ERGA OMNES PARTES BEFORE THE INTERNATIONAL COURT OF JUSTICE: FROM STANDING TO JUDGMENT ON THE MERITS

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In its landmark order on provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (*The Gambia v. Myanmar*), the International Court of Justice (ICJ, or the Court) held that The Gambia had *prima facie* standing before the Court based solely on the *erga omnes partes* nature of the obligations it sought to enforce.[1] Citing its advisory opinion in *Reservations to the Genocide Convention*, the Court reasoned:

> [A]ll the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That

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1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gam. v. Myan.), Order, 2020 I.C.J. 1, ¶ 31 (Jan. 23).

> common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.[2]

The Court first recognized *erga omnes* obligations in *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)* (*Barcelona Traction*), when it explained that there are two categories of obligations under public international law: "obligations of a State towards the international community as a whole," and "those arising *vis-à-vis* another State."[3] For the former, the Court explained that "[i]n 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*."[4] According to the Court, such obligations include the prohibitions on aggression and genocide, as well as the obligation to respect "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[5]

The Court later recognized the related concept of obligations *erga omnes partes*—obligations that a State owes to a group of other States with a common interest, such as other State parties to a multilateral convention.[6] In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (*Belgium v. Senegal*), the Court held that the State parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) have a "common interest" in ensuring compliance with certain obligations under the convention, and as such, obligations "are owed by any State party to all the other States parties to the Convention."[7] The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts similarly recognize both obligations "owed to a group of States" and "owed to the international community as a whole."[8]

Before The Gambia's case against Myanmar, the Court had never considered an application alleging violations of obligations *erga omnes*

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2. *Id.* ¶ 41.

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

4. *Id.*

5. *Id.* ¶ 34; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

6. Belg. v. Spain, 1970 I.C.J., ¶ 33.

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

8. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 29 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

partes by a State that did not assert any special interest in the dispute.[9] The closest it had previously come to doing so was in *Belgium v. Senegal*, where the Court found no need to address Belgium's asserted special interest since "any State party to the Convention [against Torture] may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . ."[10] Otherwise, it reasoned, "[i]f a special interest were required [to bring a claim], in many cases no State would be in the position to make such a claim."[11] The ICJ confirmed this position in *The Gambia v. Myanmar*.[12] Although the ICJ only found standing on a *prima facie* basis, the order may open the door to increasing claims asserting violations of treaty-based obligations, despite the lack of a factual nexus between the applicant and the respondent with respect to the legal controversy.[13]

The Court's order in *The Gambia v. Myanmar* may create opportunities for judicial intervention by the ICJ, even where other forms of international intervention are elusive.[14] For example, international efforts to hold the Assad regime accountable for atrocities in the Syrian civil war have been unsuccessful thus far.[15] However, in September 2020, the Netherlands announced that it had sent a diplomatic note to Syria stating its intention to hold the government of President Bashar al-Assad "responsible under international law for gross human rights violations and torture in particular" under the CAT.[16] The note requested that Syria enter into negotiations—a prerequisite for bringing a case before the ICJ under the CAT.[17] In announcing the decision, Dutch foreign minister, Stef Blok, stated that "[t]he

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9. *See* Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J., ¶ 40.

10. Belg. v. Sen., 2012 I.C.J., ¶ 69.

11. *Id.*

12. Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J., ¶ 40.

13. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (The Gam. v. Myan.), Summary, 2020 I.C.J. 1 (Jan. 23).

14. *Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice*, HUM. RTS. WATCH (Dec. 5, 2019), https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court#_Why_has_Gambia.

15. Balkees Jarrah, *The Netherlands' Action Against Syria: A New Path to Justice*, HUM. RTS. WATCH (Sept. 22, 2020), https://www.hrw.org/news/2020/09/22/netherlands-action-against-syria-new-path-justice; *See also* Ido Vock, *Assad on Trial*, NEWSTATESMAN (Jan. 27, 2021), https://www.newstatesman.com/world/middle-east/2021/01/assad-trial.

16. *The Netherlands Holds Syria Responsible for Gross Human Rights Violations*, GOV. OF THE NETH. (Sept. 18, 2020), https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations.

17. *Id.*

evidence is overwhelming" of the "horrific crimes" the Assad regime has committed.[18]

Nevertheless, even in cases where the evidence appears to be compelling, claims based solely on *erga omnes partes* standing are likely to present the applicant with particular evidentiary challenges.[19] The types of legal controversies that are likely to inspire claims based on *erga omnes partes* standing will often feature allegations of violations that are both widespread and difficult to prove.[20] Moreover, the lack of a factual nexus between the applicant and the legal controversy may pose serious limitations on the applicant's access to evidence.[21] This article explores the following issues in the context of proceedings before the ICJ based on *erga omnes partes* standing: (*i*) strategic considerations concerning the initiation of proceedings; (*ii*) the types of legal standards that may be applicable in merits proceedings; and (*iii*) opportunities and challenges with respect to marshaling evidence.

I. STRATEGIC CONSIDERATIONS BEFORE INSTITUTING PROCEEDINGS

When deciding whether to initiate proceedings based on *erga omnes partes* standing and initiate proceedings before the Court, States must consider the potential ICJ case in the context of the larger strategy for resolving the dispute at hand.[22] An ICJ order and judgment can play an influential role in addressing gross violations of international human rights conventions by increasing or maintaining public attention, providing leverage for diplomatic negotiations, or authoritatively settling disputed factual issues.[23] However, the initiation of contentious proceedings implicates a host of diplomatic considerations; it may complicate the applicant's relationship with the respondent creating the potential for diplomatic or economic retaliation, and could even frustrate attempts to

18. *Id.*

19. *See* Priya Pillai, *ICJ Order on Provisional Measures: The Gambia v. Myanmar*, OPINIOJURIS (Jan. 24, 2020), https://opiniojuris.org/2020/01/24/icj-order-on-provisional-measures-the-gambia-v-myanmar/.

20. *See, e.g.*, Gino Naldi, *Crimes against Humanity and Int'l Courts*, 36 IELR 49–53 (2020).

21. Annie Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. OF INT'L L. 883, 894–95 (2010).

22. Christina L. Davis & Julia C. Morse, *Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice*, 62 INT'L STUD. Q. 709, 711 (2018).

23. Jefferi Hamzah Sendut, *An Explainer on The Gambia v. Myanmar at the International Court of Justice*, MEDIUM (May 16, 2020), https://medium.com/@jhs_/an-explainer-on-the-gambia-v-myanmar-at-the-international-court-of-justice-7834529da19c (last visited Jan. 21, 2020).

resolve the legal controversy by diplomatic means.[24] Moreover, pursuit of an ICJ case also requires significant resources and access to sufficient evidence.[25] Would-be applicants might have to weigh these considerations, the gravity of the situation, and the availability of other forms of intervention in deciding whether to proceed.

If a State elects to institute ICJ proceedings based on *erga omnes partes* standing, a key strategic question is whether to bring suit alone or as part of a group of States.[26] Since the case would presumably seek to enforce community values based on their status as such, proceedings featuring multiple applicants could offer strategic advantages.[27] Joint applications by multiple States, or an application by one State on behalf of a group of States, could help demonstrate the strong collective interest in attaining accountability, increasing pressure to resolve the legal controversy.[28] States have long built coalitions before approaching international adjudication[29]—from the joint application of France, Italy, Japan, and the United Kingdom (with intervention from Poland) in the *S.S. Wimbledon* case against Germany in 1922 before the Permanent Court of International Justice,[30] to The Gambia's application against Myanmar in 2019 on behalf of the fifty-seven Member States of the Organization of Islamic Cooperation.[31] Working together can also allow applicants to share resources, better withstand

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24. Davis & Morse, *supra* note 22, at 709–10, 720; *see* Priya Pillai, *On the Anvil: The Netherlands v. Syrian Arab Republic at the International Court of Justice*, OPINIOJURIS, (Sept. 29, 2020), opiniojuris.org/2020/09/29/on-the-anvil-the-netherlands-v-syrian-arab-republic-at-the-international-court-of-justice/.

25. Davis & Morse, *supra* note 22, at 710, 714; *Q&A: The International Court of Justice & the Genocide of the Rohingya*, GLOB. JUST. CTR. (July 2019), https://globaljusticecenter.net/files/20190716_BurmaICJ_QandA_Factsheet_FINAL3.pdf; Pillai, *supra* note 24.

26. *See* Bruno Gelinas-Faucher, *Time for Canada to intervene as World Court tackles the Rohingya crisis*, POL'Y OPTIONS POLITIQUES (May 15, 2020), https://policyoptions.irpp.org/magazines/may-2020/time-for-canada-to-intervene-as-world-court-tackles-the-rohingya-crisis/.

27. *See id.*

28. *See id.*

29. *See generally* S.S. Wimbledon (U.K. et al. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 15 (Aug. 17); *see generally* Application Instituting Proceedings & Request for Indication of Provisional Measures, Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), 2019 I.C.J. 1, ¶ 21 (Nov. 11) [hereinafter Application Instituting Proceedings].

30. U.K. et al. v. Ger., 1923 P.C.I.J. at 15.

31. Application Instituting Proceedings, Gam. v. Myan., 2019 I.C.J., ¶ 21; Stephanie van den Berg, *Gambia files Rohingya genocide case against Myanmar at World Court: justice minister*, REUTERS (Nov. 11, 2019), https://www.reuters.com/article/us-myanmar-rohingya-world-court/gambia-files-rohingya-genocide-case-against-myanmar-at-world-court-justice-minister-idUSKBN1XL18S.

diplomatic backlash, and assume complementary roles in managing a broader strategy.[32]

On the other hand, joint proceedings can complicate decision-making and present coordination challenges.[33] Nevertheless, a sole applicant might not be able to prevent other States from participating in the case, either through intervention under Articles 62 or 63 of the ICJ Statute[34] or a separate application that the Court could join to the first application, as it did in the *North Sea Continental Shelf* and *South West Africa* cases.[35] For example, the Maldives, the Netherlands, and Canada have expressed interest in intervening in *The Gambia v. Myanmar*, to show further "support of the Rohingya people,"[36] "assist with the complex legal issues that are expected to arise," and "pay special attention to crimes related to sexual and gender-based violence, including rape."[37]

II. LEGAL STANDARDS ON THE MERITS

Erga omnes partes treaty obligations are generally of heightened importance; they reflect core values of the State parties, who often elect to codify them because they reflect core values of the international community as a whole.[38] Indeed, all *jus cogens* norms give rise to *erga omnes* obligations.[39] All of the *erga omnes* obligations that the ICJ first recognized in *Barcelona Traction* are *jus cogens* obligations that are codified in multilateral treaties today, which presumably give rise to obligations *erga*

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32. *See* Gelinas-Faucher, *supra* note 26.

33. *See id.*

34. Statute of the International Court of Justice, Oct. 24, 1945, ch. III, arts. 62–63, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute].

35. *See* North Sea Continental Shelf Cases (Den./Ger. Ger./Neth.), Order, 1968 I.C.J. 9, 10 (Apr. 26); *see also* South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Order, 1961 I.C.J. 13, 338 (May 20).

36. *The Republic of Maldives to File Declaration of Intervention in Support of the Rohingya People, at the International Court of Justice* MINISTRY FOREIGN AFF., (Feb. 25, 2020), https://www.foreign.gov.mv/index.php/en/mediacentre/news/5483-the-republic-of-maldives-to-file-declaration-of-intervention-in-support-of-the-rohingya-people,-at-the-international-court-of-justice.

37. *Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in The Gambia v. Myanmar case at the International Court of Justice,* GOV'T NETHERLANDS (Sept. 2, 2020), https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice.

38. Int'l Law Comm'n, Peremptory Norms of General International Law (Jus Cogens), U.N. Doc. A/74/10 at 142 (2019).

39. *Id.* at 145.

omnes partes.[40] Accordingly, allegations that a State has breached *erga omnes partes* obligations will often be the type of serious allegations for which heightened standards of proof are required.[41] By way of example, we consider here the legal standards for proving genocide under the Genocide Convention and torture under the CAT, both of which the ICJ is likely to consider obligations *erga omnes partes*.[42]

The ICJ has set a high standard for meeting the scienter requirement of the Genocide Convention, which defines genocide as any of the acts enumerated in Article II "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[43] The Court held in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)* (the *Bosnian Genocide* case):

> [I]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.[44]

At the oral argument on provisional measures in *The Gambia v. Myanmar*, counsel for Myanmar went so far as to argue that the existence of an alternative purpose for the alleged conduct—in that case, purported counterterrorism objectives—could preclude a finding of the requisite

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40. Belg. v. Spain, 1970 I.C.J. ¶ 33. ("Such obligations derive, 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."). *Id.*; *see, e.g.,* G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment (Dec. 10, 1984) *(emphasis added)* [hereinafter Convention Against Torture]; *see also* G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 1(1) (Dec. 16, 1966); G.A. Res. 666 U.N.T.S. 195, International Convention on the Elimination of All Forms of Racial Discrimination, (Dec. 21, 1965); *see also* G.A. Res. 260 A (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948) [hereinafter Genocide Convention]; U.N. Charter, art. 2, ¶ 7; *see also* G.A. Res. 212 U.N.T.S. 17, Slavery Convention (Sept. 25, 1926).

41. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. v. Serb.), Judgment, 2007 I.C.J. 43, ¶ 187 (Feb. 26) (emphasis added); Convention Against Torture, *supra* note 40, arts. 5, 7.

42. Bosn. v. Serb., 2007 I.C.J., ¶ 187; Convention Against Torture*, supra* note 40, arts. 5, 7.

43. Genocide Convention, *supra* note 40, art. II.

44. Bosn. v. Serb., 2007 I.C.J. ¶ 187 (emphasis added). *But see, e.g.*, Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*, 5 GENOCIDE STUD. & PREVENTION 238, 245 (2010) (arguing that, properly construed, the scienter requirement under the Genocide Convention is one of knowledge).

intent.[45] Proof, whether direct or by inference, of the requisite intent may require extensive fact-finding.[46] When analyzing whether there is sufficient evidence, often circumstantial, the ICJ appears to show a preference for fact gathering conducted by United Nations (UN) bodies,[47] as discussed further in Section III. B. below.

Claims under the CAT may also require applicants to meet high legal standards that require extensive factual support to satisfy.[48] CAT defines torture as an act "by which severe pain or suffering . . . is intentionally inflicted" for enumerated purposes by or "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[49] The ICJ has not yet interpreted this standard.[50] *Belgium v. Senegal*, the sole CAT case before the ICJ, did not seek to hold Senegal responsible for acts of torture, but rather for its failure to prosecute or extradite former Chadian president Hissène Habré for acts of torture that he committed.[51] But based on the plain terms of the CAT, the jurisprudence of the Committee Against Torture—the Geneva-based treaty body charged with monitoring compliance with CAT—and the jurisprudence of international criminal tribunals, the Court is likely to require specific intent.[52]

State attribution is another inquiry that may present challenging legal standards in the context of proving violations of obligations *erga omnes partes*.[53] In order to establish conduct attributable to a State under international law, the alleged act or omission must either be committed by an organ, person, or entity acting under the authority, instruction, direction, or

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45. Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J. ¶ 47; Kerstin Bree Carlson & Line Engbo Gissel, *Why the Gambia's plea for the Rohingya matters for international justice*, CONVERSATION (Jan. 14, 2009), https://theconversation.com/why-the-gambias-plea-for-the-rohingya-matters-for-international-justice-129365. ("Should the Court agree that there is ample support for an alternative explanation, then it cannot but conclude that the application has no reasonable chance of success on the merits. Not a 50 per cent chance. Not a 25 per cent chance. No chance."). *Id.*

46. *See* Hum. Rts. Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, Office of the High Comm'r on Human Rights, p. 14, ¶ 45 U.N. Doc. A/HRC/42/CRP.5 (Sept. 16, 2018).

47. ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 239 (2016 ed.).

48. Convention Against Torture, *supra* note 40, art. 7.

49. *Id.* art. 1.

50. *See generally* Belg. v. Sen., 2012 I.C.J., ¶ 73.

51. *See generally id.* ¶ 73; *see also* Convention Against Torture, *supra* note 40, arts. 6–7.

52. *See* Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture under International and Domestic Law,* 52 VA. J. INT'L L. 791, 827 (2012).

53. James Crawford (Special Rapporteur), *First Rep. on State Responsibility*, ¶ 155, U.N. Doc. A/CN.4/490 (1998).

control of the State—whether formal or *de facto*—or acknowledged and adopted by the State as its own conduct.[54] Allegations concerning *erga omnes partes* obligations, such as allegations of genocide and torture, will often be susceptible to attribution defenses.[55] For example, in the *Bosnian Genocide* case, even though the Court did find sufficient evidence of specific intent to commit genocide, it was unable to attribute the conduct of the Army of Republika Srpska to Serbia.[56] The Court, nevertheless, found that Serbia had violated its obligation to prevent the Srebrenica massacre under Article 1.[57] As with the Genocide Convention, *erga omnes partes* claims under CAT may also entail attribution issues.[58] Building a link between allegations of torture and public officials will also raise complex issues not just of law, but also of fact,[59] to which we now turn.

III. MARSHALLING EVIDENCE

The types of legal controversies that are likely to inspire efforts to secure ICJ intervention by unaffected States will often feature widespread violations of *erga omnes partes* obligations, requiring extensive fact development.[60] For example, reports indicate that more than 14,000 detainees have been killed "due to torture" at the hands of the Assad regime between March 2011 and September 2020.[61] Similarly, reports indicate that Myanmar's security forces killed at least 6700 Rohingya between late August and late September 2017 and have uprooted approximately one million Rohingya Muslims who are now left as stateless refugees sheltering in neighboring Bangladesh.[62]

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54. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, ¶ 76, U.N. Doc. A/56/10 (2001).

55. *Id.*

56. Bosn. v. Serb., 2007 I.C.J., ¶ 394.

57. *Id.* ¶ 438.

58. *Id.* ¶ 380–81.

59. *Id.* ¶ 65.

60. Bird, *supra* note 21, at 889.

61. *Death Toll Due to Torture*, SYRIAN NETWORK FOR HUM. RTS. (Dec. 1, 2020) https://sn4hr.org/blog/2020/12/01/death-toll-due-to-torture/ (cited in Anne Barnard, *Inside Syria's Secret Torture Prisons*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/world/middleeast/syria-torture-prisons.html).

62. Hannah Beech et al., *'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, N.Y. TIMES, https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html (last updated Dec. 4, 2020).

Accordingly, The Gambia's 2020 memorial spans over 500 pages with more than 5000 annexed pages of supporting materials.[63]

Applicants basing themselves solely on *erga omnes partes* standing will often face particular challenges in securing access to the evidence necessary to build their case[64] because the alleged violations will not directly affect the applicant or its nationals and are likely to have occurred within the respondent State's territory.[65] Of course, this difficulty is not necessarily unique to cases involving *erga omnes partes* standing.[66] As Judge Owada observed in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (*Oil Platforms*), there is often an "inherent asymmetry that comes into the process of discharging the burden of proof."[67] That asymmetry featured in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (the *Croatian Genocide* case), where the Court ultimately dismissed Croatia's claim that Serbia was "best placed . . . to provide explanations of acts which are claimed to have taken place in a territory over which Serbia exercised exclusive control."[68] However, the Court may afford an applicant alleging violations of *erga omnes partes* obligations within the exclusive territorial control of the respondent "a more liberal recourse to inferences of fact and circumstantial evidence" as it did in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (*Corfu Channel*).[69]

Attempts by a respondent to destroy evidence or otherwise impede the applicant's access to information can exacerbate the inherent asymmetry.[70] Indeed, the risks of evidentiary obstruction may be higher in cases alleging breaches of *erga omnes partes* obligations due to the seriousness of such allegations and the intense international scrutiny they will often inspire.[71] For example, the preservation of evidence has been the basis of two provisional measure requests by The Gambia in *Gambia v. Myanmar*.[72] Below we discuss the implications that the asymmetry in access to information likely to

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63. *Gambia files Memorial with ICJ Over Myanmar*, POINT (Oct. 26, 2020), https://thepoint.gm/africa/gambia/headlines/gambia-files-memorial-with-icj-over-myanmar.

64. Pillai, *supra* note 19.

65. Bird, *supra* note 21, at 887.

66. *Id.*

67. *Oil Platforms (*Iran v. U.S.*)*, 2003 I.C.J. REP. 161, 306 (Nov. 6), ¶¶ 46–47 (J. Owada, concurring).

68. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 170 (Feb. 3).

69. Corfu Channel (U.K. & N. Ir. v. Alb.), Judgment, 1949 I.C.J. 4, at 18 (Apr. 9).

70. Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J., ¶ 5.

71. *Id.*

72. *Id.*

attend cases based on *erga omnes partes* standing may have for the different types of evidence that typically feature in ICJ proceedings.

A. Documentary Evidence

Documentary evidence has been described as "the most common and certainly the most important type of evidence in litigation before the ICJ."[73] Applicants in cases based on *erga omnes partes* standing will often face challenges in marshaling documentary evidence for the reasons set forth above.[74] As the Court has observed in *Croatia v. Serbia* and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, while:

> [T]he burden of proof rests in principle on the party which alleges a fact, this does not relieve the other party of its duty to co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.[75]

The authenticity, provenance, and reliability of documentary evidence will often be a source of contention.[76] The Court's general approach is to liberally admit evidence and then address concerns as to credibility in determining what weight to give that evidence.[77] The use of audiovisual evidence in the *Bosnian Genocide* case illustrates the Court's approach.[78] In that case, Bosnia sought to admit a video purporting to show the execution of six Bosnian Muslims.[79] Although the Court admitted the video recording, it did not expressly serve as the basis of its conclusions.[80]

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73. RIDDELL & PLANT, *supra* note 47, at 231.

74. *See generally id.*

75. Croat. v. Serb., 2015 I.C.J., ¶ 173; Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 163 (Apr. 20).

76. Bosn. v. Serb., 2007 I.C.J., ¶¶ 221–22.

77. *Id.* ¶¶ 221–23.

78. *Id.* ¶ 289.

79. Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Application for Limited Re-opening of Bosnia and Kosovo Components of Prosecution Case, ¶ 38 (Int'l Trib. for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian L. Committed in Terr. of Former Yugoslavia since 1991 Dec. 13, 2005) (finding the video of insufficient probative value to warrant admission as the basis of a re-opened case).

80. Bosn. v. Serb., 2007 I.C.J., ¶¶ 289, 389.

B. Third-Party Reporting

Beyond their role as custodians of documentary evidence, third parties, including UN bodies and non-governmental organizations (NGOs), will often play a key role in reporting on events relevant to disputes brought on the basis of *erga omnes partes* standing.[81]

1. UN Fact-Finding

The ICJ has relied extensively on reporting from UN agencies, including country missions and reports of special rapporteurs.[82] Commentators have observed that the Court has "attached considerable probative value to reports compiled and communicated by UN agencies" in complex, fact-intensive legal controversies.[83] For instance, in *Bosnian Genocide*, the Court relied on reports by the UN Secretary-General and a Commission of Experts that the Secretary-General had appointed.[84] In assessing the evidentiary value, the Court expressly considered the following factors:

> (1) [T]he source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).[85]

The Court reaffirmed these factors in the *Croatian Genocide* case and concluded that a report by a UN Special Rapporteur appointed by the Commission on Human Rights deserved "evidential weight . . . by reason both of the independent status of its author, and of the fact that it was prepared

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81. *See* Mads Andenas & Thomas Weatherall, *International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal) judgment of 20 July 2012*, 62 INT'L COMPAR. L.Q. 753, 754, 762, 765 (2013); *see also* Radio Free Asia, *Lawyer: Genocide Case Against Myanmar Based on 'Compelling' Evidence*, VOICE AM. (Nov. 22, 2019), https://www.voanews.com/east-asia-pacific/lawyer-genocide-case-against-myanmar-based-compelling-evidence.

82. *Q&A: The Gambia v. Myanmar (Rohingya Genocide at the International Court of Justice)*, GLOB. JUST. CTR. 3 (May 2020), https://globaljusticecenter.net/files/20200115_BurmaICJ_QandA.pdf.

83. Bosn. v. Serb., 2007 I.C.J., ¶¶ 228–30; Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 60, 182 (Dec. 19); RIDDELL & PLANT, *supra* note 47, at 237–39.

84. Bosn. v. Serb., 2007 I.C.J., ¶ 211.

85. *Id.* ¶ 227.

at the request of organs of the United Nations, for purposes of the exercise of their functions."[86] Similarly, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (*Armed Activities*), the Court explained that it would "take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources."[87]

The Court's willingness to afford evidentiary weight to UN reports suggests that applicants in cases based on *erga omnes partes* standing will find themselves on firm footing when relying on fact-finding that UN bodies have conducted.[88] Indeed, in its provisional measures order in *The Gambia v. Myanmar*, the Court relied on the evidence collected to date by the UN Independent International Fact-Finding Mission on Myanmar (succeeded by the UN Independent Investigative Mechanism for Myanmar (IIMM)).[89] The Human Rights Council established IIMM "to collect, consolidate, preserve and analyze evidence of the most serious international crimes and violations of international law committed in Myanmar," in order to facilitate future judicial proceedings.[90] If the Netherlands ultimately brings a case against Syria, it will likely similarly benefit from the work of the International, Impartial and Independent Mechanism, which, like the IIMM, operates under a UN mandate to collect, preserve, and analyze evidence.[91] Of course, the Court's reliance on UN reporting has its limits.[92] While the IIMM found "reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State" based on hostile policies towards the Rohingya, denial of their citizenship and ethnic identity, hate speech,

86. Croat. v. Serb., 2015 I.C.J., ¶ 459.

87. Dem. Rep. Congo v. Uganda, 2005 I.C.J., ¶ 205.

88. *See* Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J., ¶¶ 10, 22, 37–38.

89. *See id.*; *Independent International Fact-Finding Mission on Myanmar*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx (last visited Jan. 22, 2021); *What is the Independent Investigative Mechanism for Myanmar?*, U.N., https://iimm.un.org/what-is-the-independent-investigative-mechanism-for-myanmar/ (last visited Jan. 22, 2021).

90. Human Rights Council Res. 39/2, U.N. Doc. A/HRC/RES/39/2, at 1–2, 5 (Sept. 27, 2018).

91. G. A. Res. 71/248, International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, ¶ 4 (Jan. 11, 2017).

92. *See generally* Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J., ¶ 66.

condoned living conditions, and impunity to date, the Court will ultimately draw its own legal conclusion of the intent requirement on the merits.[93]

2. NGO Fact-Finding

In addition to UN fact-finding, many NGOs collect data from victims and other sources that may prove invaluable for States alleging breaches of *erga omnes partes* obligations.[94] However, the Court has afforded less evidentiary weight to NGO reports than UN reports.[95] In *Armed Activities*, the Court declined to credit a factual finding from a report by International Crisis Group, declaring that it "does not constitute reliable evidence."[96] Still, each NGO report or document will be assessed by the Court individually.[97] In the *Croatian Genocide* case, for instance, the Court duly considered a report from Human Rights Watch, albeit not regarding it "as conclusive proof of the facts alleged."[98]

More recently, innovations in data security and metadata have improved the reliability of digital information collected by NGOs.[99] However, these new tools introduce a range of evidentiary issues, including issues concerning the reliability of third-party custodians and their methods, electronic evidence, and confidential testimony.[100]

C. Witness Evidence

Where there is access to witnesses, witness testimony may be of particular value to an applicant seeking to overcome the asymmetrical access to documentary evidence, which is likely to feature in the context of

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93. Human Rights Council, Rep. of the Indep. Int'l Fact-Finding Mission on Myan., ¶¶ 1, 14–15, 90, U.N. Doc. A/HRC/42/50 (2019)*;* Order (Request for Indication of Provisional Measures), Gam. v. Myan., 2020 I.C.J., ¶ 66.

94. *See* Compilation of International Norms and Standards Relating to Disability, UNITED NATIONS, https://www.un.org/esa/socdev/enable/discom104.htm (last visited Jan. 29, 2021).

95. *See* RIDDELL & PLANT, *supra* note 47, at 248–49.

96. Dem. Rep. Congo v. Uganda, 2005 I.C.J., ¶¶ 73, 129.

97. *See* Croat. v. Serb., 2015 I.C.J., ¶ 458.

98. *Id.*

99. Philip Alston & Colin Gillespie, *Global Human Rights Monitoring, New Technologies, and the Politics of Information*, 23 EUR. J. INT'L L. 1089, 1092, 1112–14, 1122 (2012).

100. Nikita Mehandru & Alexa Koenig, *Open Source Evidence and the International Criminal Court*, HARV. HUM. RTS. J. (Apr. 15, 2019), https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/.

proceedings based on *erga omnes partes* standing.[101] In *Qatar v. United Arab Emirates*, Qatar submitted over 100 witness statements from Qatari nationals affected by the United Arab Emirate's measures.[102] An applicant basing itself on *erga omnes partes* standing may face greater challenges in securing witness testimony because the legal controversy will not directly concern the applicant's nationals, and nationals of the respondent may fear that giving witness evidence will expose them to reprisals.[103] The Court may order protective measures to facilitate the provision of witness testimony, such as the use of pseudonyms and redactions to public documents to obscure potentially identifying information.[104]

Although "neither its Statute nor its Rules lay down any specific requirements concerning the admissibility of statements which are presented by the parties in the course of contentious proceedings" and the "Court leaves the parties free to determine the form in which they present evidence," it will weigh all evidence, including witness testimony, according to its credibility.[105] The Court treats written witness statements "with caution," taking into account their form and the circumstances in which they were made.[106] In looking at the circumstances in which the statements are made, the Court considers factors such as "whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events."[107] In the *Croatian Genocide* case, the Court gave no weight to unsigned witness statements and noted "difficulties" with certain statements that "fail to mention the circumstances in which they were given or were only made several years after the events to which they refer."[108] The Court has given "special value"

101. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Memorial of Qatar, vols. VII, XI, XII (Apr. 25, 2019).

102. *See id.*

103. Croat. v. Serb., 2015 I.C.J., ¶ 43.

104. *Id.* ¶ 33; *see also* Kubo Mačák, *Article 43*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1215, 1275 (2019).

105. Croat. v. Serb., 2015 I.C.J., ¶ 196.

106. *Id.* ¶ 196.

107. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, ¶ 244 (Oct. 8).

108. Croat. v. Serb., 2015 I.C.J., ¶ 199.

to witness "evidence which is contemporaneous with the period concerned."[109] It has also discounted hearsay evidence.[110]

D. Proceedings of Other Adjudicatory Bodies

Evidence presented to and the findings of national courts and other international courts can serve as a resource to applicants in ICJ proceedings seeking to overcome the evidentiary challenges associated with *erga omnes partes* standing.[111]

The evolution of *erga omnes partes* standing before the ICJ coincides with the rise of the exercise of universal jurisdiction by national courts as a means of addressing impunity for violation of core values of the international community.[112] For example, the Burmese Rohingya Organisation UK initiated a case in Argentina against Myanmar's top military and civilian leaders, alleging the commission of atrocity crimes against the Rohingya in Myanmar.[113] More recently, prosecutors in Koblenz, Germany, brought criminal charges of torture against two former senior officials of the Assad regime currently living in Germany.[114] Seventeen alleged victims of the defendants, formerly detained at the al-Khatib prison in Damascus, gave testimony in that trial in fall 2020.[115]

The Court's jurisprudence demonstrates a willingness to consider evidence presented before national courts and the findings of other international courts.[116] For example, in the *Croatian Genocide* case, the Court considered the statements of witnesses given in the national courts of Bosnia and Serbia "without, however, being regarded as conclusive proof of the facts alleged."[117] The Court also appeared to give substantial weight to

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109. Nicar. v. Hond., 2007 I.C.J., ¶ 244.

110. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), Judgment, 1986 I.C.J. 14, ¶ 68 (June 27).

111. RIDDELL & PLANT, *supra* note 47, at 236.

112. *See Argentinean Courts Urged to Prosecute Senior Myanmar Military and Government Officials for The Rohingya Genocide,* BURMESE ROHINGYA ORGANISATION U.K. (Nov. 13, 2019), https://www.brouk.org.uk/argentinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide.

113. *Id.*

114. *See First Criminal Trial Worldwide on Torture in Syria Before a German Court*, EUR. CTR. FOR CONST. AND HUM. RTS., https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/#:~:text=The%20first%20trial%20worldwide%20on,apparatus%2C%20for%20crimes%20against%20humanity (last visited Feb. 17, 2021).

115. *Id.*

116. *See generally* Croat. v. Serb., 2015 I.C.J., ¶ 170.

117. *Id.* ¶ 459.

evidence presented to, and the findings of, the International Criminal Tribunal for the former Yugoslavia.[118]

Proceedings before national courts have also emerged as a means to secure evidence to support *erga omnes partes* claims before the ICJ.[119] In June 2020, The Gambia initiated proceedings in the United States, invoking United States statute 28 U.S.C. § 1782, which provides an avenue for obtaining evidence to aid ongoing judicial proceedings.[120] In particular, The Gambia sought to compel Facebook to provide data on "suspended or terminated" accounts of Myanmar officials, likely in an effort to demonstrate genocidal intent.[121] The matter remains pending before the District of Columbia District Court.[122]

E. Judicial Intervention

The ICJ Statute affords the Court extensive powers for obtaining evidence that could be of particular value in a case based on *erga omnes partes* standing in which the applicant has limited access to evidence of events that occurred within the respondent's territory.[123] For instance, Article 49 permits the Court to "call upon the agents to produce any document or to supply any explanations;"[124] Article 50 authorizes the Court to "entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry [*sic*] or giving an expert opinion;"[125] Article 34(2) permits the Court to "request of public international organizations information relevant to cases before it;"[126] and Article 44(2) provides for the possibility of full-Court site visits to "procure evidence on the spot."[127] In *Oil Platforms*, Judge Owada opined that in cases featuring an asymmetry in access to evidence, the Court should engage in a:

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118. *Id.* ¶ 76.

119. *See, e.g.,* Application for Order to Take Discovery Pursuant to 28 U.S.C 1782, In re: Application Pursuant to 28 U.S.C 1782 et al. v. Facebook, Inc., No. 1:20MC00036 (D.D.C. filed 2020).

120. *Id.;* 28 U.S.C. § 1782.

121. Memorandum of Law in Support of the Republic of Gambia's Application for Order to Take Discovery Pursuant to 28 U.S.C. 1782 at 16, *In re:* Application Pursuant to 28 U.S.C 1782 et al. v. Facebook, Inc., No. 1:20MC00036 (D.D.C. filed 2020).

122. *See* Application Pursuant to 28 U.S.C. 1782 v. Facebook, Inc., No. 1:20-mc-00036 (D.D.C. filed June 8, 2020).

123. I.C.J Statute, *supra* note 34, art. 44.

124. *Id.* art. 49.

125. *Id.* art. 50.

126. *Id.* art. 34, ¶ 2.

127. *Id.* art. 44.

> [M]ore in-depth examination of this difficult problem of ascertaining the facts of the case, if necessary proprio motu, through various powers and procedural means available to the Court under its Statute and the Rules of Court, including those relating to the questions of the burden of proof and the standard of proof, in the concrete context of the present case.[128]

However, the ICJ has rarely invoked these statutory powers.[129] It has sought an expert opinion *propio motu* only once, in the *Corfu Channel* case.[130] The only site visit under Article 66 took place in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, when Slovakia invited the Court to "visit the locality to which the case relates and there to exercise its functions with regards to the obtaining of evidence."[131]

One commentator opines that the ICJ has taken a generally "reactive role" with respect to evidence gathering, despite possessing broad evidentiary powers under the Statute of the Court.[132] However, if ICJ practice evolves to feature increased cases based on standing *erga omnes partes*, increased pressure on the Court to be more proactive in exercising its evidentiary powers may also be on the horizon.

IV. CONCLUSION

The evolution of *erga omnes partes* standing before the ICJ brings welcome opportunities for the greater enforcement of community values and could serve as a valuable tool in achieving accountability and redressing human rights violations. However, standing is only the first step. The pursuit of merits judgments in specific cases will require careful consideration of case strategy, the legal standards that will apply during merits proceedings, and the marshaling of evidence to meet the applicant's burden of proof.

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128. Iran v. U.S., 2003 I.C.J., ¶ 52.

129. *See, e.g.,* U.K. & N. Ir. v. Alb.,1949 I.C.J., at 9.

130. *Id.*

131. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 10 (Sept. 25).

132. JAMES GERARD DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE 73–126 (2016).