*

The ICJ introduced the concept of obligations *erga omnes* in the *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*). In its Judgment, the Court famously affirmed that «the obligations of a State towards the international community as a whole […] are by their very nature […] 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*». The ICJ also clarified that «such obligations derive from, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination».[105]

Obligations *erga omnes* are characterised by their aim to safeguard fundamental values of the international community as a whole, implying that the violation of such obligations results in a universal harm. Moreover, they are non-reciprocal, solidarity obligations, posed on all parties of the international community and cannot be divided in bilateral relationships: to each obligation corresponds a duty to every member of the international community. Accepting these obligations means committing in protecting the common and morally superior values of the international community.[106]

Given that all states have an interest in complying with these obligations, the

[105] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Judgment, I.C.J. Reports 1970, p. 3, para. 33.

[106] Cassese, Diritto internazionale, pp. 32-35.

Court, in its Judgment in *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), affirmed that it derives that each party of the international community has an entitlement to make a claim in case of their breach.[107]

In the same Judgment, the Court made a distinction between obligations *erga omnes* and *erga omnes partes*. The former derives from general international law (i.e., customary law). The latter, instead, derives from rights expressly stipulated in a multilateral treaty to which States decided to take part. It is generally believed that obligations *erga omnes partes* provide a stronger procedural entitlement, given that States freely decide to become a party to the treaty governing these rights.[108]

The distinction between *jus cogens* and obligations *erga omnes* might appear unclear at first and requires further clarification. The reasoning in Barcelona Traction leads to the conclusion that *jus cogens* obligations have *erga omnes* effect. Indeed, considering that *jus cogens* norms are peremptory in nature (allowing no derogation), it is logical that all States have legal interest in protecting them.[109]

However, the opposite is not always true. There are several cases of obligations *erga omnes* (or *erga omnes partes*) which do not necessarily hold the status of *jus cogens*.

For example, obligations *erga omnes* (*partes*) may result from certain human rights

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[107] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012, p. 422, para. 68.

[108] Annemarieke Vermeer-Künzli, "A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*", *International and Comparative Law Quarterly*, vol. 56, no. 3 (2007), pp. 553-581.

[109] Erika de Wet, "*Jus Cogens* and Obligations *Erga Omnes*", in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 541.

obligations, such as those arising from treaties such as the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights.[110] Another instance is represented by those obligations arising for common goods beyond national jurisdictions, including “Common Heritage of Humankind” and the protection of marine and biological diversity.[111]

Ultimately, *jus cogens* norms constitute the substantive core of international law, while obligations *erga omnes* may be considered as procedural measures aimed at giving effect to the former. [112] In other words, *jus cogens* defines what the rules are (the content), while obligations *erga omnes* define who benefits from their enforcement and who has locus standi to demand cessation of breaches and reparation.

2.4 Articles on Responsibility of States for Internationally Wrongful Acts: Part III

2.4.a Implementation of the International Responsibility of a State

Part III of the ARSIWA focuses on the Implementation of the International Responsibility of a State. Chapter I (articles 42-48) governs the specific rules for the invocation of responsibility.

Article 42 defines the conditions under which a State is considered "injured" and

[110] Ibid.

[111] Zakieh Taghizadeh and Hoda Asgarian, "From Global Commons to Global Accountability: The Erga Omnes Obligation to Safeguard Marine Biological Diversity as Common Heritage of Humankind", *Journal of International Wildlife Law & Policy*, vol. 28, no. 2 (2025), pp. 193-220.

[112] Roman Kwiecień, "A New Life for Actio Popularis in International Law? The Prevention and Punishment of Genocide as an Interest of 'the International Community as a Whole'", *Forum Prawnicze*, vol. 4, no. 84 (2024), pp. 3-15.

thus entitled to invoke responsibility. According to this Article, a State is entitled to invoke the responsibility of another State if the obligation breached is owed:

I. to that State individually; or

II. to a group of States or the International Community as a whole. In this case, it has to be demonstrated that the breach specifically affects that State or it is of such a character as to radically change the position of all other States to which the obligation is owed with respect to the further performance of the obligation.[113; 114]

Moreover, the Articles clarify situations involving multiple States.

Article 46 states that where several States are injured by the same internationally wrongful act, they can all individually invoke the responsibility of the State which has committed the act.[115]

Article 47 governs the scenario where several States are responsible for an internationally wrongful act. In this case, each State is responsible for the actions imputable to it, and responsibility does not diminish because attributable to several States. Reading Article 47 in the light of Article 42, it becomes clear that the injured State must invoke the responsibility of each responsible State separately. Moreover, article 47(2) provides the fundamental limitation that the injured States cannot be compensated more than the damage suffered (i.e., prohibition of double recovery). Moreover, the same article affirms that one responsible State is allowed,

[113] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 42.

[114] Jörg Kammerhofer, "Obligations Erga Omnes", in *Oxford Bibliographies in International Law* (Oxford: Oxford University Press, 2018).

[115] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 46.

if that is the case, to raise claims against another responsible State.[116; 117]

Articles 43 and 44 govern the procedure of invocation of responsibility and the admissibility of the claim. When an injured State invokes the responsibility of another State, it is obliged to give notice of its claim to that State. The notice must specify the conduct that the responsible State should take to cease the wrongful act and the form of reparation required.[118] Article 44 clarifies that a claim, to be considered admissible, requires exhaustion of local remedies and nationality of claims.[119; 120] However, only "available and effective" local remedies have to be exhausted before invoking the responsibility of a State on the international level.

Article 45 considers the possibility for a state to lose its right to invoke responsibility, which might happen in cases of waiver and acquiescence in the lapse of the claim.[121]

2.4.b Article 48: invocation of responsibility by a State other than the injured State

Article 48 of the ARSIWA establishes that any State other than the injured State is entitled to invoke the responsibility of a State if:

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[116] *Ivi.*, Art. 47.

[117] ILC, Draft Articles with commentaries (2001), pp. 124-125.

[118] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 43.

[119] *Ivi.*, Art. 44.

[120] Vermeer-Künzli, "A Matter of Interest", p. 555.

[121] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 45.

I. the international obligation violated is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

II. the obligation breached is owed to international community as a whole.

States entitled to invoke responsibility under these terms may claim for cessation, assurances and guarantees of non-repetition (Article 30), and reparation for the injured state or of the beneficiaries of the obligation breached (Article 48(2)).[122]

This norm represents a milestone for public international law because it introduces the right of a state to invoke the responsibility of another State breaching an obligation owed to the entire international community, meaning an obligation *erga omnes* (or *erga omnes partes*). Article 48 clarifies that, since all States have a legal interest in the protection of such obligations, they have locus standi to make a claim in case of a breach of such obligations, regardless of whether they are directly injured. For this reason, claims on violations of obligations *erga omnes* and *erga omnes partes* are direct claims.[123]

It is essential to specify the scope of the claims that a non-injured State can put forward. Article 48(2) of the ARSIWA, specifies that such States do not act to seek compensation for themselves, but rather as guardians of the collective interest. Therefore, their claims are limited to requesting the cessation, assurances and guarantees of non-repetition, and demanding reparations in the interest of the injured State or of the beneficiaries of the obligation breached. This confirms the functional nature of Article 48, which aims at restoring the international legality rather than satisfying the individual interests of the claimant State.

[122] *Ivi.*, Art. 48.

[123] Vermeer-Künzli, "A Matter of Interest", p. 579.

The relation between Article 48 and other provisions might appear unclear. Many scholars have highlighted the ambiguity between Article 48 and Article 42(b)(ii), which allows States to invoke international responsibility of another state if the latter breached multilateral obligations, radically changing the «position of all other States to which the obligation is owed».[124] Scholar Priya Urs has highlighted that obligations under Article 42 are not clearly distinguishable from those under Article 48. Urs concludes that Article 48 serves only as a residual remedy to allow States to make claims against breaches or obligations due to the entire international community (such as obligations on human rights) which, although of fundamental importance, do not necessarily hinder the performance of the obligation toward other States in the way Article 42(b)(ii) requires.[125]

To clarify this concept, Urs uses climate change as a case study. In her 2024 article, entitled The Elusiveness of "Interdependent Obligations" and the Invocation of Responsibility for their Breach, Urs refers to the request of an Advisory Opinion from the ICJ on climate change from the UN General Assembly. Urs notes that the UN General Assembly used language of Article 42 in its request, hypothesising that the Court might clarify the distinction. Urs suggested that, given the request concerned the preservation of shared resources beyond national jurisdiction, this could be a claim under Article 42, as a violation in this matter would radically change the position of all States.[126] However, in its second Opinion delivered on 23 July 2025, the ICJ underlined that breaches of obligations regarding climate change mitigation fall under Article 48 of the ARSIWA. The ICJ further explained

[124] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 42.

[125] Priya Urs, “The Elusiveness of 'Interdependent Obligations' and the Invocation of Responsibility for their Breach", *British Yearbook of International Law* (Advance Access, 2024), (accessed 15 December 2025), https://doi.org/10.1093/bybil/brae006

[126] Ibid.

that when these obligations arise from general international law, every State has a right to raise claims in case of their violation, whereas when these obligations arise from treaties, only the parties to the treaty are allowed to raise such a claim.

The Court also reiterates a key limitation of Article 48: non-injured States do not have any right to ask for reparation for themselves. This right is restricted only to injured States.[127] Therefore, while this Advisory Opinion represents a milestone by confirming that climate change obligations are *erga omnes* (*partes*), it also suggests that the distinction between the two Articles remains heavily debated.

Another complex characteristic of Article 48 is that, to make a claim under it, the requirements of articles 43 (notice of the claim), 44 (admissibility of the claims) and 45 (loss of the right to invoke responsibility) must be met.[128] In particular, problems arise with Article 44, which requires the exhaustion of local remedies and compliance with rules on the nationality of claims. These requirements might potentially create practical hurdles for the effective protection of collective interests by non-injured States.[129]

2.4.c Countermeasures

Chapter II (articles 49-54) of Part III focuses on countermeasures taken against a State which is responsible for an internationally wrongful act.

Article 49 highlights that countermeasures can be taken only by an injured State against a State responsible for violating an international obligation, with the sole

[127] *Obligations of States in respect of Climate Change*, Advisory Opinion, I.C.J. Reports 2025 (forthcoming), paras. 442–443.

[128] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 48.

[129] Vermeer-Künzli, "A Matter of Interest", p. 580.

intention of inducing that State to comply with its obligation (cessation and reparation). These countermeasures can only be temporary in nature. Indeed, the Article governs that the State putting in practice countermeasures may refrain from performing international obligations towards the responsible State, but only in such a way as to permit the future resumption of such obligations.[130]

Article 51 sets the limitations according to which countermeasures must be proportionate to the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[131]

Article 52 sets the terms according to which countermeasures can be applied. Before taking countermeasures, the injured State is obliged to first call upon the responsible State to fulfil its obligations and to notify it of any decision to take countermeasures, offering a path to negotiation.

However, the injured State is allowed to take urgent countermeasures as are necessary to preserve its rights. Article 52 also states the countermeasures must be suspended if the internationally wrongful act has ceased or if the dispute is pending before a Tribunal or a Court with the authority to take binding decisions on the parties, unless the responsible State fails to implement the dispute settlement procedures in good faith.[132]

Additionally, Article 50 affirms that countermeasures shall not affect the obligation to refrain from the threat or use of force, as well as obligations on the protection of human rights, humanitarian obligations prohibiting reprisals and obligations

[130] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 49.

[131] *Ivi.*, Art. 51.

[132] *Ivi.*, Art. 52.

under peremptory norms of general international law. The rationale behind these limitations is to prevent the escalation of disputes and endanger the fundamental interests of the international community. While countermeasures are legitimate tools for inducing a State to comply with its obligations, they cannot be used as a pretext to bypass the prohibition on the use of force or to infringe upon non-derogable human rights. By shielding these core obligations from the logic of reciprocity, Article 50 ensures that the protection of the individual and the maintenance of international peace remain paramount, even in the context of a bilateral legal dispute[133].

Furthermore, a States taking countermeasures is not relieved from fulfilling its obligations under dispute settlement procedure applicable between it and the responsible State, nor from respecting the inviolability of diplomatic or consular agents, premises, archives and documents.[134; 135]

Lastly, Article 54 is a "saving clause". It affirms that the Chapter on countermeasures does not prejudice the right of any State entitled under Article 48 to take "lawful measures" against the responsible State to ensure the cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached.[136] The distinction between "countermeasures" (reserved for injured States) and "lawful measures" (for non-injured States) remains one of the most debated aspects of the ARSIWA, reflecting the cautious approach of the International Law Commission toward collective enforcement.

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[133] ILC, Draft Articles with commentaries (2001), pp. 131-134.

[134] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 50.

[135] *Ivi.*, Art. 51.

[136] *Ivi.*, Art. 54.

The core of this debate lies in whether 'lawful measures' include non-forcible countermeasures taken by States that are not directly injured. While the ILC initially considered the practice on third-party countermeasures to be embryonic, Article 54 was drafted as a saving clause intended to leave the matter open to the further development of international law.[137] As Stefano Silingardi points out, the collective sanctions adopted against Russia following the 2022 aggression might represent a 'qualitative leap' in this practice. These measures, adopted in response to a grave breach of jus cogens norms and before a paralyzed Security Council due to the exercise of veto power, suggest an evolving framework where the obligation of cooperation (Article 41 ARSIWA) may justify collective reactions aimed at restoring international legality. However, Silingardi warns that such measures must remain strictly proportional and aimed solely at the cessation of the wrongful act, as pursuing different political goals—such as regime change—could jeopardize their legal status.[138]

2.5 Articles on Responsibility of States for Internationally Wrongful Acts: Part IV

Part IV (Articles 55-59) contains the general provisions of the ARSIWA. These norms are fundamental for grasping the relationship between the ARSIWA, other branches of international law and the political reality of the international system.

Article 55 establishes the principle of lex specialis derogat legi generali. It states that the ARSIWA are residual in nature: they apply only when the conditions for the existence of an internationally wrongful act or its consequences are not

[137] ILC, Draft Articles with commentaries (2001), pp. 137-139.

[138] Stefano Silingardi, "Sulla legittimità delle sanzioni unilaterali nei confronti della Russia a seguito dell'aggressione contro l'Ucraina," *Rivista di diritto internazionale* 105, n. 3 (2022), pp. 795-817.

governed by special rules of international law.[139] For instance, if an EU Member State breaches an obligation under EU treaties, the specific consequences provided by EU law (e.g., infringement proceedings) take precedence over the general rules of the ARSIWA. However, as the ILC commentary notes, the general rules remain relevant to fill any gaps left by these special regimes.[140]

Article 58 separates the regime of State Responsibility (civil in nature, aiming at reparation) from International Criminal Law.[141] The former is civil in nature, aiming at reparation. Contrarily, the second one is penal in nature and aims at punishing individuals. Therefore, while the ARSIWA deals with the liability of the State, the prosecution of the individuals who ordered or executed those acts falls under the jurisdiction of domestic courts or international tribunals like the International Criminal Court (ICC).[142]

Article 59 affirms the hierarchy of sources, stating that the legal rules on responsibility can be displaced by binding resolutions of the UN Security Council.[143] For example, if the Security Council imposes sanctions or authorizes the use of force against a State, those political decisions override the general legal limitations on countermeasures.[144]

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[139] *Ivi.*, Art. 55.

[140] ILC, Draft Articles with commentaries (2001), pp. 140-141.

[141] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 58.

[142] ILC, Draft Articles with commentaries (2001), pp. 142-143.

[143] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 59.

[144] ILC, Draft Articles with commentaries (2001), pp. 143.

CHAPTER III
ACTIO POPULARIS IN INTERNATIONAL LAW

3.1 Origin of *actio popularis*

The origins of *actio popularis* (i.e. popular action) date back in Roman Law. The legal framework of *actio popularis* was designed to allow citizens to initiate a legal action in defence of the public interest.

The main key feature of the *actio popularis* was that, in order to be sued, it did not require the existence of a direct victim[145]. The claimant was not supposed to be directly injured by the wrong action, and, in most cases, there was not a direct victim at all. The only fact that the injury occurred was sufficient to enable citizens to start this process. However, if the action specifically injured a person or their relatives, the judges would give priority to them. Moreover, the *actio popularis* had a universal standing[146]. Any citizen, apart from women and pupils, had a right to demand for a remedy. Therefore, for the illicit actions falling within the case of *actio popularis*, if the relatives or the harm person, if any, failed to sue, any other Roman citizen (enabled to do so), was empowered to sue. The primary goal of this legal framework was the maintenance of the public order. Indeed, most illicit action that could be sued under this framework were intended to maintain urban safety, moral order and sanitation. The consequences of an illicit public action usually were financial penalty.

[145] Farid Turab Ahmadov, "The Right of Actio Popularis before International Courts and Tribunals" (DPhil thesis, University of Oxford, 2017), 15–23.

[146] Calvin P. M. Simanjuntak, "Actio Popularis in International Accountability: A Case Research of the UAE," *Lampung Journal of International Law* 7, no. 1 (2024): 3.

In the traditional Roman Law, *actio popularis* stood between public, or criminal, trials and private civil suits.[147] These actions were designed to protect a public interest, collective for the entire community, and they were carried out as forms of private civil litigation. However, given that the offense signalled through *actio popularis* involved the public community, the final judgment was made by a board of judges, intended as an organ with a public nature. Therefore, the litigation was carried out in two different steps: first, before a single judge as a private litigation; later, before a board of judges as a public one.[148] In Roman Law, *actio popularis* was considered a defence of the right of the people of the Roman community.

In the Roman tradition, there was not a single legal source containing all the illicit actions that could trigger an *actio popularis*. Originally, most of them were established through Praetor's Edicts. The Praetor (i.e., a chief magistrate) used to display annually the *album*, which was a white board displaying that Praetor's annual edict, listing the legal remedies and actions he would grant during his term. Interestingly, the *album* was considered so important that its vandalization could be sued through a specific *actio popularis*, requiring a massive financial penalty to be repaired. However, formal laws and senate decrees were also used. They were later compiled into a specific section of the *Corpus Juris Civilis*, called Digest, of Emperor Justinian. The Digest is made up 50 Books, being those from 1 to 47 on Private Law, 48 on Public Law, 49 on appeals and 50 on legal definition and rules. Title 23 of Book 47 contains rules on *actio popularis*, called "*de popularibus actionibus"*. They were strategically placed at the very end of the

[147] Michele Giagnorio, "Brevi note in tema di azioni popolari (actio popularis)," *Diritto @ Storia* 13 (2015)

[148] *Ibid.*

Book on private offenses and right before Book 48 on public trials, directly reflecting their hybrid nature in the Roman judicial system.[149]

Given that in the Roman Empire there was not a vast bureaucratic police force, it strongly relied on its citizens' notification of wrongdoing. Therefore, the Preator would usually give a financial price to the citizens who successfully brought cases of *actio popularis* as a reward for enforcing the law.[150] This reward-system incentivise the community to enforce community laws and it improved citizens' participation into public affairs.

As mentioned above, *actiones populares* were intended to maintain urban safety, moral order and sanitation. A first group of illicit actions against which *actio popularis* could be enforced was for the safety of the streets. These actions concerned objects thrown, poured or suspended from buildings that could endanger the citizens. For example, if an object was dangerously suspended from a building, any citizens could bring a suit because it represented a threat for the passerby. If the object fell killing a free man, the priority for the judicial request was granted to his relatives. However, if they failed to act, any citizen could bring a suit for a fixed penalty. Another example regarded the protection of sacred spaces. If a tomb, considered a sacred resting place, was desecrated, inhabited or built upon and the family of the death person failed to take action, any other citizen could step in to protect the community's religious values.[151] A last example concerned the cases of people bringing dangerous animals in public spaces.

[149] Valentina Arena, "Actiones Populares, Popular Sovereignty, and the People," in *A Companion to Roman Republican Political Culture*, ed. Valentina Arena and Jonathan Prag (Hoboken, NJ: John Wiley & Sons, 2022), pp. 40-48.

[150] Giagnorio, "Brevi note in tema di azioni popolari," p. 17.

[151] Arena, "Actiones Populares," pp. 40-48.

One may wonder why a citizen would spend their time to sue for an action which did not injure them. First, as mentioned, the financially rewarding strategy put in place by the government incentivised public participation. Moreover, it is relevant to underline the role of the State in the Roman Empire. The State was not seen as an abstract and separated entity, but it was actually considered the collection of citizens. Therefore, citizens did not start the process of *actio popularis* only for financial profit, but because community rights were considered private rights. They acted in defence of a personal community right which belonged to them because they belonged to the community.[152]

Even if *actio popularis* was initially confined to the municipal law of ancient Rome to protect local order and safety, the principles of *actio popularis* eventually transcended history and national boundaries. In modern times, the concept has influenced domestic legal systems and gained relevance in international law. Today, it underpins the concept of *obligations erga omnes*, allowing states to challenge grave international crimes (like genocide or slavery) and protect global public goods, even if they have not suffered a direct, individual injury.

3.2 Evolution of *actio popularis* in the International Court of Justice

The evolution of *actio popularis* as a legal framework which could be used before the International Court of Justice started in 1966, with the South-West Africa Cases with an explicit rejection regarding the use of this legal means. Nevertheless, ICJ's position evolved overtime, and it is still evolving nowadays.

3.2.a The denial in South-West Africa Cases (1966)

The first cases before the ICJ where *actio popularis* was discussed are the *South-West Africa Cases* (*Ethiopia v. South Africa*; *Liberia v. South Africa*). Initiated in

[152] *Ivi.*, pp. 48-51.

1960, these cases forced the Court to determine if individual States could sue to enforce a collective, public interest in the absence of direct material injury.

In the 1966 *South-West Africa Cases*, Ethiopia and Liberia sued South Africa because of its administration of the Mandate for Southwest Africa. Specifically, both States claimed South Africa violated its Mandate's obligations established in the Leage Covenant by instituting the apartheid system in the area and failing to promote the material and moral well-being of the territory's citizens.[153]

Ethiopia and Liberia claimed jurisdiction for the Court because Article 7 of the Mandate Agreement allowed any member of the League Covenant to submit disputes with the Mandatory to the Court.[154]

The Court gave two different judgments for each case, the first in 1962 and the second one in 1966. The 1962 judgments are very different from those of 1966, reflecting an internal conflict on the matter within the ICJ.

In the preliminary phases, South Africa claimed that both claimant States lacked a material interest in the dispute. Nevertheless, in 1962, the Court rejected South Africa's objections. Indeed, the Court established that the League Members had a "right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members".[155] These Judgments seemed to open a door for an *actio popularis* claim.

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[153] Roman Kwiecień, "A New Life for Actio Popularis in International Law? The Prevention and Punishment of Genocide as an Interest of the International Community as a Whole before the International Court of Justice," *Polish Yearbook of International Law* (2024)

[154] Ahmadov, "The Right of Actio Popularis".

[155] *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, 343, para. 24.

In 1966, when the Court ruled for the second time, it radically changed its previous position. The Court distinguished between procedural standing—the capacity to invoke the Court's jurisdiction—and substantive standing—the possession of a specific legal right regarding the merits of the case. The Court confirmed the procedural admissibility of the claim, meaning that the applicants (Ethiopia and Liberia) possessed the necessary legal status to initiate proceedings under the jurisdictional clause of the Mandate. In other words, the Court merely verified that the parties were allowed to appear before it, without evaluating the validity of their claims. However, the Court's final determination focused on substantive standing, claiming that even if the applicants had the right to bring the case to court, they did not possess a specific vested legal interest in the subject matter.[156] Indeed, the Court stated that the Mandate did not grant individual league members a right to police the conduct of the Mandatory power. The obligations of the Mandate Agreement were not owed to the applicants specifically and they did not suffer a direct legal injury, therefore they could not claim a breach of an obligation.[157]

Moreover, the Court underlined that the applicants' arguments required the Court to allow an *actio popularis*.[158] However, the Court claimed that even if that right is recognised in some municipal legal systems, "it is not known to international law as it stands at present".[159]

The 1966 Judgments provoked a wave of discontent within and towards the ICJ.

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[156] Andrea Gattini, "Actio Popularis," *Max Planck Encyclopedia of International Procedural Law* (2019), para. 1.

[157] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, I.C.J. Reports 1966, 6, para. 7.

[158] Urs, Priya. "Obligations Erga Omnes and the Question of Standing before the International Court of Justice." *Leiden Journal of International Law* 34, no. 3 (2021): 505–25.

[159] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, I.C.J. Reports 1966, 47, para. 88.

Some believed the Court reflected extreme judicial conservatism and an anachronism.[160] Many judges dissented with the Judgments given, claiming that, for example, international law had already recognised that States possess legal interests in matters such as general humanitarian causes.[161]

3.2.b The partial re-opening in Barcelona Traction (1970)

A shift on the matter occurred in 1970, when the ICJ published its Judgement on the Barcelona Traction case. The Court, as underlined in Chapter II, famously affirmed in paragraphs 33 and 34 the existence of obligations *erga omnes*, due to the international community as a whole. These obligations *erga omnes* are a concern of all States, with the implication that «all States can be held to have a legal interest in their protection; they are obligations *erga omnes*».[162]

Regardless of the opening of the ICJ in paragraphs 33 and 34, in paragraph 91 the Court claimed that «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. It is therefore still on the regional level that a solution to this problem has had to be sought»[163].

With this paragraph, the ICJ highlighted the procedural gap between substantive rights and the ability to actually enforce them. The Court observed that while fundamental human rights are the concern of all states, the actual treaties and instruments on the universal level at that time did not explicitly grant states the

[160] Roman Kwiecień, "A New Life for *Actio Popularis* in International Law?," *Forum Prawnicze* 4, no. 84 (2024): 5.

[161] Kwiecień, "A New Life for Actio Popularis", p. 5.

[162] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Judgment, I.C.J. Reports 1970, p. 3, para. 33.

[163] *Ivi.*, p. 48, para. 91.

legal capacity to protect victims of human rights infringements irrespective of their nationality. The Court then contrasted this lack of universal enforcement with the regional level, where solutions had been found. For example, the European Convention expressly entitled any contracting state to make a claim against any other contracting state for human rights violations, completely irrespective of the victim's nationality.[164]

The Court stressed that without an explicit treaty provision, general international law at the universal level did not provide the procedural mechanism for states to bring public interest claims without a direct link to the victim.

3.2.c The development between the 1970s and 2000s

The evolution of *actio popularis* at the ICJ after the Barcelona Traction Case was characterised by hesitancy. Indeed, even if the critical theoretical step was made in the 1970 Judgment, the ICJ remained paralysed by conservatism and procedural hurdles. An example of this attitude can be found in the *Nuclear Tests* cases (*Australia v. France*; *New Zealand v. France*). The proceedings of these cases were started by Australia and New Zealand against France in 1974 to stop French nuclear testing in the South Pacific.[165] The Court, in the end, avoided ruling on the applicants' standing since France unilaterally declared to conclude the tests.[166] The Case was relevant because it kept the debate on *actio popularis* alive. Judges, referring to the Barcelona Traction's Judgment of 1970, underlined that it could now be used as a subject of litigation before the ICJ.[167]

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[164] Ahmadov, "The Right of Actio Popularis", p. 147.

[165] *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, 262, para. 26.

[166] *Ivi.*, para. 56.

[167] Ahmadov, "The Right of Actio Popularis", p. 12.

Another relevant setback for *actio popularis* occurred in 1995 with the ICJ's Judgment on the *East Timor Case* (*Portugal v. Australia*). In 1989, Northern Australia and the Indonesian Province of East Timor created a Zone of Co-operation between, where Portugal served as the Administering Power of East Timor. Portugal claimed that Australia did not respects Portuguese duties and powers in its role and it failed to respect the right of self-determination of the people of East-Timor.[168] While recognising the *erga omnes* value of the right to self-determination.[169] The ICJ ruled that it could not delivery a judgment on the matter because of the principle stated in *Case concerning Monetary Gold Removed from Rome in 1943*, or the "indispensable third-party" rule, according to which the Court cannot take any decision on the international responsibility of a State if that decision would affect the legal interests of that third-party.[170] In the East Timor case, the indispensable third-party would have been Indonesia, which had not consented to the Court's jurisdiction, therefore the case could not proceed. Indeed, the Court argued that it «could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. […] the Court cannot act, even if the right in question is a right *erga omnes*».[171] To affirm this, the ICJ relied upon the principle of consent, claiming that it could exercise its jurisdiction over a state with its consent.[172]

These are two relevant historical examples which represent the state of art of the

[168] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, 92, para. 1.

[169] *Ivi.*, p. 102, para. 29.

[170] *Ivi.*, p. 100, para. 24.

[171] *Ivi.*, p. 102, para. 29.

[172] *Ivi.*, p. 104, para. 34.

development of *actio popularis* in the ICJ. While the ICJ established the *substantive* framework that certain obligations are owed to the entire international community, it failed to adjust its *procedural* rules to allow states to actually enforce these rights.[173]

3.2.d The establishment of a partial *actio popularis* in the ILC Project on the Responsibility of States for Internationally Wrongful Acts (2001)

In the meanwhile, as explained in the previous chapter, the International Law Commission started working on the Articles on Responsibility of States for Internationally Wrongful Acts in the 1950s. The debate on these topics lasted almost 5 decades, with the adoption, in 2001, of the last version of the ARSIWA. An highly relevant step forward for the adoption of a legal tool as *actio popularis* was made thanks to Special Rapporteur Roberto Ago, who introduced the critical distinction between “ordinary international delicts” and international crime of State”.[174] The latter were defined as a breach of an obligation "essential for the protection of fundamental interests of the international community".[175] This distinction implied that, in the case of breach of an obligation of this nature, any State could consider itself “injured”, endorsing collective enforcement and *actio popularis*. Even if Ago’s proposed distinction was not included in the final text of the Articles, it served as the basis to for the distinction between ordinary and

[173] Urs, "Obligations Erga Omnes and the Question of Standing before the International Court of Justice," p. 518.

[174] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," in *The Fundamental Rules of the International Legal Order*, edited by Christian Tomuschat and Jean-Marc Thouvenin (Leiden: Martinus Nijhoff Publishers, 2006), p. 390.

[175] Andreas L. Paulus, "Coherence in International Law: Constructing an International Community," in *The Fundamental Rules of the International Legal Order*, edited by Christian Tomuschat and Jean-Marc Thouvenin (Leiden: Martinus Nijhoff Publishers, 2006), p. 369.

aggravated responsibility of States, included in the ARSIWA. As explained in previous chapter, ordinary responsibility arises in case of a violation of norms commonly applicable between states, while aggravated responsibility when there are serious breaches of peremptory norms of general international law (jus cogens), which aim at safeguarding the common values of the international community as a whole.[176]

The most relevant tool in the ARSIWA which allows for *actio popularis* is Article 48, which governs the invocation of a responsibility by a State other than the injured State. It establishes that any State other than the injured State is entitled to invoke the responsibility of a State if:

I. the international obligation violated is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

II. the obligation breached is owed to international community as a whole. [177]

The ILC recognised that there might be certain serious breaches of international law which did not directly injure a State at all, that without Article 48 would remain unenforceable.[178]

However, Article 48 established only a partial *actio popularis*. Members of the ILC who worked on the project limited the scope of actions that non-injured states could actually do in two different ways. First, non-injured States cannot claim

[176] Antonio Cassese, *Diritto internazionale*, pp. 372-383.

[177] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 48.

[178] Urs, "Obligations Erga Omnes and the Question of Standing before the International Court of Justice," pp. 507-508.

compensations for themselves. Non-injured States are entitled to demand reparations in the interest of the injured states or for those injured by the violation of the obligation.[179] This is because the invoking State is acting on behalf of the international community as a whole, therefore it cannot benefit from the reparations.[180]

Second, the ARSIWA does not allow States other than the injured State to take countermeasures against the breaching State. Even if some Special Rapporteurs, such as Crawford, attempted to include provisions that would allow collective countermeasures, they were not included.[181] The hypothesis of their introduction within the final text of the ARSIWA was met with opponency by many states, which feared abuse, chaos and the establishment of "international vigilantism".[182] The compromise was reached in Article 54, which establishes that States other than the injured State are allowed to enforce "lawful measures" against the violating State.[183] However, the distinction between countermeasures and lawful measures remains unclear and very debated.

There is another limitation for claims of *actio popularis*, which does not depend from Article 48. The ultimate procedural barrier to *actio popularis* claims before the International Court of Justice (ICJ) is State consent to jurisdiction. As said, in the East Timor Case, the ICJ established that the rule of consent is essential: the

[179] *Ibid.*

[180] Annemarieke Vermeer-Künzli, "A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes," *International and Comparative Law Quarterly* 56, no. 3 (2007), p. 556.

[181] Chin Leng Lim and Ryan Martínez Mitchell, "Neutral Rights and Collective Countermeasures for Erga Omnes Violations," *International and Comparative Law Quarterly* 72, no. 2 (2023), p. 376.

[182] Paulus, "Coherence in International Law".

[183] ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Art. 54.

Court can only exercise its jurisdiction over a State with its consent.[184]

As the ICJ does not have automatic jurisdiction over international disputes, an applicant State bringing an *actio popularis* claim before the Court must find a specific jurisdictional link.[185] In the context of treaties on human rights, this link is usually a compromissory clause, which is a specific provision in the treaty stating that disputes regarding the interpretation or application of that treaty shall be submitted to the ICJ. For example, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide states that «disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute».[186]

Similarly, Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment governs that any dispute, which cannot be settled through negotiation between the Parties, on the interpretation or application of the Convention can be brought before the ICJ for its settlement.[187] The main limitation over these jurisdictional clauses is that States are allowed to make reservations on them, excluding the function of the compromissory clause for that specific Convention or treaty. If a State which has placed a reservation on the compromissory clause of the Convention on Genocide violates the obligations in

[184] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, 104, para. 34.

[185] Helen Duffy and Giulia Pinzauti, "Genocide and armed conflict before the International Court of Justice," *Questions of International Law*, Zoom-in 108 (2024): 77–100.

[186] Convention on the Prevention and Punishment of the Crime of Genocide, art. IX, December 9, 1948, 78 U.N.T.S. 277.

[187] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30, December 10, 1984, 1465 U.N.T.S. 85.

the Convention, no other State can bring an *actio popularis* claim against them before the ICJ.[188]

The opportunity to make reservations on such clauses might create situations where fundamental community interests are violated, but no State is in a position to bring a judicial claim because the violator has opted out of the Court's jurisdiction

In case of lack of a compromissory clause in a treaty or convention, States are free to establish a clause declaration, recognising the Court's jurisdiction. However, only a minority of States made these declarations. Most states often avoid making such clauses on matters concerning armed conflicts, national defence and military matters.[189] Given that the Court cannot rule on the lawfulness of the conduct of a State which has not consented to its jurisdiction, this legal mechanism creates a strong limitation to the Court's actions, as previously explained for the East Timor case.[190]

3.2.e Contemporary Practice in the 21st Century

More recent developments of *actio popularis* in front of the International Court of Justice, after the publishment of the ARSIWA in 2001. The ARSIWA established that claims of *actio popularis* were indeed actionable before the ICJ. But even if the Articles on State Responsible established the right for non-injured States to invoke responsibility for *erga omnes* breaches, it took over a decade for the ICJ to

[188] Urs, "Obligations Erga Omnes and the Question of Standing before the International Court of Justice", p. 518.

[189] Duffy and Pinzauti, "Genocide and armed conflict," pp. 85-86.

[190] Urs, "Obligations Erga Omnes and the Question of Standing before the International Court of Justice," p. 518.

adopt this into its jurisprudence.

The definitive turning point for *actio popularis* before the ICJ was made in 2012, with the Court's judgment over the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Belgium sued Senegal under the UN Convention Against Torture without needing to prove any special interest or direct injury.[191] In its judgments, the ICJ recognised that given the type of obligations violated by Senegal, which were "obligations *erga omnes partes*" contained in the Convention against Torture, every State party of the Convention has a common interest, and not a particular interest of its own, in compliance with the obligations under the Convention. This implies that every State party is entitled to make a claim concerning the cessation of an alleged breach of the Convention by another State party.[192]. With this judgment, the Court clarified also a relevant legal gap which existed in the jurisprudence. It clarified that the common interest was the motif which entitled all State parties to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If special interests were required to make the claim, no State would be in the position to make such a claim.[193]

In 2014, the ICJ expanded the scope of accepted claims of *actio popularis* in the case *Whaling in the Antarctic (Australia v. Japan)*, moving from the realm of human rights to the one of environment and conservation treaties. In 2014, Australia sued Japan in respect of Japan's large-scale program, in breach of the international obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW'), and on the preservation of marine mammals

[191] Béatrice Bonafé, "Impacts of substance on procedure: Genocide litigation before the ICJ," *Questions of International Law*, Zoom-in 108 (2024): 5–28.

[192] *Belgium v. Senegal*, Judgment, [2012] I.C.J. Rep. 422, pp. 449-450, para. 68–69.

[193] *Ivi.,* p. 450, para. 69.

and the marine environment.[194] Australia specified it was acting for the collective interest of the international community. The ICJ ruled on the merits without Japan even contesting Australia's standing, setting a major precedent for litigating global public goods.[195]

The peak development for *actio popularis* claims occurred starting from 2019, when States started litigations to enforce Conventions which embody the most fundamental values of the international community, such as the Genocide Convention and the Torture Convention.

The most relevant examples, which will be explored in great detail in the next chapter are:

1. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 11 States intervening)***.** In 2019, the Gambia sued Myanmar for acts of genocide against the Rohingya community. In its 2022 preliminary objections judgment, the ICJ rejected Myanmar's argument that The Gambia lacked standing because it was not an "injured State". The Court affirmed that the Genocide Convention contains obligations *erga omnes partes* and that the shared interest in preventing genocide allows *any* state party to sue, regardless of special interest.[196]
2. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. In December 2023, South Africa sued Israel, claiming it was violating the Genocide

[194] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, [2014] I.C.J. Rep. 226, para. 1.

[195] Ahmadov, "The Right of Actio Popularis", p. 140.

[196] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, [2022] I.C.J. Rep. 477, para. 113.

Convention in the Gaza Strip following the outbreak of conflict in October 2023.[197] 14 states intervened through declarations in the process.

3. *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic).* Canada and the Netherlands jointly instituted proceedings against the Syrian Arab Republic, alleging the widespread use of torture by the Syrian government.[198]

As it is possible to see in these proceedings, claims of *actio popularis* are attracting many States to take part in the collective enforcement. States are increasingly acting jointly rather than unilaterally to defend community values, or releasing declarations in already-existing processes, stressing even more that these claims are a concern of the entire international community. The most relevant recent example of collective action has occurred in the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, where 33 States submitted declarations to intervene to offer their interpretation of the Genocide Convention.[199]

A new, interesting characteristic of these claims of *actio popularis* is that they are used not merely to seek accountability for past violations of international obligations, but applicant states are utilizing requests for Provisional Measures to intervene in ongoing conflicts and influence belligerent conduct in real-time. This preventative use of the Court is evident in the cited cases (e.g., *The Gambia v. Myanmar* (2020), *Ukraine v. Russia* (2022), and *South Africa v. Israel* (2023/2024)), where the ICJ has been called upon to draw immediate "red lines"

[197] *Ibid.*

[198] *Ibid.*

[199] Bonafé, "Genocide Cases", p.10.

for ongoing hostilities.[200]

3.3 Distinction between current and "original" *actio popularis*

On the one side, the modern international law mechanism of *actio popularis* and the original Roman one share a core philosophy, meaning allowing legal action to protect a collective public interest without the need for direct, personal injury. On the other side, they also present several differences.[201]

The first difference regards the actors entitled to initiate a claim of *actio popularis*. In the original legal framework, this right belonged to any individual citizens of the Roman community, apart from women and pupils. It functioned as a privatized law enforcement tool. In the current international system, before the International Court of Justice, individuals generally do not have standing to bring such claims. The right to invoke responsibility belongs to sovereign States, as underlined in the Articles on Responsibility of States for International Wrongful Acts. The States bringing the claim act either as members of a specific treaty group (protecting obligations *erga omnes partes*) or as members of the international community as a whole (protecting obligations *erga omnes*).

Second, claims of *actio popularis* in the Roman Law were brought against citizens or householders whose behaviour threatened the community. Before the ICJ, claims of *actio popularis* target sovereign States to hold them internationally accountable for severe breaches of international law.

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[200] *Ibid.*

[201] For a comprehensive comparison between the original Roman law mechanism of actio popularis and its modern international equivalent, see Farid Turab Ahmadov, "The Right of Actio Popularis before International Courts and Tribunals" (DPhil thesis, University of Oxford, 2017), 16–17; Michele Giagnorio, "Brevi note in tema di azioni popolari (actio popularis)," Diritto @ Storia 13 (2015); and Calvin P. M. Simanjuntak, "Actio Popularis in International Accountability: A Case Research of the UAE," Lampung Journal of International Law 7, no. 1 (2024): 3–4.

It comes that the nature of the interests protected varies. In the Roman *actio popularis*, the interests protected were highly localized and tangible: *actio popularis* served to maintain urban safety, moral order, and sanitation. Before the ICJ, such claims are used to protect foundational and universal human values, combat systemic atrocities like genocide, slavery, racial discrimination, torture, and severe environmental harm.

Moreover, in the Roman tradition, the citizen who successfully brought a claim of *actio popularis* before the tribunal was usually financially rewarded. The financial reward served as a means to incentivise public notification of violations. In the system set by the International Court of Justice, an invoking State acts to vindicate a fundamental community value, not for personal enrichment. Article 48 of the ARSIWA explicitly forbids the non-injured invoking State from claiming reparations for itself. It may only demand the cessation of the wrongful act and seek reparations for the injured State or for those injured by the breach.

Lastly, in the Roman tradition, *actio popularis* operated within a domestic legal system with magistrates who had automatic authority over the community. Contrarily, the International Court of Justice does not have an automatic, universal jurisdiction over the claims. States need to consent for the Court's jurisdiction. Even if a State violates a peremptory norm like genocide, another State cannot simply bring them before the International Court of Justice unless the wrongdoing State has explicitly consented to the Court's jurisdiction.[202]

[202] Urs, "Obligations Erga Omnes and the Question of Standing before the International Court of Justice," p. 518.

3.4 Development of *actio popularis* in international and regional tribunals other than the International Court of Justice

It is relevant to spend some words on the development of *actio popularis* in international Courts and Tribunals other than the ICJ. The state of art of this legal action varies significantly across international and regional tribunals. In general, each international court is based on different spheres of competencies and *locus standi* requirements. Different characteristic of each tribunals creates different possibilities on the feasibility to begin claims of *actio popularis*.[203]

In the following sections, I will explain how *actio popularis* is integrated in some of the most relevant international and regional tribunals, namely: The European Court of Human Rights (ECtHR), The Court of Justice of the European Union (CJEU), The Inter-American Court of Human Rights (IACtHR) and The African Human Right System.

3.4.a The European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR) manages claims of *actio popularis* depending on who is bringing the case before the Court. The core of *actio popularis* of the ECtHR lies in articles 33 and 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, mostly referred to as the European Convention on Human Rights (ECHR). The ECHR is an international treaty to protect human rights and fundamental freedoms in Europe.[204] Article 33 of the European Convention on Human Rights governs that any State party of the

[203] Giorgio Gaja, "Standing: International Court of Justice (ICJ)," in *Max Planck Encyclopedia of International Procedural Law*, ed. Hélène Ruiz Fabri (Oxford: Oxford University Press, 2018).

[204] European Convention on Human Rights (ECHR)," EUR-Lex, Glossary of Summaries, accessed March 11, 2026, https://eur-lex.europa.eu/EN/legal-content/glossary/european-convention-on-human-rights-echr.html.

Convention can refer to the Court in case of breaches of obligations of the Convention by another party.[205] Article 34 determines that individuals, NGOs and groups of people may bring claims before the Court if their rights protected by the Convention were violated by one of the Party of the Convention.[206] Article 34 is a relevant innovative feature because it allows individuals to take part in the international arena to protect their rights. As underlined by many scholars, legal texts such as the ECHR, which focuses on the protection of fundamental rights, are not intended to protect the private interests of the contracting Parties. In the case *Austria v. Italy* (1961), the ECtHR underlined that the Parties in the ECHR agreed to obligations of objective character, whose purpose is to protect the fundamental rights of individual human beings rather than to create subjective and reciprocal rights for parties themselves.[207] Moreover, the ECtHR, in the case *Ireland v. United Kingdom* (1978), further underlined that the nature of the obligations of the ECHR is not limited to «mere reciprocal engagements between contracting States», but that they create «objective obligations which […] benefit form a "collective enforcement"» and that «the drafters of the Convention intended to make it clear that the rights and freedoms would be directly secured to anyone within the jurisdiction of the Contracting States».[208]

However, despite the "collective enforcement" nature of the ECHR, the ECtHR has maintained a relevant distinction regarding the *locus standi*. While States are entitled to present claims of *de facto actio popularis* before the Court, individuals are not as free to do to the same. Under Article 33, States are not required to justify

[205] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 33, November 4, 1950, 213 U.N.T.S. 221.

[206] ECHR, art. 34.

[207] *Austria v. Italy*, App. No. 788/60, 4 Eur. Comm'n H.R. CD 116, 140, para. 19 (1961).

[208] *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) 5, 82, para. 239 (1978).

a specific legal interest or prove that they or their nationals have suffered a direct injury. When States bring a claim against another party, they act to contribute to a "collective guarantee" of human rights. Therefore, Article 33 effectively allows for an *actio popularis* at the inter-state level, empowering any State party to act in the general interest.[209]

Under Article 34, the Court rejects the idea of an *actio popularis* for individuals and NGOs. As established in the landmark case *Klass and Others v. Germany* (1978), applicants must demonstrate that they are a "victim" of a violation. The Convention does not permit individuals to complain against a law *in abstracto* simply because they feel it contravenes the ECHR: the law must have been applied to their detriment.[210] However, the Court recognized that applying the victim requirement in a "rigid, mechanical and inflexible way" could undermine the effectiveness of human rights protection. Therefore, the Court specified that, in cases where the violations have not occurred yet, individuals must be able to produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur in order to be able to claim victim status.[211] In more recent jurisprudence, such as *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (2024)*, a slight evolution has occurred. While the Court reaffirmed its rejection of *actio popularis*, it granted standing to associations in the context of climate change, acknowledging that collective interests might require a more flexible interpretation of the "victim" status to ensure effective protection against shared global threats. Specifically, an association can now be granted standing to bring a climate case even if its individual members do not meet the strict victim criteria, provided the association is lawfully established, pursues a

[209] Ahmadov, "The Right of *Actio Popularis*", p. 57.

[210] *Klass and Others v. Germany*, App. No. 5029/71, 28 Eur. Ct. H.R. (ser. A) 5, para. 33 (1978).

[211] *Pernechele and Others v. Italy*, App. No. 19543/22, Eur. Ct. H.R., para. 11 (2023).

dedicated purpose to defend human rights against climate change threats, and is genuinely qualified and representative to act on behalf of affected individuals.[212] In conclusion, the ECtHR system functions as a dual mechanism: it allows a form of *actio popularis* for States under Article 33 to protect the European public order, while maintaining a restrictive "victim-based" approach for individuals under Article 34 to prevent abstract litigation.

3.4.b The Court of Justice of the European Union (CJEU)

The Court of Justice of the European Union (CJEU) maintains a highly restrictive approach to *actio popularis* when it comes to private parties and NGOs. For private individuals or NGOs to challenge a legally binding act of the EU before the CJEU, they must file an action for annulment under Article 263(4) of the Treaty on the Functioning of the European Union (TFEU).[213] This article requires applicants to demonstrate that the contested act is of "direct and individual concern" to them.[214] The CJEU applies a test, known as the *Plaumann* **test,** to determine the level of "individual concern" and to decide whether the claim brought by the private parties or NGOs is admissible.[215] It is extremely difficult for private parties to pass this test. This strict interpretation was deliberately adopted by the CJEU precisely to prevent *actio popularis* claims and avoid a flood of lawsuits challenging abstract-general measures.[216]

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[212] European Court of Human Rights, *Inter-State Cases under the European Convention on Human Rights: Case-law Analysis* (Strasbourg: Council of Europe, 2024).

[213] Treaty on the Functioning of the European Union, art. 263(4), December 13, 2007, 2012 O.J. (C 326) 47.

[214] Justice and Environment, "Climate Litigation Case Study Collection (CJEU & ECtHR)" (2024), 3.

[215] *Ibid.*

[216] Ahmadov, "The Right of Actio Popularis", pp. 177-181.

The CJEU has consistently refused to relax the *Plaumann* test for cases involving diffuse collective interests, such as the protection of the environment or the fight against climate change. The Greenpeace case (1998) might serve as a landmark example. Environmental NGOs and local residents attempted to challenge EU funding for power stations in the Canary Islands, arguing they would suffer environmental detriment. The CJEU denied them *locus standi*, ruling that their interests did not differ from anyone else living in the area, firmly rejecting the argument that environmental claims justify a departure from the strict standing rules.[217]

However, while private *actio popularis* are extremely difficult to begin before the CJEU, the Court admits claims of certain applicants. Under Article 258 of the TFEU, the European Commission is empowered to bring claims against Member States for failing to comply with EU law.[218] Moreover, also the Council, the European Parliament, and Member States can begin applications of *actio popularis* before the CJEU. Because these European organs act in the general public interest and do not need to prove any specific injury or direct concern, their right to sue operates essentially as a form of *actio popularis*. These privileged applicants do not have to clear the hurdles of the *Plaumann* test.

3.4.c The Inter-American Court of Human Rights (IACtHR)

The Inter-American system provides a much more liberal approach to claims of *actio popularis*. The IACtHR is particularly open to individuals and non-governmental organizations.

[217] *Ibid.*

[218] *Ibid.*

Article 44 of the American Convention on Human Rights sets the most relevant basis of *actio popularis* in the Inter-American system. This article explicitly allows any individual, group of individuals, or NGO to lodge a petition with the Inter-American Commission claiming a violation of the Convention by a State Party.[219] Article 44 does not specify that the individuals or NGOs need to be direct "victims" of the alleged violations. Therefore, given applicants do not need to prove they were personally injured, the Inter-American system effectively permits individuals and NGOs to exercise a form of *actio popularis* to defend human rights in the broader public interest.[220]

Recent developments of the jurisprudence of the Inter-American Court seem to be directed towards a narrowing of the current conditions set in Article 44, slowly moving closer to the more restrictive jurisprudence of the European Court of Human Rights (ECtHR) regarding individual *locus standi.*[221] For example, in the 1996 case of *González v. Costa Rica* (Case 11.553, Report No. 48/96), the IACtHR placed boundaries on the system's traditionally broad rules for standing.

The Commission clarified that there are limits to the openness of Article 44, specifically regarding attempts to challenge laws in a purely theoretical or abstract manner.[222] Specifically, the Commission established that the liberal standing requirement should not be interpreted in the sense that a case can be presented before the Commission in abstracto. Individuals cannot begin an *actio popularis*

[219] American Convention on Human Rights, art. 44, November 22, 1969, 1144 U.N.T.S. 123.

[220] Giorgio Gaja, "Standing: International Court of Justice (ICJ)," in *Max Planck Encyclopedia of International Procedural Law*, ed. Hélène Ruiz Fabri (Oxford: Oxford University Press, 2018).

[221] *Ibid.*

[222] *Ibid.*

and present a complaint against a law without establishing some active legitimation justifying his standing before the Commission.[223]

Contrarily to individual petitions, the inter-state complaint mechanism has remained completely unused. Under Article 45 of the Convention, a State Party can file a complaint with the Commission alleging a violation by another State Party, but this competence is optional and based on reciprocity. To date, only 9 of the 23 Member States have made the optional declaration accepting this competence, and not a single inter-state case has ever been presented.[224]

3.4.d The African Human Right System

The African system on the protection of Human Rights, comprised of both the Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (ACtHPR), explicitly recognizes and embraces the concept of *actio popularis.*

The African Commission has long utilized a purposive and evolutionary interpretation of the African Charter on Human and Peoples' Rights to permit public interest litigation.

Article 56(1) of the African Charter defines that the only requirement for an application is that the author's identity must be disclosed; it does not require the applicant to be a direct victim of the alleged violation.[225] In relevant cases, such as *Law Society of Zimbabwe v. Zimbabwe* and *SERAP v. Nigeria*, the Commission explicitly reaffirmed its *actio popularis* approach ruling that NGOs and individuals

[223] *Emérita Montoya González v. Costa Rica*, Case 11.553, Report No. 48/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1997), para. 31.

[224] Giorgio Gaja, "Standing: International Court of Justice (ICJ)".

[225] African Charter on Human and Peoples' Rights, art. 56, June 27, 1981, 1520 U.N.T.S. 217.

can bring complaints to defend the rights of others or the general public interest without needing to show that their own specific rights were violated or that they suffered personal injury.[226]

The African Court has adopted the same inclusive stance in the Ouagadougou Protocol. Articles 5(3) and 34(6) of the Protocol govern individual and NGO access to the Court. The Court clarified that individuals and NGOs do not need to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation.[227]

The Court justified this broad standing as a necessity. Given the difficulties that ordinary African victims face when trying to bring human rights complaints, allowing any person to step in on their behalf without proving victimhood was needed to assure justice.[228]

The greatest limitation to *actio popularis'* application in the African system is originated by the principle of *consensus*. Indeed, *actio popularis* claims initiated by individuals or NGOs can *only* be brought against States that have formally accepted the Court's jurisdiction. This means the State must have ratified the Charter and the Protocol, and deposited the optional declaration under Article 34(6) allowing direct individual access. Unfortunately, only a few states have

[226] *Garreth Prince v. South Africa*, Communication 255/2002, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (2004).

[227] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (2001).

[228] Patient Mpunga-Biayi, "The Assertion of a Regional Specificity of the Right of Peoples to Self-determination by the African Court on Human and Peoples' Rights," *Journal of Human Rights Practice* 17, no. 3 (2025): 1–13.

ratified the two documents and deposited the declaration.[229]

The case *Mornah v. Benin and Others* (2022) represents a significant jurisprudential development regarding *actio popularis* in the African system. The applicant, a Ghanaian citizen, sued eight African states claiming that by voting to admit Morocco into the African Union without making it conditional upon respecting the Sahrawi people's right to self-determination, these states failed their collective obligation to assist people struggling against foreign domination.[230] Respondent states argued the case should be dismissed because the Ghanaian applicant was not personally affected by the occupation of Western Sahara. However, the Court rejected the respondents' argument, affirming that an individual acting alone may bring a claim alleging the violation of collective rights. The Court emphasised that the right to self-determination is a *jus cogens* norm and an *erga omnes* obligation.[231] Therefore, its protection is a shared duty, empowering *any* African citizen to institute an *actio popularis* claim to defend it.[232]

[229] *Ibid.*

[230] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96.

[231] *Ibid.*

[232] Mpunga-Biayi, "The Assertion of a Regional Specificity," 6.

CHAPTER IV
CURRENT JURISPRUDENCE OF ACTIO POPULARIS BEFORE THE INTERNATIONAL COURT OF JUSTICE

This chapter explores the current cases of *actio popularis* before the International Court of Justice. In particular, it will discuss the following cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* and *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*.

4.1 The Gambia v. Myanmar

4.1.a The Facts

The Rohingya are a Muslim ethnic minority who primarily reside in the Rakhine State, in Northern Myanmar. Rohingyas claimed their connection to Rakhine State dates back to the ninth century. Myanmar's government officially recognised Rohingyas as an ethnic minority in the first years of the State's independence in 1948. Modern Myanmar's authorities did not recognise their indigenous status and identity. They rejected the name "Rohingya" and insisted calling them "Bengalis" to portray them as illegal immigrants from Bangladesh.[233] In 1982, Myanmar's authorities enacted the Citizenship Law excluding Rohingyas from the recognised "national races", effectively depriving them of legal rights and making the majority

[233] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim Record, CR 2026/1, 12 January 2026, pp. 35-36, para. 76-85.

of them stateless. Because of their current political status and religious differentiation, Rohingyas are considered one of the most persecuted minorities in the world.[234] For decades, they have faced institutionalised oppression, including forced segregation and oppression, as well as restriction of their freedoms and limitations over their lives. Myanmar had subjected the Rohingya to hate campaigns, portraying them as a threat to the State and its culture. The peak of persecution culminated in 2016 and 2017 with the beginning of the "clearance operations". The government stressed that these operations were counterinsurgency and counter-terrorism operations launched in response to attacks perpetrated by the Arakan Rohingya Salvation Army (ARSA).[235] The result of these operations was mass killings, sexual violence, the destruction of Rohingya villages, and the forced displacement of over a million Rohingya refugees into neighbouring Bangladesh. However, the Independent International Fact-Finding Mission on Myanmar (FFM) established in March 2017 by the UN Human Rights Council to establish the facts and circumstances of the alleged recent human rights violations by Myanmar's authorities in Rakhine State, concluded that these operations had been planned in advance, that the actions of the authorities were immediate, brutal, and grossly disproportionate, targeting and terrorizing the entire Rohingya population.[236]

The FFM gathered seven indicators, concluding that the only reasonable conclusion to draw regarding the actions of Myanmar's authorities was the one of "genocidal intent". Specifically, these indicators were: (1) military's extreme

[234] Mulaj, Klejda. "Cascades of violence to genocide: sovereignty, nationalism and the predicament of the Rohingya of Myanmar." *Third World Quarterly 46,* no. 9 (2025), pp. 951-969.

[235] *The Gambia v. Myanmar*, Verbatim Record, CR 2026/1, p. 21, para. 22.

[236] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019, I.C.J., pp. 9-12, para. 10-14.

brutality, (2) highly organised nature of the destruction, (3) enormity and nature of the sexual violence perpetrated, (4) insulting, derogatory, racist and exclusionary expressions used towards the Rohingyas before, during and after the "clearance operations", (5) the existence of discriminatory plans and policies, (6) the government's tolerance of hatred for the Rohingyas and (7) the State's failure to investigate and persecute the gross violations.[237]

4.1.b The Gambia's Application

In this context, on November 11th, 2019, The Gambia filed an application instituting proceedings against Myanmar at the ICJ accusing the country of violating its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In its application, The Gambia underlined that Myanmar had violated the Genocide Convention under different perspectives: by directly committing genocide (aiming to destroy the Rohingya group in whole or in part), conspiracy to commit genocide, attempting to commit genocide, being complicit in genocide, failing to prevent and punish genocide and failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide.[238]

In Section 2 of its Application, The Gambia detailed the grounds for the Court's jurisdiction. The Gambia underlined that Article 36 (1) of the Statute of the Court, established that the International Court of Justice had jurisdiction in «all cases which the parties refer to it and all matters specially provided for in the Charter of

[237] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 September 2019), para. 224. MG, Vol. III, Annex 49.

[238] *The Gambia v. Myanmar*, Application Instituting Proceedings, p. 56, para. 111.

the United Nations or in treaties and conventions in force».[239] Moreover, The Gambia highlighted that both The Gambia and Myanmar were parties to the Genocide Convention, whose article IX established that «Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.»[240] Crucially, The Gambia stressed that neither party had presented any reservation to Article IX of the Convention.

The Gambia stressed the peremptory nature of the norms prohibiting genocide and underlined that the obligations under the Convention on Genocide were owed *erga omnes* and *erga omnes partes.* Furthermore, The Gambia stressed it and other parties to the Convention had notified Myanmar multiple times of its violation before filing the Application. Nevertheless, Myanmar rejected any suggestion of violation. Therefore, The Gambia claimed the existence of an ongoing dispute between itself and Myanmar on the interpretation and application of the Convention, concluding that, for this reason, the Court had jurisdiction to hear the claims submitted by The Gambia against Myanmar.[241]

Moreover, The Gambia underlined its legal entitlement to seek compliance. Citing the 1951 Advisory Opinion of the ICJ "*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*", The Gambia stressed that the Court had clarified the Convention was not intended to protect private interests

[239] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 36, para. 1.

[240] Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277, art. IX.

[241] *The Gambia v. Myanmar*, Application Instituting Proceedings, pp. 12-16, para. 16-24.

of the States. Contrarily, the Convention's aim was to protect the existence of certain human groups and to confirm and endorse the most elementary principles of morality. Moreover, The Gambia underlined that on several occasions the Court stated that the norms prohibiting genocide were to be considered peremptory norms of international law, namely *jus cogens*, and that the obligations contained in the Convention were to be considered *erga omnes*. Thus, all States parties to the Convention had a legal interest in protecting those rights.[242] Citing the Judgment of the Court in the Case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, The Gambia stressed that the Court established that, given the common interest of States parties to these type of Conventions containing norms of peremptory nature, every State party to the Convention was entitled to make claims to ask the cessation of alleged breaches by another State party.[243] Therefore, The Gambia claimed legal entitlement to seek Myanmar's compliance with its obligations as party to the same Convention containing norms of *jus cogens*. The Gambia argued it sought to protect the *erga omnes partes* rights it had under the Convention. Moreover, The Gambia stressed that it had no special, material interest apart from protecting the rights of the Rohingyas, part of the territory of Myanmar, as a protected group under the Convention.[244]

The subjective interests which pushed The Gambia to file the Application had nothing to do with a subjective gain. A primary driving force was The Gambia's membership and leadership role within the Organisation of Islamic Cooperation (OIC).[245] The Gambia's former Minister of Justice underlined that it was a duty of

[242] *Ivi.*, pp. 60-64, para. 119- 127.

[243] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment, 20 July 2012, I.C.J. Reports 2012 (II), p. 450, para. 69.

[244] *The Gambia v. Myanmar*, Application Instituting Proceedings, pp. 60-64, para. 119- 127

[245] *Ivi.*, p. 14, para. 21.

the OIC to demand accountability for crimes committed against fellow Muslims. He viewed this crisis as an opportunity for the OIC to increase its global leadership.[246]

Apart from the religious responsibility, The Gambia stressed its motivations were also rooted in its recent history. Having endured over two decades of a brutal dictatorship, The Gambia learned firsthand that it had to use its moral voice to condemn oppression and atrocity crimes. This historical trauma taught the nation that demanding accountability was imperative to ensure that such crimes are not repeated with impunity.[247]

The Gambia asked the ICJ to address the matter with extreme urgency, requesting Provisional Measures to protect the Rohingya against further, irreparable harm. The Gambia underlined that Myanmar had acted with the intent to destroy in whole or in part the Rohingya as a group, denying any wrongdoing and, therefore, making clear that it had no intention of ending these acts.[248] The Gambia asked that Myanmar (1) take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, (2) ensure that any military, paramilitary or irregular armed units refrain from committing any act of genocide or to incite acts of genocide, (3) not destroy or render inaccessible any evidence related to the events.[249]

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[246] Republic of the Union of Myanmar. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections of the Republic of the Union of Myanmar, 20 January 2021, p. 24, para. 76.

[247] *The Gambia v. Myanmar*, Verbatim Record, CR 2026/1, 12 January 2026, p. 19, para. 5.

[248] *The Gambia v. Myanmar*, Application Instituting Proceedings, pp. 58-60, para. 113-118.

[249] *Ivi.*, pp. 66-68, para. 132-134.

4.1.c Myanmar's Defence

Myanmar built its defence on both substantive and jurisdictional grounds.

On the substantive ground, Myanmar denied any genocidal intent, framing the "clearance operations" as counterterrorism and counter-insurgency operations. Myanmar also recognised that the consequences of such military operations had been severe, including the killing of civilians and the displacement of many individuals. Nevertheless, it argued that these events were consequences of the internal armed conflict, instability and terrorism.[250]

To further emphasise that its actions did not have any genocidal purpose, Myanmar underlined its active work to deal with this situation peacefully. In particular, it stressed the existence of National Verification Cards (NVCs), which were the first step for a person wishing to apply for citizenship. Myanmar claimed that only in the Rakhine State, there were around 50 thousand Bengalis holding NVCs. However, Myanmar argued that many Bengalis did not apply for the NVC, which was the reason for which they could not be granted citizenship, and they saw some of their rights denied (i.e., political participation). Moreover, Myanmar underlined the previous bilateral efforts made with Bangladesh to negotiate the safe repatriation, resettlement, and rehabilitation of displaced persons who refugeed in Bangladesh. Myanmar highlighted that nowadays, new comprehensive measures are being negotiated to resettle and rehabilitate the returnees (i.e. by providing security, education, healthcare, food and job opportunities). Myanmar authorities underlined they have also invited diplomats, delegates of refugees and media to verify the implementation of these new measures for returnees, which include the issuance of NVCs, temporary livelihood support and shelters close to their

[250] *The Gambia v. Myanmar*, Verbatim Record, CR 2026/1, 12 January 2026, p. 13, para. 7-8.

previous living place.

Crucially, Myanmar heavily criticized the evidence relied upon by The Gambia, particularly the UN Fact-Finding Mission (FFM) reports. It claimed that the FFM reports were biased and flawed, arguing that they were based on untested "narratives" and anonymous sources rather than objective, hard evidence.[251]

Jurisdictionally, Myanmar attempted to have the case thrown out by filing four formal preliminary objections, arguing that the Court lacked jurisdiction and that the application was inadmissible.

The first preliminary objection regarded the “real applicant”. Myanmar claimed that The Gambia was not acting in its own rights, but merely as an organ, agent or proxy for the Organisation of Islamic Cooperation (OIC). Myanmar underlined that Article 34 of the Statute of the ICJ governed that “only States may be parties in cases before the Court”. Myanmar argued that, given the real applicant of this case was the OIC, the Court lacked jurisdiction on this case because the applicant was an international organisation.[252]

The second preliminary objection concerned The Gambia’s *locus standi*. Myanmar underlined that The Gambia lacked any link whatsoever to the facts of the case. Myanmar stated there was no territorial connection between The Gambia and the alleged violations nor were there any other relevant links. Myanmar claimed that the only specially-affected State, Bangladesh, could not have instituted these proceedings without the consent of Myanmar because of a reservation that it has made to Article IX of the Genocide Convention. Myanmar stressed that The

[251] *Ivi.*, pp. 14-16, para. 14-24.

[252] Republic of the Union of Myanmar, *The Gambia v. Myanmar*, Preliminary Objections of the Republic of the Union of Myanmar, 20 January 2021, pp. 11, para. 33-35.

Gambia had "put before the Court for the first time ever was a pure form of *actio popularis*". Nevertheless, Myanmar stressed that the Genocide Convention, and notably its Article IX, did not grant non-injured Contracting States standing to claim alleged violations of the Convention.[253]

First, Myanmar highlighted the distinction between the right to invoke another State's responsibility and whether a State had standing to bring a claim before this Court. Specifically, while Article 48 of the International Law Commission's Draft Articles on State Responsibility allows non-injured States to invoke responsibility of other States for internationally wrongful acts, it does not determine that the breached obligation could be enforced by bringing a case before the court.

Moreover, Myanmar stressed that the Genocide Convention did not provide for an *actio popularis*. Myanmar contended that the famous *Barcelona Traction dictum*, which recognized *erga omnes* obligations, did not state that such obligations automatically granted any State the standing to bring proceedings in the nature of an *actio popularis*. Moreover, Myanmar stressed that the members of the Court underlined that the Barcelona Traction *dictum* should not be understood as enabling an *actio popularis*.

Myanmar also pointed out that in every prior case brought under Article IX of the Genocide Convention (i.e., the *Bosnian Genocide* and *Croatia Genocide* cases), the proceedings were exclusively instituted by specially-affected States.[254]

Additionally, Myanmar argued that The Gambia's claims were inadmissible because they violated the traditional rule concerning the nationality of claims.

[253] *Ivi.*, pp. 65-66, para. 210-214.

[254] *Ivi.*, pp. 67-73, para. 217-237.

Building its argument on Article 44(a) of the ILC Articles on State Responsibility, Myanmar claimed that The Gambia lacked standing to invoke responsibility on behalf of the Rohingya, because the victims were not Gambian nationals.

Lastly, Myanmar argued that even if non-injured States possessed standing, it was strictly subsidiary to, and dependent upon, the standing of the specially-affected State. Myanmar recognised Bangladesh as the "specially-affected" state. However, as said, Bangladesh acceded to the Genocide Convention placing a reservation to Article IX, according to which it could not bring a case to the ICJ without the consent of all the parties to the dispute. Myanmar concluded that because Bangladesh effectively waived its right to vindicate Myanmar's responsibility before the Court, non-injured States like The Gambia were similarly barred from doing so.[255]

The third preliminary objection regarded the reservation that Myanmar made on article VIII of the Convention, which stated «Any Contracting Party may *call upon the competent organs of the United Nations* to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III». The reservation made by Myanmar was «with reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union». Myanmar argued that Article VIII provided for the seisin of organs of the United Nations (including the Court) to prevent and suppress acts of genocide, while Article IX of the Convention governed the specific question of the Court's exercise of jurisdiction once it had been validly seised. [256] Therefore, according to

[255] *Ivi.*, pp. 91-107, para. 296-350

[256] *Ivi.*, pp. 109-111, para. 351-360.

Myanmar, its reservation legally precluded from seising the Court against it.[257]

Lastly, the fourth preliminary objection regarded that by the date The Gambia filed its application, no crystallized legal dispute existed between the two States. Myanmar argued that The Gambia's reliance on OIC resolutions and a single Note Verbale sent just one month prior to the filing did not give Myanmar an appropriate opportunity to react, meaning a formal dispute had not yet formed. Therefore, Myanmar argued that the Court lacked jurisdiction in the Case.[258]

4.1.d The Court's Judgment

The ICJ delivered its first Judgment on July 22nd, 2022. It rejected all four Myanmar's preliminary objections, concluding it had jurisdiction on the case and that The Gambia's application was admissible.

The Court rejected unanimously the first preliminary objection, stating that The Gambia instituted the proceedings in its own name as a State party to the Statute of the Court and the Genocide Convention, asserting a dispute regarding its own rights. The Court underlined that even if The Gambia presented the application following the proposal of an intergovernmental organization (the OIC) or with the financial and political support from the organization to institute these proceedings, it still maintained its status as the applicant before the Court.[259]

Additionally, the Court rejected by fifteen votes to one the second preliminary objection, on The Gambia's lack of standing. The ICJ re-affirmed that the

[257] *Ivi.*, p. 135, para. 443.

[258] *Ivi.*, p. 221, para. 730-731.

[259] *The Gambia v. Myanmar*, Preliminary Objections, Judgment, 22 July 2022, I.C.J., pp. 22-23, para. 42-45.

Genocide Conventions contained obligations on the prevention, suppression and punishment of genocide which constituted a common interest of all the parties to the Convention. The Court underlined that these were *erga omnes partes* obligations, owed by any State party to all the other States parties to the Convention. The Court first underlined the possibility for any State party to the Convention to invoke the responsibility of another State breaching its *erga omnes partes* obligations. It highlighted that since all States had a common interest with the compliance of the obligations contained in Conventions such as the Genocide Convention, there was no need to prove the existence of a "special interest" for a State party to the convention to invoke the responsibility of another State party for an alleged violation of *erga omnes partes* obligations. The Court stressed that, if the "special interest" element were required, in many cases no State would be able to make such claims.

Having confirmed the possibility of The Gambia to invoke Myanmar's responsibility, the Court focused on The Gambia's possibility to institute proceedings before the Court. First, the ICJ governed that there was no need to demonstrate that any victim of the breach of an *erga omnes partes* obligation was a national of the State instituting proceedings, as needed for the diplomatic protection mechanism. Crucially, the Court underlined that diplomatic protection was a different mechanism from the entitlement to invoke the responsibility of a State party to the Genocide Convention before the Court for alleged breaches of obligations *erga omnes partes*. Indeed, the latter mechanism was based on the common interest of all States parties. This made the entitlement to invoke responsibility not limited to the nationality of the victims, considered that most times the victims are nationals of the State allegedly breaching the obligations.

Additionally, the Court clarified that the terms of Article IX of the Convention, the compromissory clause, were not intended to limit the categories of Parties entitled to bring claims for alleged breaches of the Convention. Specifically, Article IX did

not specify that the dispute might rise only between the State allegedly violating the obligations and a "specially-affected" Party. Therefore, the Court stressed that any State party might invoke the responsibility of another State party, including through the institution of proceedings. The ICJ concluded that The Gambia, being a State party to the Convention, was entitled to invoke Myanmar's responsibility and to institute proceedings.[260]

Moreover, the Court rejected unanimously the third preliminary objection. The ICJ underlined that Article VIII and Article IX of the Convention had distinct areas of application. Article VIII governed the prevention and suppression of genocide "at the political level", allowing parties to call upon competent UN organs to take discretionary action. Instead, Article IX focused on the matter of legal responsibility, specifically providing the conditions for legal recourse to the ICJ. The Court concluded that since Article VIII did not govern the seisin of the Court, Myanmar's reservation to it was irrelevant to the Court's jurisdiction.[261]

Additionally, the Court rejected unanimously the fourth preliminary objection, on the existence of a dispute between the parties. The Court concluded that a legal dispute existed between the parties at the time the application was filed on 11 November 2019. The Court stated it was clear that the parties had opposed views regarding Myanmar's compliance with the Convention, as evidenced by their clashing statements before the UN General Assembly in 2018 and 2019 following the release of the UN Fact-Finding Mission reports. Furthermore, The Gambia explicitly articulated its legal claims on 11 October 2019 in a Note Verbale, and the Court inferred Myanmar's rejection of these claims from its failure to respond

[260] *Ivi.*, pp. 42-45, para. 106-114.

[261] *Ivi.*, pp. 36-38, para. 86-90.

to the note in the month leading up to the Application.[262]

Moreover, the Court argued that the actual risk that Myanmar's authorities committed the crime of genocide against the Rohingya people was "plausible". Due to this plausibility, the ICJ ordered unanimously four provisional measures against Myanmar on January 23, 2020. First, the Court ordered Myanmar to take all the necessary measures to prevent genocidal acts. Specifically, these measures included preventing (1) the killing of Rohingya, (2) causing them serious bodily and mental harm, (3) inflicting to the group conditions of life to cause their physical destruction and (4) imposing measures intended to prevent births. Second, the Court ruled that Myanmar endured that its military and armed groups did not commit any genocidal act. Third, the Court deliberated that Myanmar's authorities took measures to ensure the preservation of evidence connected to the proceedings. Lastly, the ICJ asked Myanmar to submit regular reports on the state of art of the enforcement of these provisional measures.[263]

4.1.e Recent Developments

The Case is currently continuing before the Court in the *merits* phase. Recently, it has evolved in three major ways.

First, Myanmar asked for exceptionally high standards of proof, given the nature of the case. Myanmar underlined that The Gambia was the first state which had been granted the possibility to institute proceedings on the basis of "the common interest of all States parties". Myanmar warned that if a non-injured state could

[262] *Ivi.*, pp. 29-34, para. 63-77

[263] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the Indication of Provisional Measures, Order, 23 January 2020, pp. 28-29, para. 76-83.

bring claims before the Court for common interests, the risk of overzealous, agenda-driven, or bad-faith proceedings was multiplied. Therefore, Myanmar stressed the exceptional need of due care during the proceedings, underlining that the Court was responsible for maintaining the highest judicial rigor and applied a "beyond reasonable doubt" standard of proof, effectively equivalent to criminal proceedings.[264] Myanmar argued that The Gambia failed this duty of care by relying mostly on UN Fact-Finding Mission reports, which Myanmar characterized as not equipped or qualified to produce evidence suitable for the judicial proceedings before the Court.[265]

Second, the *actio popularis* nature of the case has transformed the proceedings into a massive multilateral effort. The Court admitted the intervention in the proceeding by eleven states (the Maldives, Canada, Denmark, France, Germany, the Netherlands, the United Kingdom, Slovenia, the Democratic Republic of Congo, Belgium, and Ireland), basing the interventions on Article 63 of the Statute of the ICJ. Article 63 (2) determined that every state had the right to intervene in proceedings, accepting that, by intervening in the proceedings, the judgment would be binding upon it. Nevertheless, they would not become a party to the case.[266]

These interventions have shifted Article 63 from a neutral treaty-interpretation tool into a "collective evidentiary calibration". Indeed, intervening States are traditionally not allowed to weigh in on the specific facts of the case, the application of the treaty to those facts, or the evidentiary value of documents. Thus, interventions of this kind served to the ICJ only to contribute to setting the legal

[264] *The Gambia v. Myanmar*, Verbatim Record. CR 2026/1, 12 January 2026, pp. 18-19, para. 8-15.

[265] *Ivi.*, pp. 26-27, para. 43-44.

[266] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 63, para. 2.

benchmark by which the genocidal intent can be inferred from circumstantial evidence and patterns of conduct.[267]

Myanmar objected to these interventions, arguing that they went far beyond mere treaty interpretation, falling far beyond the scope of Article 63 of the Statute. Specifically, Myanmar stressed that the intervening States were trying to determine the standard of proof to be applied, how genocidal intent should be evaluated, and what inferences could be drawn from the evidence.[268] Nevertheless, in its July 2025 Order, the Court admitted the interventions ruling that they were admissible as they concerned the construction of the Genocide Convention.[269]

Third, the last major development of the case regards the remedies. The Gambia further underlined that it was acting only in the common interest of States parties to the Convention. It was seeking structural remedies explicitly "for the victims" and not for itself. The Gambia requested reparation spacing from cessation and punishment to a victim-centred reparation programme, which includes safe and dignified return, family reunification, restoration of property, protection against persecution, rehabilitation for physical and mental injury, the guarantee of "full and equal citizenship" for all Rohingyas and compensation for harm not capable of full reparation by restitution.[270] Myanmar objected to the full set of remedies asked. In particular, Myanmar stressed that The Gambia's remedial package was trying to convert a state-to-state treaty dispute into a "quasi-human-rights remedial

[267] Adnan, Khan Khalid. "Article 63 as Evidence Law: The Gambia v Myanmar and the Missing Intervener." *Opinio Juris*, December 17, 2025.

[268] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Admissibility of the Declarations of Intervention, Order, 25 July 2025, pp. 9-10, para. 48-51.

[269] *Ivi.*, p. 12, para. 58-60.

[270] Adnan, Khan Khalid. "Remedies as the Real Test in The Gambia v Myanmar: Full Reparation and the ICJ's Habit of Saying Less." *Verfassungsblog*, February 18, 2026.

programme", interfering with Myanmar's domestic affairs.[271]

4.2 South Africa v. Israel

4.2.a The Facts

The Israeli Palestinian conflict is a long-standing territorial and political dispute mainly between Israel and Palestine. In 2023, the conflict reached a new peak, due to the large-scale attack launched on October 7, 2023, by Hamas and other Palestinian armed groups. Palestinian militants breached Israeli territory, killing over 1.200 people, injuring thousands and taking around 240 hostages. Israel highlighted the extreme brutality of these attacks, which included calculated massacres, torture, and systemic violence against civilians.[272] In response to October 7, 2023 attacks, Israel launched an unprecedented military operation in the Gaza Strip by land, air, and sea, with the purpose of eliminating Hamas. By December 2023, reports indicated that Israeli military campaign had resulted in over 21,000 Palestinians killed, including more than 7.700 children, and over 55.000 people wounded. Moreover, reports showed that many people had been placed under siege or subjected to forced evacuation, causing the displacement of more than 1.9 million civilians, the massive destruction of civilian infrastructures and the severe famine. Moreover, the intensity of the attacks had reportedly made humanitarian response impossible.[273]

Israel claimed that the military operations were a legitimate response to the threat

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[271] *Ibid.*

[272] Republic of South Africa. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, pp. 68-70, para. 40-42.

[273] *Ivi.*, p. 188, para. 142.

posed by Hamas. Israel argued that the massive civilian casualties of the attacks were a consequence of Hamas's strategy to place its fighters, weapons, strategic and military infrastructures under populated civilian areas, including homes, mosques, United Nations infrastructures and hospitals. Furthermore, Israel maintained that it made extensive efforts to mitigate civilian harm—such as issuing evacuation warnings—and facilitated humanitarian aid, which it claimed Hamas frequently stole. Moreover, Israel rejected the real number of casualties was the one declared in the reports, claiming that statistics were provided by Hamas itself and therefore could not be considered reliable sources.[274]

4.2.b South Africa's Application

South Africa filed the Application before the ICJ on December 29, 2023, accusing Israel of violating its obligations under the 1948 Genocide Convention in its military campaign in Gaza.

In its Application, while South Africa condemned the October 7 attacks by Hamas, it claimed that no armed attack could legally or morally justify a breach of the Genocide Convention. South Africa argued that the Israeli response to those attacks was genocidal in character, since they were committed with the specific intent (*dolus specialis*) to destroy Palestinians in Gaza.[275] Specifically, South Africa claimed that Israel's genocidal intent could be traced back to eight acts:[276]

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[274] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Verbatim Record CR 2024/2. 12 January 2024, pp. 18-19, para. 36-41.

[275] Republic of South Africa, *South Africa v. Israel,* Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, pp. 6-8, para. 1-3.

[276] The acts are presented in detail in: Republic of South Africa, *South Africa v. Israel,* Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, pp. 70-140, para. 43-100.

i. Killing of Palestinians in Gaza. South Africa pointed to the massive death toll, noting that an overwhelming proportion of the casualties were women and children.
ii. Serious bodily and mental harm caused. The application highlighted the tens of thousands of Palestinians who had been wounded, maimed, and subjected to severe psychological trauma and degrading treatment.
iii. Mass expulsion from homes and displacement of Palestinians. South Africa stressed the high number of Palestinians forced to leave their homes, stressing that for most of them this condition had switched from temporary to permanent.
iv. Deprivation of access to adequate food and water.
v. Deprivation of access to adequate shelter, clothes, hygiene, and sanitation.
vi. Deprivation of adequate medical assistance.
vii. Destruction of Palestinian life in Gaza. The Applicant stressed that Israel had deliberately targeted the infrastructures and foundations of Palestinian life in Gaza (i.e., the Palace of Justice, the Palestinian Legislative Council complex, the Gaza City's Central Archive building, as well as universities, mosques and other religious sites, monuments to the history and heritage of Palestinians in Gaza) with the purpose of causing the physical destruction of Palestinians.
viii. Imposing measures intended to prevent Palestinians births.

Moreover, South Africa stressed that the genocidal intent was also made clear by repeated public statements made by high-level Israeli officials**,** including the President, the Prime Minister, and the Minister of Defence. South Africa argued that these statements employed dehumanizing language (such as referring to the enemy as "human animals" or "monsters") and invoked biblical commands of total destruction, serving as direct and public incitement to genocide. South Africa

claimed that Israel had failed to prevent or punish this incitement.[277]

South Africa grounded its standing in the foundational legal nature of the Genocide Convention. It argued that the prohibition of genocide was a peremptory norm of international law (*jus cogens*), and that the duties under the Convention were owed to the international community as a whole (*erga omnes*) and to all other State parties to the treaty (*erga omnes partes*).[278] Because the contracting States shared a common interest to ensure genocide was prevented and punished, any State party to the Convention had the right to invoke the responsibility of another State party to ensure compliance and bring an end to alleged violations. Moreover, South Africa stressed that both itself and Israel were United Nations Member States and parties to the 1948 Genocide Convention and that both had accepted the jurisdiction of the Court under Article IX of the Genocide Convention without any reservation. Moreover, to establish the Court's jurisdiction, South Africa argued that a formal dispute existed because it repeatedly warned Israel in international forums and via diplomatic channels that it viewed Israel's actions as genocidal. However, Israel categorically rejected these accusations. Thus, South Africa affirmed that there was a clear dispute over the interpretation of the Genocide Convention. Therefore, South Africa claimed it had standing to submit its claim against Israel to the Court and that the Court had jurisdiction over the case.[279]

It is relevant to underline that South Africa repeatedly referred to the case *The Gambia v. Myanmar* in its Application. Specifically, it used the case to claim its *locus standi* to prove it had the right to bring the dispute before the Court. Moreover, South Africa drew parallelisms between the Rohingya and Palestinians

[277] *Ivi.*, pp. 140-156, para. 101-107.

[278] *Ivi.*, p. 24, para. 16.

[279] *Ivi.*, p. 174, para. 120-122.

in Gaza to underline the similar urgency and irreparability of the situation. South Africa used this parallelism to ask the Court to impose provisional measures in Gaza as it did in Myanmar for the Rohingyas. South Africa asked the Court to order the suspension of all military operations in Gaza. Moreover, South Africa requested orders compelling Israel to desist from all genocidal acts, halt forced displacements, allow unimpeded access to humanitarian assistance and basic services, and prevent the destruction of evidence related to the allegations of genocide.[280]

By instituting proceedings, South Africa, following the precedent of The Gambia in *The Gambia v. Myanmar*, acted not to protect or claim some material subjective interests, but for the enforcement of collective interests and the common good of the entire international community. Regardless of South Africa's lack of material interest, as the South African Ambassador to the United Nations underlined, the painful past of the country with the apartheid system was the reason for which South Africa felt its duty to intervene and take action against the current Israel's actions against the people of Palestine.[281] South Africa underlined the parallelisms existing between the previous South African apartheid system and the actual situation in Gaza, stressing that the three pillars of apartheid (i.e. racial categorisation, geographical segregation, and draconian security laws) were all currently put in practice by Israel against Palestinians.[282]

4.2.c Israel's Defence

Israel rejected South Africa's accusation. It claimed that the allegations of genocide

[280] *Ivi.*, pp. 190-194, para. 144-147.

[281] *Ivi.*, pp. 18-20, para. 13.

[282] *Ivi.*, p. 62, para. 35.

did not have any legal nor factual foundation. Moreover, it argued that the correct legal framework to be considered was international humanitarian law, not the Genocide Convention. Therefore, the Court lacked jurisdiction over the case.[283] Moreover, Israel affirmed that there was not any existing dispute between itself and South Africa on the interpretation of the Genocide Convention, thus the Application should be rejected by the Court.[284]

Israel insisted that its actions had to be understood in close relation with the attacks of October 7, 2023. It claimed its actions were made for self-defence, as a means to defend Israel and free its hostages from Hamas. Israel asserted that it was only exercising its right to self-defence, which had been largely acknowledged from a wide range of states.[285] Israel argued that the core element of genocide—the specific intent to destroy a people in whole or in part—was "totally lacking". It affirmed that civilian casualties and sufferings were the result of Hamas's military strategy of hiding behind civilians and building its infrastructures in densely populates areas, which included also houses, schools, hospitals, UN facilities and public infrastructures. Israel affirmed that Hamas's tactics made civilians vulnerable during self-defence operations.[286]

To underline the lack of any genocidal intent, Israel underlined its efforts to mitigate civilian harm and alleviate suffering, which included giving civilians advance notice to evacuate areas of intense hostilities through millions of leaflets,

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[283] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024, p. 18, para. 40.

[284] *South Africa v. Israel*, Verbatim Record CR 2024/2, 12 January 2024, p. 28, para. 25.

[285] *Ivi.*, p. 39, para. 67.

[286] *Ivi.*, p. 74, para. 20.

radio broadcasts, and individual phone calls and maintaining a dedicated military unit to coordinate humanitarian aid, facilitating the entry of food, water, medical supplies, fuel.[287] Israel argued that a State seeking to destroy a population would not invest resources, intelligence, operational advantage and staff to provide civilians with evacuation routes or work to facilitate humanitarian aid.[288]

Furthermore, Israel claimed that the provisional measures requested by South Africa were out of proportion and aimed to put Israel at disadvantage. Indeed, it asserted that the measure package required would deprive it from its right to self-defence, leaving its citizens without proper defence, abandoning the hostages and encouraging further terrorist attacks from Hamas.[289]

Notably, Israel did not challenge South Africa's standing in the proceedings, implicitly accepting the possibility for a State to bring claims before the ICJ in cases of alleged breaches of *erga omnes (partes)* obligations. This might be interpreted as an acceptance of the Court's 2022 judgement made during *The Gambia v. Myanmar* proceeding. Instead, Israel focused its defence on the absence of a formal dispute between itself and the applicant. Israel argued that for a dispute to exist under Article IX of the Convention, there had to be a bilateral exchange and a "positive opposition" of views, which it claimed was lacking.[290]

4.2.d The Court's Orders on Provisional Measures

The International Court of Justice issued three significant orders indicating

[287] *Ivi.*, p. 45, para. 40-45 and pp. 50-52, para. 8-13.

[288] *Ivi.*, p. 48, para. 73-75.

[289] *Ivi.*, pp. 60-63, para. 20-36.

[290] *Ivi.*, p. 25, para. 15.

provisional measures in this case, progressively modifying its initial directives as the situation in Gaza deteriorated.

In the first Order, the Court affirmed that it had *prima facie* jurisdiction under Article IX of the Genocide Convention. Similarly to *The Gambia v. Myanmar*, the Court underlined that all the States parties to the Genocide Convention shared the common interest in ensuring the prevention, suppression and punishment of genocide. The ICJ underlined that the obligations contained in the Genocide Convention were *erga omnes partes*. From the common interest of all States parties in compliance with the obligations, it came that each State party was entitled to invoke the responsibility of another State party which allegedly breached these obligations and to institute proceedings before the ICJ. Therefore, the Court concluded that South Africa had standing to submit the application against Israel for its alleged violations of the Genocide Convention.[291] By confirming South Africa's standing, the Court re-affirmed the principle that in the presence of *erga omnes partes* obligations, the legal interest of a non-injured State was not theoretical but sufficient to set off the Court's jurisdiction for the protection of collective rights.

Moreover, the Court argued that the risk that crimes for which South Africa accused Israel occurred was "plausible".[292]

The Court, referencing *The Gambia v. Myanmar*, confirmed that given the nature of the fundamental values protected by the Genocide Convention was such that prejudice to these rights might cause irreparable harm. The Court assessed that the conditions of the Palestinians in Gaza and the humanitarian situation of the Gaza

[291] *South Africa v. Israel,* Order of 26 January 2024, I.C.J. Reports 2024, pp. 16-17, para. 33-34.

[292] *Ivi.*, p. 23, para. 54.

Strip was extremely urgent, due to the real and imminent risk for the population, because it might deteriorate before the Court delivered its final judgement.[293] Therefore, the Court concluded that the conditions for the indication of provisional measures were met. Referring again to *The Gambia v. Myanmar* case, the Court exercised its discretionary power under Article 75, paragraph 2, of the Rules of Court to indicate provisional measures that were different, in whole or in part, from the specific measures requested by the applicant.[294]

In its first order of January 26, 2024, the Court ruled that Israel had to take all measures within its power to prevent that its actions could fall within the scope of the Genocide Convention. In particular, the ICJ ordered Israel to refrain from (1) killing Palestinians in Gaza, (2) causing them physical or mental suffering, (3) endangering their physical existence, (4) imposing measures intended to prevent births, and ordered to (5) prevent and punish public incitement to commit genocide. Furthermore, the Court ordered Israel to take all measures to ensure that its military did not commit genocidal acts. Moreover, the Court established that Israel had to take immediate and effective measures to enable the provision of humanitarian assistance. Lastly, the Court ruled that Israel had to prevent the destruction and ensure the preservation of evidence related to allegations of genocide.[295]

In its second order of March 28, 2024, after the worsening conditions in Gaza Strip, the Court modified its previous order to address the widespread famine and starvation in Gaza. The Court explicitly directed Israel to take all necessary and effective measures to ensure the provision of basic services and humanitarian

[293] *Ivi.*, pp. 26-28, para. 66-74.

[294] *Ivi.*, p. 28, para. 76.

[295] *Ivi.*, pp. 28-29, para. 75-82.

assistance, including food, water, electricity, fuel, shelter, and medical supplies. Moreover, the ICJ required Israel to ensure that its military did not commit acts that violated the rights of Palestinians, including by preventing the delivery of urgently needed humanitarian assistance.[296]

Following Israeli's military ground offensive in Rafah, the Court determined that the situation had become "disastrous" and required further modification of its previous orders. The new order was issued on May 24, 2024. The Court ordered Israel to stop its military offensive and any other action in Rafah which could result in the physical destruction in whole or in part of the Palestinians. Moreover, the Court ruled that Rafah's crossing remained open for the provision of basic and humanitarian assistance. Lastly, the Court established that Israel had to take measures to ensure access to the Gaza Strip for any UN-mandated commission of inquiry, fact-finding mission, or investigative body to investigate allegations of genocide.[297]

4.2.e Recent Developments

The case *South Africa v. Israel* is one of the most participated cases by third-State parties. 20 states had currently realised declarations of intervention in the proceedings, with others which had sought to realise one or more declarations but have not done it yet.

Most of these intervening countries' declarations were intended to support South

[296] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Request for the Modification of the Order Indicating Provisional Measures of 26 January 2024, Order of 28 March 2024, I.C.J. Reports 2024, pp. 525-527, para. 41-50.

[297] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Request for the Modification of the Order of 28 March 2024, Order of 24 May 2024, I.C.J. Reports 2024, pp. 664-665, para. 48-54.

Africa's perspective on the alleged violations (i.e., Colombia, Belgium, Nicaragua, Mexico, Spain).[298] A few, namely the US, Fiji, and Hungary, filed declarations supporting Israel's position that the allegations were invalid.[299]

Most of these countries intervened under Article 63 of the Statute of the ICJ, which governed the "interpretative interventions", according to which States intervened strictly to give their interpretation of the Convention under dispute.[300] Under Article 63, a State did not become a party to the case and had limited procedural rights. Nevertheless, they would be bound by the interpretation of the convention.[301] Some parties also asked to intervene in the dispute under Article 62, which allowed for what is called "protected intervention". It allowed states to intervene if they could demonstrate to have a "an interest of a legal nature which might be affected by the decision in the case".[302] This intervention is very broad and allows State-parties to intervene on any issue of law or facts related to the case. To be allowed to intervene under Article 62, a State had to prove its legal interest.[303] While intervention under Article 63 was considered a "low-cost" and

[298] United Nations Regional Information Centre for Western Europe (UNRIC), "*South Africa vs Israel*: 14 other countries intend to join the ICJ case," https://unric.org/en/south-africa-vs-israel-14-other-countries-intend-to-join-the-icj-case/.

[299] American Society of International Law, "Four States File Declarations of Intervention in *South Africa v. Israel*," *International Law in Brief*, https://www.asil.org/ILIB/four-states-file-declarations-intervention-south-africa-v-israel.

[300] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 63, para. 2.

[301] Haris Huremagić, "Intervening for the community? —The law and politics of third-party intervention before the International Court of Justice," *Journal of International Dispute Settlement* 17, no. 1 (2026), pp. 1–21

[302] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 62.

[303] Huremagić, "Intervening for the community?—The law and politics of third-party intervention before the International Court of Justice," pp. 1–21

"low-commitment" option, intervention under Article 62 was considered "high-cost" and "high-commitment". Historically, given the commitment required to intervene under Article 62, this option had been used only by States interested in protecting their personal interests.[304]

This is why it was relevant to note that States parties intervened in this case under Article 62. The reasons behind this choice were multiple. First, this option allowed States to broaden the scope of their intervention. Under Article 62, States could submit observations on any issue of law or fact arising from the case.[305] Other States believed that intervention on these matters under Article 62 was a duty. For example, Nicaragua and Belize, which sought to intervene in this case under Article 62, stated that intervention was the most effective means to fulfil their positive obligations to prevent genocide and to avoid impunity of the perpetrators.[306] Lastly, given that the obligations allegedly breached were *erga omnes partes*, States seeking to intervene under Article 62 claimed that each State party to the Convention had the legal interest in intervening.[307] This perspective increases the possibility of collective standing, consequently strengthening the unity of the international community.

4.3 Canada and The Netherlands vs Syria

4.3.a The Facts

[304] *Ibid.*

[305] *Ibid.*

[306] *Ibid.*

[307] Béatrice Bonafé, "Impacts of substance on procedure: Genocide litigation before the ICJ," *Questions of International Law*, Zoom-in 108 (2024), pp. 5–28.

The Syrian Arab Republic was accused of having largely used torture and other cruel, inhuman or degrading treatment or punishment ("CIDTP") in its detention system for the past four decades. The situation significantly deteriorated starting in February 2011, when demonstrations broke out in the country around economic, social and human rights topics. In March 2011, the Syrian government detained and tortured a group of Syrian children who had been accused of painting anti-government graffiti. These tortures triggered further demonstrations in the country. The Syrian government continued the repression against demonstrators. As the civil unrest became an armed conflict, the use of torture and other CIDTP became deeply entrenched within the Syrian detention system.[308]

Syria systematically denied these allegations and defined its conduct as necessary to combat terrorism.[309] Moreover, Syria accused the Applicants, and in particular The Netherlands, of not being impartial and of having supported the armed groups opposing the Syrian government.[310]

4.3.b Canada and The Kingdom of the Netherlands's Joint Application

In this context, the Netherlands initiated the dispute resolution process under Article 30(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by requesting negotiations with Syria on September 18, 2020, followed by Canada on March 3, 2021. Article 30 of the Convention against Torture is the compromissory clause, establishing that any

[308] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic),* Joint Application Instituting Proceedings, 8 June 2023, pp. 20-22, para. 25-28.

[309] *Ivi.,* p. 8, para. 5.

[310] Embassy of the Syrian Arab Republic in Brussels. *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic),* Letter from the Chargé d'Affaires. 10 October 2023, p. 12, para. 49-50.

dispute between one or more States Parties to the Convention on its application or interpretation shall be submitted to arbitration or to the International Court of Justice.[311] Neither Syria nor either of the two applicants had made reservations to Article 30 (1), therefore the Court had jurisdiction over this dispute.

Before formally requesting arbitration to the Court, the parties exchanged 66 Notes Verbales for over two years and held two in-person meetings in Abu Dhabi in April and October 2022. However, Canada and the Netherlands ultimately concluded that the negotiations had become deadlocked and futile. Consequently, the applicants formally requested arbitration on November 7, 2022. When more than six months elapsed without the parties reaching an agreement on the organization of the arbitration, Canada and the Netherlands filed the Joint Application instituting proceedings at the International Court of Justice on June 8, 2023. Given these two-year attempts to settle the dispute through negotiations, the applicants affirmed a dispute between the parties on the interpretation of the Convention against Torture existed.[312]

The facts presented in the application by Canada and The Netherlands outlined a consistent, country-wide pattern of abuses, including:[313]

i. Torture and other CIDTP used on detainees, including severe beatings, electric shocks, burns, simulated drownings, and prolonged stress positions.
ii. Abhorrent conditions of detention.

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[311] United Nations. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 30(1). 10 December 1984. United Nations, Treaty Series, vol. 1465, p. 85

[312] *Canada and the Netherlands v. Syrian Arab Republic,* Joint Application Instituting Proceedings, 8 June 2023, pp. 12-18, para. 13-21.

[313] The in-depth explanation of the alleged breaches committed by the Syrian authorities can be found at: International Court of Justice. *Canada and the Netherlands v. Syrian Arab Republic,* Joint Application Instituting Proceedings, 8 June 2023, pp. 22-20, para. 29-58.

iii. Use of torture and other CIDTP to interrogate, punish, intimidate and coerce.
iv. Sexual and gender-based violence. Specifically, men, women, and children had been subjected to various forms of sexual violence to extract information, punish, or humiliate them.
v. Children had been subjected to torture and other CIDTP or were forced to witness torture and other CIDTP or inflict them on their family members.
vi. Enforced disappearances on a widespread and massive scale.

Syrian authorities were allegedly aware of these systemic violations and had failed to fulfil their obligation to prevent torture and other CIDTP. Moreover, those subject to torture and other CDITP lacked access to effective remedies. Additionally, the Syrian government withheld information on these actions.[314]

In their Application, Canada and The Netherlands underlined that the Convention against Torture contained peremptory norms of international law (*jus cogens*), such as the prohibition of torture in any case and with no derogation. Moreover, the Applicants underlined that the obligations contained in the Convention against Torture were of *erga omnes* nature. Therefore, any State party to the convention had a common interest to seek compliance with the Convention against Torture.[315]

The Applicants requested the Court provisional measures. Specifically, they required to order Syria to cease and prevent torture and other ill-treatment, end arbitrary and incommunicado detention and improve conditions of detainees,

[314] UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 46th Session, UN doc. A/HRC/46/55 (2021) [COI Report A/HRC/46/55] at para. 5, online: www.ohchr.org/en/documents/country-reports/ahrc4655-report-independent-international-commission-inquiry-syrian-arab, p. 25, para. 104.

[315] *Canada and the Netherlands v. Syrian Arab Republic*, Joint Application Instituting Proceedings, 8 June 2023, pp. 8-10, para. 5-7.

preserve evidence related to the Application, safeguard death records and provide accurate death certificates, disclose the location of burial sites of individuals who died as a result of torture or other CIDTP, not take any action that may aggravate or extend the existing dispute, report to the Court on all measures taken to give effect to the provisional measures within six months and take all needed measures to reduce the risk of torture being committed by its personnel.[316]

The choice of Canada and the Netherlands to file a joint application was relevant. Following the previous decision of 2020 and 2021 to file two individual requests, the two countries decided to cooperate to hold Syria accountable for its alleged serious breaches of the obligations contained in the Convention against Torture. Neither of the two Applicants had a material subjective interest in filing this application, but they only shared the common interest, along with all States Parties, in ensuring that acts of torture were prevented and that perpetrators did not enjoy impunity. Some scholars identified Canada and The Netherlands' intervention as a reputation and systemic stake in upholding the integrity of the international legal order. On the one side, scholars stressed the Applicants' willingness to be considered reliable "rule of law" models in the international community. On the other side, some scholars highlighted the reputational pressure of The Netherlands on international justice matters. Specifically, this pressure originated from the presence of ICJ's headquarter in The Hague, which pushed The Netherlands to act against Syria to avert the risk of impunity.[317] Moreover, scholars like Mollie Gerver underlined that Western governments might face intense internal political pressure from voters and anti-immigration protesters to decrease the number of asylum

[316] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Verbatim Record, CR 2023/20, October 10, 2023, pp. 32-41, para. 1-42.

[317] Phoebe Okowa, "The Legal Framework for the Protection of Community Interests Before the International Court of Justice", in *European Journal of International Law*, 2021.

seekers and refugees within their borders. Since democratic States could not force refugees back to countries where they would face life-threatening conditions, they could seek for other international solutions. For example, Gerver stressed host States might seek repatriation (i.e. the process of assisting refugees to return home voluntarily) as an option to decrease refugee populations without violating international law.[318] Given the high rates of Syrian refugees in Canada and The Netherlands, it was plausible to conclude that these States wanted to follow the same trend started by other Western countries. Indeed, Gerver underlined that some Western states (i.e. Germany) openly declared their willingness to repatriate Syrian refugees as soon as the conflict ended. Therefore, pushing for international legal intervention against Syria at the International Court of Justice might serve as a domestic motivation for host countries like Canada and The Netherlands: they wanted to make the country of origin "safe" to facilitate the repatriation and ease some domestic tensions.[319]

The connection between international justice and national interest might serve as an example of strategic litigation, where the protection of collective interests is deeply intertwined with domestic, practical interests of Applicant states.

The fact that neither Canada nor The Netherlands intended to obtain a direct material gain from their action, made the application a real claim of *actio popularis*. By joining forces, Canada and the Netherlands were primarily exercising their shared right to pursue their common interest: making the global struggle against torture more effective and bringing Syria's crimes to an end. This case brought *actio popularis* to a new level on both the legal and material level. Legally, it expanded the claims of *actio popularis* to the Convention against

[318] Mollie Gerver, "The Ethics and Practice of Refugee Repatriation", in *Edinburgh University Press*, 2018.

[319] *Ibid.*

Torture. Materially, the joint application served as a sign to underline that parties of the international community were able and ready to cooperate for the respect of their rights, even if they did not obtain anything (materially) from that proceeding.

4.3.c Syria's Defence

Syria strongly disputed the claims brought by Canada and the Netherlands.

First, Syria challenged the standing of the Applicants. It underlined human rights treaties like the Convention against Torture created individual obligations for States. Given that neither of the two Applicants had suffered any direct damage from Syria's actions, Syria claimed Canada and The Netherlands had no right to invoke Syrian international responsibility.

Furthermore, Syria highlighted that the Applicants violated the procedure to invoke responsibility for States breaching the Convention against Torture established in the Convention itself. According to the defendant, the Applicants jumped to the dispute resolution mechanism in Article 30 of the Convention, while Articles 17-21 governed mandatory, sequential steps that had to be exhausted before Article 30 could be invoked, such as the establishment of a Committee against Torture. However, Syria stressed that it made a reservation on Article 21 of the Convention, not recognising the competence of the Committee against Torture. Therefore, Syria claimed the Court did not have jurisdiction over the case.[320]

Moreover, Syria argued the lack of a legal dispute between the Applicants and itself on the interpretation of the Convention. Specifically, it underlined that Applicants' statement of facts was a "general discourse" with no verifiable claims. Moreover,

[320] Embassy of the Syrian Arab Republic in Brussels, *Canada and the Netherlands v. Syrian Arab Republic,* Letter from the Chargé d'Affaires, 10 October 2023, pp. 2-6, para. 7-17.

Syria claimed that it never held opinions that actually opposed the Applicants' but that its interventions were limited in scope, with the purpose of understanding Applicants' concerns and finding a common agreement. Moreover, Syria underlined that holding only one substantive meeting in Abu Dhabi in October 2022 was insufficient to conclude that negotiations had become "deadlocked" or "futile". Additionally, Syria accused Canada and the Netherlands of wanting to undermine the negotiation process by demanding the precondition that Syria acknowledged its international responsibility for breaching the Convention *before* negotiations could even begin. Therefore, Syria claimed there was not any real dispute.[321]

Additionally, Syria also invoked the "clean hand" principle. It accused the Applicants of holding hostile, politicised stances. Specifically, Syria underlined that the Netherlands provided over 25 million euros to an armed Syrian opposition faction called the "Levant Front" which, as international reports showed, practiced torture. Therefore, Syria argued that Dutch public officials might be complicit in instigating or consenting to torture, fundamentally undermining their standing to bring this case against Syria.[322]

Lastly, Syria opposed the provisional measures requested by the Applicants. It first claimed that, since the Applicants' factual claims primarily revolved around events from 2011 to 2014, there was not an urgent, ongoing threat. Furthermore, Syria emphasized that during the Abu Dhabi meetings, it requested specific, credible cases of torture from the Applicants so that Syrian authorities could study, analyse and evaluate them. However, the Applicants refused to provide specific details or verifiable facts. Thus, Syria argued that Applicants' claims were "not plausible,

[321] *Ivi.*, pp. 6-10, para. 18-38.

[322] *Ivi.*, pp. 12-13, para. 49-52.

exaggerated, and based on assumptions". Therefore, due to lack of urgency and specific evidence, Syria concluded the Court should not order any provisional measure.[323]

4.3.d The Court's Order

The Court delivered its first Order on the case on November 16, 2023.

It clarified that to establish the jurisdiction of the Court under Article 30(1), three conditions had to be met: there had to be a dispute concerning the interpretation or application of the Convention, the dispute could be settled through negotiation, and the parties had to be unable to agree on the organization of an arbitration within six months of a request.

Regarding the existence of a dispute, the Court rejected Syria's arguments. The Court found that the exchange of many Notes Verbales and the meeting occurred between the Applicants and the Defendant indicated that a dispute existed.[324] Moreover, the Court observed that during the exchanges between the Parties, the positions of the Parties had not evolved, and no substantive progress had been made toward resolving the dispute. This state of things satisfied the negotiation precondition, as required by Article 30 (1) of the Convention against Torture.[325]

Moreover, the Court noted that Syria never replied to the Applicants' request of November 7, 2022, to submit the dispute to arbitration. More than six months had

[323] *Ivi.*, pp. 10-13, para. 39-53.

[324] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Order. 16 November 2023, pp. 597-598, para. 30-32.

[325] *Ivi.*, p. 601, para. 41-42.

passed since the explicit offer for arbitration was made. This satisfied the last precondition to establish jurisdiction under Article 30 (1).[326]

Moreover, the Court established that Syria's reservation on Article 20 of the Convention against Torture, according to which it did not recognise the competence of the Committee against Torture was not relevant to establish the Court's jurisdiction.[327] Therefore, the Court concluded it had jurisdiction under Article 30 to entertain the case.[328]

On the Applicants' standing, the Court ruled that the obligations under the Convention had *erga omnes partes* nature. Therefore, all States parties to the Convention against Torture shared a common interest in ensuring that acts of torture were prevented and that perpetrators did not enjoy impunity. Therefore, the Court concluded that any State party had the legal standing to invoke the responsibility of another State party which allegedly breached the obligations under the Convention against Torture. On this basis, the Court concluded that the Applicants had *prima facie* standing to submit the dispute.[329]

Lastly, the Court ordered only two provisional measures. The first was the prevention of torture, according to which Syria had to take all measures within its power to prevent acts of torture and other cruel, inhuman, or degrading treatment or punishment. The second was the obligation to preserve evidence, according to which Syria had to take effective measures to prevent the destruction and ensure

[326] *Ivi.*, p. 601, para. 43-44.

[327] *Ivi.*, p. 602, para. 46.

[328] *Ivi.*, p. 602, para. 47.

[329] *Ivi.*, pp. 602-603, para. 48-51.

the preservation of any evidence related to allegations of acts.[330]

Following this decision on provisional measures, the Court issued a subsequent Order on February 1, 2024, concerning the procedural timeline for the case's merits.

4.3.e Recent Developments

With its order, the Court confirmed the nature of *erga omnes (partes)* obligations for the norms contained in the Convention against Torture. This enlarged the scope of claims of *actio popularis* that could be brought before the International Court of Justice. Moreover, the shift from individual protection to collective protection showed that international litigation was becoming a collective effort to safeguard the "public order" of the international community.

In December 2024, after more than a decade of civil war, Syrian rebels overthrew the Bashar al-Assad regime, who ruled over the country since 2000. He was followed in January 2025 by Ahmed al-Sharaa. On the one side, Ahmed al-Sharaa's government was characterised by a commitment to the creation of a more secular state, with more equality among the various populations living in the country. On the other side, some other people (including individuals part of certain minorities and women) feared the new administration and did not hold the same political rights and representation of the majority.[331]

The latest transitional government of al-Sharaa was established on March 29, 2025. In April 2025, the Ministry of Defence of the transitional government issued

[330] *Ivi.*, pp. 610-611, para. 76-80.

[331] Center for Preventive Action. "Conflict in Syria." *Global Conflict Tracker*. Council on Foreign Relations. Last modified February 18, 2026.

a Code of Conduct on Military Discipline. This code explicitly prohibited the insulting or mistreating of detainees, emphasised the need to respect civilians, treat them with dignity, and refrain from any form of abuse or discrimination.[332]

Moreover, in May 2025, President Ahmed al-Sharaa ordered the creation of a National Commission for Transitional Justice (NCTJ), responsible for uncovering the severe violations perpetrated by the Assad regime. Moreover, also in May 2025, the President established a National Commission for the Missing (NCM), with the purpose of research and uncover the fate of the missing and forcibly disappeared.[333] Additionally, President al-Sharaa promised to hold accountable those who committed serious crimes under the previous regime.

Nonetheless, the organisation Syrians for Truth and Justice, on the International Day in Support of Victims of Torture, on June 26, 2025, published a report to highlight that tortures and other CIDTP continued under the Assad regime.[334]

The report underlined that tortures were perpetrated against civilians by groups affiliated with the transitional government, including armed forces and military units. It stressed that these violations breached Syria's binding international obligations, including the prohibition of torture, the protection against forced disappearance and the obligations to uphold the dignity of detainees. The report included many testimonies of act of torture, often happening in governmental

[332] Bassam Alahmad, "Torture Persists: Testimonies and Indicators Reveal Alarming Incidents in Post-Assad Syria," *Syrians for Truth and Justice*, June 26, 2025, https://stj-sy.org/en/torture-persists-testimonies-and-indicators-reveal-alarming-incidents-in-post-assad-syria/.

[333] Roger Lu Phillips, "Syria Embarks on a Transitional Justice Project," *International Centre for Counter-Terrorism - ICCT*, September 1, 2025.

[334] Bassam Alahmad, "Torture Persists: Testimonies and Indicators Reveal Alarming Incidents in Post-Assad Syria," *Syrians for Truth and Justice*, June 26, 2025.

buildings, such as police stations.[335]

Therefore, while President al-Sharaa promised to take actions to hold persecutors of the old regime accountable for the violence they inflicted, the exclusive focus on the crimes of the old regime resulted as a selective approach and did not respect the principle of comprehensive justice. The attitude of the new transitional government, which focused only on the crimes of the past regime and did not take concrete steps to enforce concrete measures to stop the current violence showed an unwillingness to bring these practices to an end.[336]

4.4 The New Paradigm of International Litigation

The three cases analysed in this Chapter marked a relevant development for the jurisprudence of the International Court of Justice. Having confirmed for the first time in *The Gambia v. Myanmar* case the legal standing of The Gambia to present an application against the alleged breaches of the Genocide Convention by Myanmar and having confirmed its *prima facie* jurisdiction, the Court demonstrated that *actio popularis* claims were no longer a theoretical aspiration but a functional reality in contemporary international law. Moreover, with the confirmation of this decision in *South Africa v. Israel* and *Canada and The Netherlands v. Syria*, the Court re-affirmed *actio popularis* claims as established jurisprudence rather than a one-case exception.

The lack of a material subjective interest in the Applicants of these cases, as seen in the above analysis, did not preclude other personal interests. The historical burden of the dictatorship in The Gambia and the horrors of the apartheid system

[335] *Ibid.*

[336] *Ibid.*

in South Africa were two major elements which motivated these States to file applications against, respectively, Myanmar and Israel to denounce their violations of international obligations. It was relevant to highlight how the historical experiences of States might allow them to develop a strong sensitivity to certain situations. This demonstrated how the development of elements such as *erga omnes (partes)* obligations, *jus cogens*, and an openness toward the *actio popularis* framework in international law was deeply intertwined with the deepest wounds of contemporary history and served as a means to enforce essential international principles, such as "never again". "Never again" is an emblematic principle arising after the horrors of the Second World War as a promise to never repeat the horrendous actions of the past century. The development of *actio popularis* in international law made States more obliged to remember their historical responsibility to prevent or stop current atrocities in order to not perpetrate the same mistakes.[337]

The affirmation of the Court on the *erga omnes (partes)* nature of the obligations contained in some of the most relevant Conventions on human rights, granted every State party to these Conventions the right to seek compliance with these obligations and to invoke the responsibility of those States breaching the obligations, regardless of the existence of a direct injury.

Moreover, the switch to joint application in *Canada and The Netherlands v. Syria* case and the huge intervention of other third-States in the existing cases proved that international litigation was becoming a collective tool to maintain the public order of the international community and to safeguard the most relevant rights at the foundation of the entire international community.

[337] Kim Lane Scheppele, "Never Again. And Not Quite". *Verfassungsblog*. July 23, 2024. https://verfassungsblog.de/never-again-and-not-quite/.

It is essential to underline the change of paradigm we are witnessing in third-party interventions. Historically, third States intervened in others' proceedings when they had some subjective interests to safeguard. Nowadays, we are witnessing a huge number of third-party interventions to cases concerning breaches of *erga omnes* obligations. Béatrice Bonafè noted that this phenomenon reflected a gradual abandonment of the traditional unilateral approach to international law. Instead, States were moving toward an objective, collective assessment of severe breaches.[338] Because substantive rules like the prohibition of genocide were designed to protect the collective interests of the international community, they demanded a collective procedural response, fundamentally challenging the classic bilateral framework of the ICJ. Moreover, Bonafé underlined that States were using traditional ICJ's rules to make such collective interventions (i.e. Articles 62 and 63 of the Statute of the ICJ). This is interesting because the affirmation of *erga omnes (partes)* obligations forced the traditional ICJ's norms to stretch, in order to adapt to the new collective approach of the international community, modifying the traditional, bilateral dispute settlement rules.[339]

Rather than acting in isolation, States used Articles 62 and 63 to take part in proceedings through coordinated joint interventions, with the purpose of safeguarding the international order. Moreover, while most interventions were made under Article 63, some States started requesting to intervene under Article 62. Article 63 limited States' interventions to the interpretation of the Convention under dispute. Article 62 allowed States to intervene on any issue of law or facts related to the case, provided that States had to prove their legal interest in the case

[338] Béatrice Bonafé, "Impacts of substance on procedure: Genocide litigation before the ICJ,", pp. 5–28.

[339] *Ibid.*

and would be affected by its outcome.[340] Interventions under Article 62 required a higher commitment than those under Article 63. States seeking to intervene under Article 62 claimed that their legal interest lay in the fact that the obligations breached were *erga omnes*, meaning that any party to the international community possessed a legal interest in their respect by each and any member of the international community.[341]

The theoretical evolution was supported by recent empirical analysis. Huremagić pointed out that historically (1951-2025) around 76.7% of interventions under Article 63 of the ICJ Statute had been driven by "community interests", with a peak starting from 2013. States were increasingly utilizing Article 63 as a 'low-cost, low-commitment' procedural avenue to act as guardians of international law. According to Huremagić's study, in the same period, only 35% of interventions under Article 62 advanced community interests, whereas most of them were used primarily to protect concrete self-interests. However, interventions under Article 62 to advance community interests increased starting from 2023.[342]

Joint interventions were generally intended to safeguard the "most elementary principles of morality", rather than private, material interests of States.[343] However, some scholars doubted the strength of this mobilisation, arguing it assumed an unrealistic level of altruism among States. This criticism was rooted in the idea that third-party interventions might be dictated more by political

[340] Huremagić, "Intervening for the community?—The law and politics of third-party intervention before the International Court of Justice," pp. 1–21.

[341] Bonafé, "Impacts of substance on procedure: Genocide litigation before the ICJ,", pp. 5–28.

[342] Huremagić, "Intervening for the community?—The law and politics of third-party intervention before the International Court of Justice," pp. 1–21.

[343] Bonafé, "Impacts of substance on procedure: Genocide litigation before the ICJ,", pp. 5–28.

alliances than by a genuine willingness to protect *erga omnes (partes)* obligations. Nevertheless, as underlined by Huremagić, community interest intervention did not need to be fully altruistic to be ethically valid or legally effective: third-state participation could advance the ethical and legal interests of the international community even if the states' motivations were partly motivated by their own self-interest.[344]

Lastly, by granting provisional measures in all three cases, the Court accepted to assume an active role in these cases with alleged very severe breaches. The Court intervened primarily to prevent further harm and to ensure the preservation of evidence for future accountability.

[344] Huremagić, "Intervening for the community?—The law and politics of third-party intervention before the International Court of Justice," pp. 1–21.

CONCLUSION

This thesis has analysed the emergence and development of *actio popularis* within the international legal system.

The idea of *actio popularis* was designed in Roman Law, where citizens could initiate a legal action against another citizen in defence of the public interest, without being directly harmed by the latter's actions, but only for the purpose of the common good.

Similarly, in international law *actio popularis* has recently developed with the purpose of safeguarding fundamental rights of such fundamental importance to the international community that they are non-derogable. These rights are the norms of *jus cogens*, which have affirmed within the international community starting from the end of the Second World War. *Jus cogens* norms can be seen as international obligations *erga omnes (partes)*, meaning towards every member of the international community or every State party to a certain Treaty or Convention. The relevance of such obligations for the international community allowed for the drafting and development of the Articles on the Responsibility of State for Internationally Wrongful Acts (ARSIWA) by the International Law Commission.

ARSIWA contains an extremely relevant article for the development of *actio popularis* in international law, which is Article 48. This article allows non-injured States to hold responsible other States which violated fundamental norms of international law.

After extensive debates on the scope and functioning of this Article, the International Court of Justice has recently accepted cases of pure *actio popularis*, brought by some States against others which allegedly violate norms of *jus cogens*, namely norms contained in the Genocide Convention and in the Convention

against Torture.

Starting from the first Application in 2019 (*The Gambia v. Myanmar*), the Court is currently seized of three distinct proceedings (the others are *South Africa v. Israel* and *Canada and The Netherlands v. Syria*). In all three cases, the Court has confirmed the Applicants' legal standing to bring the case before the court and its jurisdiction to hear the merits of each case.

To analyse the development of *actio popularis* within international law, this thesis first analyses the relevant changes that occurred within the modern international community. The origin of the modern international community is commonly identified with the 1648 Peace of Westphalia. This event is regarded as the milestone for the development some relevant characteristics of the current international community, such as the secularisation of international law, the institution of rules for the peaceful settlement of disputes and the formulation of individual and collective sanctions against aggressors. However, the Westphalian international community was characterised by bilateral relations between States and did not establish a real, multilateral cooperation between States. The dramatic events of the Second World War marked the establishment of this multilateral cooperation and the formation of an international community, characterised by the affirmation of universal values at the very basis of the international community which must be protected. The rise of these common values has crystallised in relevant legal texts, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, or the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

The second section focuses on the establishment and the content of the ARSIWA.

It analyses the content of the entire set of Articles, as an attempt to explain in detail how the responsibility of States for internationally wrongful acts works in international law. Moreover, this section focuses on Article 48, which allows for claims of *actio popularis.*

The third section delves into the history of *actio popularis.* First, it explores its design and purpose in Roman Law as a means to safeguard the public order. Second, it focuses on the most relevant milestones of its development before the International Court of Justice. In fact, first it explains the ICJ's denial of this legal framework in the South-West Africa Cases (1966) and the partial re-opening in the Barcelona Traction Case (1970). Moreover, it explains the developments of *actio popularis* over the last decades of the last century, with a focus on the establishment of the ARSIWA. In addition, it briefly presents the most recent developments on the matter during the 21st century. Lastly, this chapter concludes with a summary of the state of the art of *actio popularis* claims before international and regional tribunals other than the ICJ, such as the European Court of Human Rights and the Inter-American Court of Human Rights.

Lastly, the last section deeply analyses the current jurisprudence of *actio popularis* before the ICJ. The first three cases of pure *actio popularis* brought before the ICJ are explored in detail, with a focus on the positions of the Applicants, the Defendants and the Court. The purpose of this chapter is to stress that *actio popularis* has become a practical reality within the ICJ, which marks a great step forward for the international community. The Court, by accepting the standing of the Applicants and confirming its jurisdiction, recognises that there are fundamental rights which must be safeguarded.

Furthermore, this thesis has demonstrated that *actio popularis* is no longer a theoretical aspiration but a practical reality. By accepting these claims, the ICJ has recognized that certain rights are so fundamental that their protection cannot be

left to the discretion of the injured State—which is often non-existent in cases of genocide or systemic torture, being mostly the breaching State itself.

The emergence of *actio popularis* before the ICJ represents a crucial development for the international community. It establishes a new paradigm, where non-private-interest-driven cooperation, protection of common values and enforcement of *jus cogens* take precedence over narrow state interests. The ICJ has proved it is moving from a bilateral view of international responsibility to a constitutional view, which considers the obligations that each State party to the international community has towards each and any other member.

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