Abhandlungen

Common Interests and Common Spaces: Visions of the Past and Future of International Justice

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Abstract

From climate change to genocide, front page news is increasingly becoming the business of international courts. These cases are typically brought before the International Court of Justice on the basis of common

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interests in compliance with obligations owed to the international community or collective/shared responsibility associated with global challenges. Taking stock of recent developments, the present contribution considers how common-interest and common-space litigation has impacted the architecture of international justice in terms of legal interests, legal standing, third states' interventions, and reparations, prompting the emergence of new institutional approaches to tackling these issues. In the attempt to sketch a narrative about the past and future of common-interest and common-space litigation (and the role of international judicial institutions therein), this article intends to provide a history-sensitive account of the 'juridification' process of common interests, and show the centrality of international courts and tribunals to the juridical life of common interests and common spaces. At the same time, it aims to illuminate how international justice has adapted to the challenges of international adjudication. Ultimately, it prompts reflections as to the evolving institutional dimensions of international justice in regard to common interests and common spaces.

Keywords

common interests – community interests – *erga omnes* obligations – common spaces – global commons – public interest – public nature

I. Introduction

Arguments regarding common interests and common spaces are increasingly being raised and developed in the halls of international justice. 'Common spaces' is framed here as a deliberately wide expression that encompasses shared resources and areas such as global commons that pertain to the community (or where resources are governed in the interest of the common heritage of mankind), and which are, as such, generally *public* in character. In this regard, they provide a tangible – and increasingly vulnerable – setting in which notions of the common interest are often applied and arguably tested. Instead, by 'common interests', reference is made to interests that are common to the international community as a whole and, as such, shared in character, not pertaining to one or few states but engaging the compliance of virtually all states vis-à-vis all states. It is not uncommon for 'community

interests'[1] or 'general interests'[2] to be used in lieu of 'common interests',[3] with community interests being understood as moral and objective values and interests[4] that are shared across the international community and that deserve the protection of all states through collective/coordinated action.[5]

From a legal viewpoint, common interests are correlative of obligations that are owed to the international community as a whole[6] (i. e. *erga omnes* obligations), or to all parties to a multilateral convention of universal or quasi-universal character (i. e. *erga omnes partes* obligations), and which offer

1 Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 217-384; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', EJIL 21 (2010), 387-419; Yoshifumi Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea', Max Planck UNYB 15 (2019), 329-375; Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011); Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018); Jutta Brunnée, 'International Environmental Law and Community Interests: Procedual Aspects' in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018); Gentian Zyberi, *The Protection of Community Interests in International Law: Some Reflections on Potential Research Agendas* (Intersentia 2021); Rüdiger Wolfrum, *Solidarity and Community Interests* (Brill 2021).

2 Separate Opinion of Judge Jessup to ICJ, *South West Africa* (Liberia v. South Africa), judgment of 21 December 1962, ICJ Reports 1962, 387 (432), referring to Article 7 of the South West Africa Mandate as 'intended to recognize and to protect the *general interests* of the Members of the international community in the Mandates System'; Giorgio Gaja, 'The Protection of General Interests in the International Community General Course on Public International Law', RdC 364 (2013), 19-185; James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', AJIL 96 (2002), 874-890 (884, 888); Massimo Iovane et al., *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press 2021).

3 René Lefeber, 'The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law: The International Community and Common Interests', NYIL 21 (1990), 81-137.

4 See e. g. Samantha Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 36-49 (38).

5 On the point, see also Letizia Lo Giacco, 'When a Dispute Exists: the Emerging Evidentiary Practice of the ICJ in Common Interests Proceedings', The Law & Practice of International Courts and Tribunals 23 (2024), 353-384 (354 f.).

6 Yoshifumi Tanaka, 'Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the *Whaling in the Antarctic* and *South China Sea* Cases', The Law & Practice of International Courts and Tribunals 13 (2018), 527-554. Notably, *erga omnes* obligations are owed to the international community as a whole, while *erga omnes partes* obligations are owed to all parties to a multilateral convention of universal or quasi-universal character, such as the 1948 Genocide Convention and the 1984 Convention against Torture. See ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment, of 20 July 2012, ICJ Reports 2012, 422 (para. 68).

a basis for the decentralised enforcement of those obligations.[7] The latter has been central to a lineage of cases[8] culminating in the judgment on the merits in *Belgium v. Senegal* (2012),[9] and more recently in the judgment on preliminary objections in *The Gambia v. Myanmar* (2022),[10] which confirmed resort to the doctrine weaving together common interests and *erga omnes partes* obligations in international adjudication. Multiple proceedings instituted on the basis of common interests are yet pending before the Court, such as *Canada and the Netherlands v. Syria*[11] – regarding the Convention against Torture – and *The Gambia v. Myanmar*,[12] *South Africa v. Israel*[13] and *Nicaragua v. Germany*[14] – instead concerning the Genocide Convention.

But it is not only in the context of contentious cases that common interests and common spaces are springing into view. Rather, common interests and common spaces are litigated, argued, and presented in different institutional forms, across disciplinary boundaries, and engaging different functions and jurisdictions. For example, several international courts and tribunals are currently hearing cases relating to climate change.

Requests for advisory opinions concerning common interests and common spaces have been increasingly pursued as an alternative avenue to the contentious jurisdiction of the Court. For instance, advisory opinions in the case *Obligations of State in respect of Climate Change* and *Legal Consequences arising from Policies and Practices of Israel in the Occupied Palestinian*

7 Christian Tams, 'Individual States as Guardians of Community Interests' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 379-405, (381 f.).

8 ICJ, *East Timor* (Portugal v. Australia), judgment of 30 June 1995, ICJ Reports 1995, 90 (para. 29); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2024, ICJ Reports 2004, 136 (paras 88, 155–157); ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), jurisdiction and admissibility, judgment of 3 February 2006, ICJ Reports 2006, 6 (paras 64 and 125); ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, ICJ Reports 2007, 43 (paras 147 and 162).

9 ICJ, *Belgium v. Senegal* (n. 6).

10 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477 (in particular paras 107-108).

11 ICJ, *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and The Netherlands v. Syrian Arab Republic), provisional measures, order of 16 November 2023, ICJ Reports 2023, 587.

12 ICJ, *The Gambia v. Myanmar* (n. 10).

13 ICJ, *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.

14 See ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian* Territory (Nicaragua v. Germany), provisional measures, order of 30 April 2024.

Territory, including East Jerusalem, respectively, were requested by the United Nations (UN) General Assembly, giving new impulse to a formerly neglected avenue of international justice.[15] In the same vein, advisory proceedings concerning common spaces such as the environment and the ensuing scope of state obligations to respond to climate change have also involved the International Tribunal on the Law of the Sea (ITLOS), particularly with regard to small islands threated by the marine environmental impacts of climate change, as well as the Inter-American Court of Human Rights in the framework of international human rights law.

Arguments on states' obligations vis-à-vis environmental degradation have also been advanced before the UN Committee on the Convention of the Rights of the Child (see e. g. *Sacchi et al. v. Argentina et al.*) resulting in the adoption of General Comment 26 in August 2023, as well as before the European Court of Human Rights in no less than three cases since 2021 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 Others*). In relation to common spaces, an interesting line of reasoning about victimhood and reparations has emerged in the *Prosecutor v. Al Mahdi* case before the International Criminal Court (ICC), i. e. the first case dealing with the destruction of a world cultural heritage site as a war crime in the jurisprudence of the ICC. In this context, questions may be raised as to the potentially varied treatment of what are nevertheless common interests.

As such, common interests and common spaces have catalysed a wave of judicial activity that traverses legal regimes and appears qualitatively novel, suggesting that it may be too reductive to frame international courts and tribunals as mere dispute settlement mechanisms, for their action goes beyond mere adjudication. Against this evolving background, the present contribution explores how international justice mechanisms are adapting to proceedings concerning common interests and common spaces, potentially breaking new frontiers in the broader architecture of international justice.

In our attempt to sketch a narrative about the past and future of common-interest and common-space litigation (and the role of international courts and tribunals therein), we will next provide a history-sensitive account of the 'juridification' process of the common interests doctrine in international law (section II.). Thereafter, we will illustrate how evolving approaches to litigation concerning common interests and common spaces are poised to impact the broader architecture of international law, with regard to legal interests,

15 See further *Obligations of Israel in relation to the presence and activities of the United Nations, other international organizations and third States in and in relation to the Occupied Palestinian Territory*, Request for Advisory Opinion (23 December 2024).

legal standing, third-State intervention, and reparations among others (section III.). In light of the normative limits of this institutional centralisation of the international community, we will draw final conclusions on the trajectory of international justice toward common interests and common spaces (section IV.).

This introduction thus broadly defines the thematic scope of the present Focus Section of the *ZaöRV/HJIL* as the changing shape of justice in the global commons. Subsequent articles build upon this theme by considering innovations in institution-building and strategic litigation in respect of the marine environment and the atmosphere, reimagining the foundations and functions of international dispute settlement bodies, and reflecting new perspectives on the doctrines and practices that may 'remodel' the architecture of international justice in the coming years.

II. The Juridification of Common Interests in the Jurisprudence of the ICJ: A Look Backward

In an often overlooked scholarly achievement, Wilfred Jenks in 1969 registered fundamental changes in the sociological foundations of international law,[16] which prompted him to query the place of international law in the world community:

> 'The world has become one. This may be the most controversial but it is also the fundamental point, and most of the controversy arises from a misunderstanding of what is meant when it is said that the world has become one. This one world no longer accepts the supremacy of any of its parts over the whole or any other part. In this one world, any war or threat of war has become an immediate danger of overwhelming catastrophe for the whole world. In this one world, respect for the dignity and worth of the human person has come to the widely accepted as the foundation of fundamental and inalienable human rights. This one world recognises a common responsibility for the common welfare, among as within nations. […] This oneness of the world does not presuppose or imply any unity of purpose, ideology or interest, or any proved capacity for common action among the conflicting forces which are struggling for mastery or self-assertion. […] In brief, the world has become a unit by reason of the growing intensity of the struggles which divide it no less than the growing intimacy of the bonds which unite it.'[17]

16 Wilfred Jenks, *A New World of Law? A Study of the Creative Imagination in International Law* (Longmans 1969).

17 Jenks (n. 16), 5 f., 20.

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One of the aspects Jenks interrogated concerned 'the capacity of the law to grow and change with the growth and needs of the community'.[18] This question still remains relevant to date. For instance, how have conceptions of legal standing changed in relation to common interests and common spaces litigation? To what extent can the concept of reparation adapt to findings of responsibility for violation of community interests, e. g. in the context of climate change? What institutional changes are ongoing to effectively tackle the common concerns of the international community? Our claim is that international courts have so far been central pivots in this aspiration for development and adaptation, not necessarily because they perceived their own role as central in addressing these perennial matters,[19] but more simply because applicants saw in judicial proceedings an effective way to bring their claims forward and achieve something actually or strategically.

Nominally, the existence of common interests is an uncontroversial issue among most international lawyers. An important dimension to bear in mind pertains to the way in which the concept of common interest entered the practice of international law. Its pedigree is theoretical/doctrinal rather than strictly legal,[20] in the sense that it came about through a judicial pronouncement rather than being based on a source of international law. In fact, the *Reservations to the Genocide Convention* Advisory Opinion (1951) is commonly seen as the first international judicial reference to the concept of 'common interest'. What is more, multilateral conventions such as the 1984 Convention Against Torture – adopted with a view to safeguard common 'values and interests' – do not specifically or expressly refer to the concept of 'common interest'.[21]

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18 Jenks (n. 16), 13. Notably, these shifts were of interest for a number of international scholars at the time. See, e. g. Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964); Georg Schwarzenberger, *The Frontiers of International Law* (Stevens & Sons 1962).

19 Hernández, for instance, is dismissive of positions that would assign a central role to the ICJ for, in his view, the Court has continuously relied on the centrality of states in defining the international community and has evidenced a certain reticence in arrogating to itself the role of determining the bounds of this concept. See Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), 237.

20 In this vein, some scholars have observed that the idea of a 'common good' is rooted in the philosophical works of XVI and XVII centuries. On the point, see Rüdiger Wolfrum, 'Identifying Community Interests in International Law: Common Spaces and Beyond' in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 19-35 (19).

21 In ICJ, *Belgium v. Senegal*, the ICJ constructs the concept of common interest by reference to the *Preamble* to the Torture Convention, in the recital: 'Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. ICJ, *Belgium v. Senegal* (n. 6), para. 68. See *infra* II.1.

As such, common interests are elements of a conceptual or epistemic framework, capable to influence and direct the interpretation of legal norms, not as a matter of law but as a matter of theory and knowledge.[22] Being vested with a unique authority to pronounce on what the law is, in exerting this function courts often produce new concepts which mould the architecture of the law by affecting how the legal operators understand, argue and act upon the law. It is not by coincidence that several international law sources adopted since the International Court of Justice (ICJ) Advisory Opinion on the *Reservations to the Genocide Convention* (1951) have expressly utilised a 'common interest' register. These include the *Preamble* to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (referring to the 'common interest of all mankind'), as well as the *Preamble* to the 1994 UN Convention to Combat Desertification, which refers to 'the concern of the international community'.[23]

Treating common interests as doctrinal limbs rather than legal concepts shall of course not diminish their significance. On the contrary, they are integral to the conceptual foundation which has enabled current litigation before the ICJ and beyond, impacting the very understanding of the structure of international law. To borrow the terms from Bruno Simma's seminal work, the resort to concepts such as 'common interests' marks the shift 'from bilateralism to community interest in international law'.[24] Moving from this, the following sub-section explores the genealogy of common interests as a concept constructed through the jurisprudence of the ICJ, not in isolation, but by reference to the concept of *erga omnes (partes)* obligations. The Court has in fact been central in articulating the very doctrine that interweaves common interests and *erga omnes (partes)* obligations.

1. The Genealogy of Common Interests in the Jurisprudence of the ICJ: Foundational Developments

Many scholars identify the first reference to common interest in the jurisprudence of the Court dating back to 1951. Indeed, in the context of its Advisory Opinion on the *Reservations to the Genocide Convention*, the Court considered '[i]n such a convention the contracting States do not have

22 On the point, see also Letizia Lo Giacco, *Judicial Decisions in International Law Argumentation – Between Entrapment and Creativity* (Hart 2022), 174-176, 181-183.

23 Preamble, para. 2, signed 14 October 1994, entered into force 13 October 1995.

24 Simma (n. 1); Tams (n. 7).

any interests of their own; they merely have, one and all, *a common interest*, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.'[25]

On closer scrutiny, however, it is possible to trace the origins of the concept even further back, by reference to Judge McNair's separate opinion to the Advisory Opinion on the *International Status of South West Africa*,[26] discussing the creation of an international regime by a multilateral treaty when a 'public interest' is involved:

> 'From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires *a degree of acceptance and durability extending beyond the limits of the actual contracting parties*, and *giving it an objective existence*. *This power is used when some public interest is involved*, and its exercise often occurs in the course of the peace settlement at the end of a great war.'[27]

Similarly, a reference to common interests can be distilled from the dissenting opinion of Judge Jessup in the 1966 *South West Africa* cases,[28] referring to 'a *general interest* [of States] in the maintenance of an international régime adopted for the *common benefit* of the international society'.[29] In aggregation, these clues suggest that common interest as a concept was already in the making in the early days of activity of the ICJ, as part of the fabric of the newly established international legal order.

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25 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion of 28 May 1951, ICJ Reports 1951, 15 (23).

26 ICJ, *International Status of South West Africa*, advisory opinion of 11 July 1950, ICJ Reports 1950, 128.

27 ICJ, *International Status* (n. 26), 153. (emphasis added). For an excellent recollection on the matter, see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2000), 35-37. Ragazzi importantly notes that McNair's position shares some conceptual similarities with the Report of the International Committee of Jurists entrusted by the Council of the League of Nations to provide an advisory opinion on some legal aspects of the Aaland Islands question, in particular its demilitarisation. See Ragazzi (n. 27), 28-37.

28 Oscar Schachter, 'Philip Jessup's Life and Ideas', AJIL 80 (1986), 878-895 (892). On the point, see also Ragazzi (n. 27), 8.

29 ICJ, *South West Africa* cases (Ethiopia v. South Africa and Liberia v. South Africa), dissenting opinion of Judge Jessup, judgement of 18 July 1966, ICJ Reports 1966, 325 (373). As explained by Maurizio Ragazzi, this excerpt of Judge Jessup's dissent shall be read in the context of the arguments raised by Spain during the pleadings which laid out the premises to the Court's dictum. In particular, counsel for Spain Roberto Ago argued that 'denial of justice committed against a particular person is not a kind of crime towards the international community as a whole or towards each one of its members; it is an international delict committed by a State towards a State to which the person in question belongs'. See Ragazzi (n. 27), 10-11.

However, common-interest proceedings are a recent win in international law. By this, reference is made to the actual application of the concept in contentious proceedings before the Court. Indeed, it took several failures – the most notorious being the *South West Africa* cases – until the Court finally recognised in *Belgium v. Senegal* (2012) that a state may have legal standing to invoke the responsibility of another state based on common interests in the compliance with *erga omnes partes* obligations.[30]

Common interests and *erga omnes (partes)* obligations are intertwined concepts in international law in that one is often used as a corollary of the other, or to explain the rationale for distinguishing them from individual interests and reciprocal obligations, respectively.[31] In this vein, the ICJ defined *erga omnes* obligations as those that '*[b]y their very nature […] are the concern of all States*. In view of the importance of the rights involved, all States can be held to have a *legal interest* in their protection; they are obligations *erga omnes*.'[32]

The *Barcelona Traction* case is widely considered the first juridical articulation of the concept of *erga omnes* obligations. Given the somewhat cloudy meaning of the concept, the Court found apposite to provide a few effective illustrations thereof, such as obligations derived from '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',[33] which find their legal basis in general international law or in 'instruments of a universal or quasi-universal character'.[34] In doing so, the Court has charted the frame that ties together the concept of 'legal interests of all states' and that of *erga omnes* obligations.

As it may be appreciated, the concept of common interests interwoven with that of *erga omnes* obligations has primarily recurred in the context of cases concerned with norms set at protection of fundamental values for the international community (e. g. the prohibition of aggression or of genocide, as mentioned in the *Barcelona Traction* case, in the Advisory Opinion on *Reservations to the Genocide Convention* just cited and, to some extent, in the *South West Africa* cases concerned with the performance of South Africa's obligations as a mandatory power on a territory ruled by apartheid), thus

30 ICJ, *Belgium v. Senegal* (n. 6), 422. It is worth noting that legal standing based on the common interest with the compliance with *erga omnes* obligations – distinguished from those codified in multilateral treaties (i. e. *erga omnes partes*) – has not yet found application in the Court's jurisprudence.

31 See Lo Giacco, 'When a Dispute Exists' (n. 5), 354.

32 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), second phase, judgment of 5 February 1970, ICJ Reports 1970, 3 (para. 33) (emphasis added).

33 ICJ, *Barcelona Traction* (n. 32), para. 34.

34 ICJ, *Barcelona Traction* (n. 32), para. 34.

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highlighting two main inherent traits: on the one hand, universality, in that *erga omnes* obligations are binding on all states with no exception; on the other, solidarity since every state is considered to have a common (legal) interest in their protection.[35] These two hallmarks continue to inform the articulation of common interests and *erga omnes* obligations in judicial practices before the Court.

In particular, only in 2012 did the Court explicitly expound the conceptualisation of common interests in relation to *erga omnes partes* obligations, in the context of *Belgium v. Senegal.*[36] The case concerned a dispute on the application and interpretation of Senegal's obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention'), with respect to former President of Chad Hissène Habré, resident in Senegal since the 1990s. In particular, Belgium submitted that, among other things, by failing to either prosecute Habré for alleged acts of torture or extradite him to Belgium, Senegal had violated the obligation *aut dedere aut judicare* set out in Article 7 of the Torture Convention. The Court noted that

> '68. As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture [..] throughout the world". The States parties to the Convention have a *common interest* to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a *common interest* in compliance with these obligations by the State in whose territory the alleged offender is present. *That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention*. All the States parties "have a *legal* interest" in the protection of the rights involved *(Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I. C. J. Reports 1970, p. 32, para. 33)*. These obligations may be defined as "*obligations erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that

35 Ragazzi (n. 27), 17.
36 ICJ, *Belgium v. Senegal* (n. 6).

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention." *(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I. C. J. Reports 1951, p. 23)*.[37]
>
> 69. The *common interest* in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. *It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations* erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.'[38]

As such, in *Belgium v. Senegal*, the Court recognised for the very first time the legal standing of the applicant to invoke the responsibility of Senegal with its obligations *erga omnes partes* under the Torture Convention based on its common interest in the compliance of all other States parties with their conventional obligations.

The granting of legal standing based on common interests has been upheld in the *The Gambia v. Myanmar* case (2022)[39] and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*,[40] in relation to *erga omnes partes* obligations enshrined in the Genocide Convention, as well as in *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and The Netherlands v. Syrian Arab Republic)*,[41] in relation to the Torture Convention. This reaffirmation of common interests as a legal basis for the applicant's legal standing in disputes concerned with *erga omnes (partes)* obligations has clearly advanced the juridification of these two concepts in the Court's caselaw.

37 ICJ, *Belgium v. Senegal* (n. 6), para. 68 (emphasis added).

38 ICJ, *Belgium v. Senegal* (n. 6), para. 69 (emphasis added).

39 ICJ, *The Gambia v. Myanmar* (n. 10), paras 107-108. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), provisional measures, order of 23 January 2020, ICJ Reports 2020, 3 (para. 41).

40 ICJ, *South Africa v. Israel* (n. 13).

41 ICJ, *Canada and The Netherlands v. Syrian Arab Republic* (n. 11), para. 50.

2. Subsequent Refinement of the Scope of Common Interests in Codification and Judicial Practice

The ICJ's jurisprudence on common interests informed, and has since drawn upon, the identification and codification of customary requirements for legal standing in inter-State proceedings, as reflected in the International Law Commission's (ILC) 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[42] Among these reflections of modern customary international law, Article 42 can in large part be seen as a reflection of the traditional requirement of direct interest, such as arises from a unique injury. Yet whereas Articles 42(a) and 42(b)(i) respectively refer to injuries which 'individually' or 'specially' affect a particular State, Article 42 (b)(ii) refers to the breach of an obligation which radically changes the position of 'all other States' to which it is owed.

The lack of requirement of 'specially affected' status to invoke breaches of international obligations under Article 42(b)(ii) appears to find closer kin in Article 48 of the ARSIWA, which concerns obligations whose 'principal purpose will be to foster a common interest, over and above any interests of States concerned individually', such as for the protection of a group of people.[43] In this light, Articles 42(b)(ii) and 48 are distinguishable by the characterisation of members of 'the international community' as 'injured' in the former, and non-injured – yet still entitled to invoke responsibility – in the latter.

Article 42(b)(ii) especially recalls the aforementioned development in ICJ case law of *erga omnes partes* doctrine, given the origins of this provision in the law of treaties.[44] Notably, while the ILC's Commentary frames Article 42 as encompassing non-treaty obligations in theory, the only examples of Article 42(b)(ii) provided therein derive from treaty systems – 'a disarmament treaty, a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of

42 ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', (2001) ILCYB, Vol. II, Part. Two.

43 See James Crawford, *Chance, Order, Change: The Course of International Law* (Brill 2014), 278. For a typology of such interests in this context, see generally Benvenisti and Nolte (n. 1), 3. On the role of the PCIJ in this area, see Antonios Tzanakopoulos, 'The Permanent Court of International Justice and the 'International Community' in: Christian Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013), 339-359 (referring to PCIJ, *Greco-Bulgarian "Communities"*, advisory opinion of 31 July 1930, PCIJ Ser. B, No. 17 (1930), 4).

44 See ILC, ARSIWA (n. 42), 117-119 (detailing the influence of Article 60 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)).

each of the others'.[45] The Commentary makes particular reference to the Antarctic Treaty in this light as well.[46] In each of these instances, the obligation is 'integral', or interdependent, meaning that its performance by the responsible State is a necessary condition of its performance by all the other States.[47]

The question of which treaty instruments actually contain obligations *erga omnes* or *erga omnes partes* has been discussed in the aftermath of several cases concerning global commons, such as the legal regimes of Antarctica, the deep seabed, and the atmosphere. In the *Whaling in the Antarctic* case, in which Australia alleged Japan's breaches of the International Convention for the Regulation of Whaling (ICRW). The Court was reluctant to take up Australia's argument that the primary object and purpose of the ICRW concerned conservation.[48] For his part, however, Judge Cançado Trindade considered that the legal nature of the ICRW had been transformed into that of an 'environmental treaty' over time.[49]

In Crawford's view, by instituting proceedings under the ICRW, 'Australia invoke[d] Japan's obligations *erga omnes partes* under the [ICRW]'.[50] Tanaka has similarly observed that 'the *Whaling* judgment appears to demonstrate that the *erga omnes partes* character of treaty obligations can be indirectly recognized through the establishment of the […] admissibility of the Applicant State's claims'.[51]

It is thus all the more notable that, after being asked by Judge Bhandari '[w]hat injury, if any, has Australia suffered as a result of Japan's alleged

45 ILC, ARSIWA (n. 42), 119.

46 ILC, ARSIWA (n. 42), 119.

47 ILC, ARSIWA (n. 42),117-118. While the ARSIWA Commentary credits the notion of 'integral' obligations to Sir Gerald Fitzmaurice's work as ILC Special Rapporteur on the Law of Treaties, that earlier work had more clearly distinguished integral from interdependent obligations. For Sir Gerald, the force of 'integral' obligations are 'self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others'. Third Report on the Law of Treaties, by Mr. Gerald Fitzmaurice, Special Rapporteur, A/CN.4/115 (1958), 27-28.

48 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226 (paras 57-58).

49 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), separate opinion of Judge Cançado Trindade, judgment of 31 March 2014, ICJ Reports 2014, 348 (para. 71).

50 See James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 224-240 (235). See also James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013), 373.

51 Tanaka, 'Reflections' (n. 6), 533, 537-538.

breach of the ICRW',[52] Burmester (arguing for Australia) referred in passing to 'the fact that some of the JARPA II take is from waters over which Australia claims sovereign rights and jurisdiction', while much more emphatically stressing that it 'is seeking to uphold its collective interest, an interest it shares with all other parties [to the ICRW]'.[53] Boisson de Chazournes (arguing for the same) similarly focused her response on Australia's '*intérêt commun*' in maintaining the integrity of the regime deriving from the ICRW.[54]

In the broader context of the law of the sea, we might consider the prospect of a State raising interests in judicial proceedings concerning environmental obligations under the UN Convention on the Law of the Sea (UNCLOS).[55] In the light of public interest litigation, it may be particularly salient to determine whether the environmental damage or risk at issue concerns a coastal State's claimed exclusive economic zone or continental shelf, as opposed to the shared resources of the high seas or the International Seabed Area. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea observed in *Activities in the Area*, obligations to preserve the environment of those common spaces may be owed to the international community as a whole, or owed 'to a group of States [providing] that the obligation is established for the protection of a collective interest of the group'.[56]

Despite reference to general interests by the applicant States in *Nuclear Tests*,[57] the Court has not specifically resolved the question of *locus standi* in disputes concerning atmospheric pollution through nuclear testing. Nevertheless, in regard to nuclear disarmament, the issue of standing was preemptively raised by the Marshall Islands as Applicant in the *Nuclear Disarmament* cases, with relatively innovative reference to Article 42(b)(ii) of the ARSIWA.[58] The United Kingdom (UK), as one of the nuclear-armed

52 ICJ, Verbatim Record, CR 2013/13, 3 July 2013, 73.

53 ICJ, Verbatim Record, CR 2013/18, 9 July 2013, 28 (Burmester).

54 ICJ, Verbatim Record, CR 2013/18, 9 July 2013, 33 (Boisson de Chazournes).

55 See UN Convention on the Law of the Sea (Montego Bay, 10 December 1982), Part XII.

56 ITLOS, *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, para. 180.

57 See *Nuclear Tests* (Australia v. France), Application Instituting Proceedings, 9 May 1973, para. 49; *Nuclear Tests* (New Zealand v. France), Application Instituting Proceedings, 9 May 1973, para. 28.

58 On the disuse of this provision in inter-State dispute settlement during the years following the ARSIWA's adoption, see Simon Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Preliminary Draft* (British Institute of International and Comparative Law 2007), 249. On the characterisation of nuclear weapons under international law, see further ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226.

Respondents, did not object to the Applicant's arguments in regards to Articles 42(b)(ii) and 48(3) of the ARSIWA. Instead, it persuasively refocused the Court's attention on the continued requirement of a bilateralised dispute, even in cases arising from collective interests.[59] Yet this question may arise in future proceedings before the ICJ and other inter-State bodies.

III. Institutional Approaches to Common Interests and Common Spaces: A Look Forward

Across international legal fields, arguments about common interests and common spaces have been invoked in multiple judicial proceedings. These actions present an unprecedented terrain to go beyond the mere invocation of commonality, and more importantly explore *how* they were – successfully or unsuccessfully – brought under judicial purview. Many procedural hurdles that may prevent jurisdiction and admissibility, e. g. legal standing in contentious proceedings before the ICJ, or the requirement of exhaustion of local remedies in international human rights proceedings stemming from individual applications.[60] These procedural impasses may well give a sense of the limits that international legal proceedings would set to the very notion of international community.

Innovative tactics to overcome these procedural hurdles are explored in other contributions to this Focus Section, such as the 'proxy-state model' for advancing common interests in *The Gambia v. Myanmar*.[61] This was the first case in which the applicant was 'specifically and explicitly nominated by an international organization [the Organization of Islamic Cooperation] to bring a case on its behalf'.[62] In a similar vein, alternative institutional solutions are taking shape at the International Criminal Court, whose Statute contemplates international organisations to represent the international community at the reparations stage.[63] The *Al Mahdi* case

59 ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), preliminary objections of the United Kingdom, ICJ Pleadings 2015, para. 51 ('[T]he prior notification requirement applies equally to States other than injured States as it does to injured States.').

60 See e. g. Art. 34(1) ECHR; Art. 41(1)c) ICCPR; Art. (7)(e) of the Optional Protocol to the Convention on the Rights of the Child. See *Sacchi et al. v. Argentina et al.*, CRC/C/88/D/108/2019, Decision of 22 September 2021.

61 See Sarah Thin, '"Proxy States" as Champions of the Common Interest? Implications and Opportunities', HJIL 85 (2025), 69-96.

62 Thin (n. 61).

63 See Elisa Ruozzi, 'Repairing Harm to Common Interests and Common Spaces: Recent Institutional Developments Across Public International Law', HJIL 85 (2025), 127-150.

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offered a concrete opportunity for the United Nations Educational, Scientific and Cultural Organization (UNESCO) to represent the interests of the international community in protecting common heritage of humankind from war crimes.[64]

The growing apparition of common interests in international justice is visible from a range of other angles. 'Trust funds' are booming in the practice of reparations for common interests and common spaces, raising the question of the extent to which findings of responsibility are still necessary to secure reparations. Further, the value of advisory proceedings as an alternative to contentious proceedings is being potentially redefined in multiple proceedings concerning climate change, but also in regard to arguably common interests in, for example, labour and human rights.[65] Although not legally binding per se, the normative impact of advisory proceedings should not be underestimated, due to the actual effects they may have on state conduct and the procedural flexibility they may offer in terms of public participation.[66] This latter point is springing into view if one considers compliance-mechanisms established by multilateral agreements, in particular in the environmental sector. For example, the Implementation and Compliance Committee under the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (ABBNJ) oversees compliance with the principle of common heritage of mankind.[67] Such mechanisms shift focus towards stakeholders and cooperation among states to protect marine-genetic resources, manage marine areas, and assess environmental impacts effectively.

As such, the present Focus Section engages with different areas of public international law relevant for the protection of common interests and common areas, such as climate change, environmental protection, the common heritage of humankind, and the common interest of preventing and punishing genocide. Exploring these proceedings comparatively as well as in the aggregate prompts reflections as to how the concepts of common interests and common spaces impact upon the architecture of international justice and the role of courts therein.

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64 Ruozzi (n. 63).

65 See ICJ, *Right to Strike under ILO Convention No. 87*, Request for Advisory Opinion, 10 November 2023.

66 See Vladyslav Lanovoy and Miriam Cohen, 'Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings', HJIL 85 (2025), 97-125.

67 See Carlos Antonio Cruz Carrillo, 'The Implementation and Compliance Committee of the ABBNJ: Facilitating Cooperation and Public Participation in the High Seas', HJIL 85 (2025), 151-181.

1. Adaptations in the Managerial Architecture of Global Commons

In this light, we may observe that one of the central aspects of interests shared by the international community is that they reflect legal obligations owed to the international community as a whole. Samantha Besson for instance contends that 'community interests are best understood as interests (i) that are common (ii) and/or belong to a community (iii)'.[68] The definition of the international community has thus far generated extensive controversy and can certainly be considered not yet settled. On the contrary, who exactly are the holders and the bearers of common interests – whether states, individuals or the international community as a collective entity – warrants further reflection. In particular, a point is worth of notice. As observed by Besson 'the identity of the community holding the interests may not correspond to that of those acting upon or enforcing those interests procedurally in practice. The international community, in particular, is not (yet) institutionalised.'[69]

The problem of the lack of institutionalisation of the international community is evidenced in the decentralisation of the enforcement of *erga omnes partes*. It is in other words for individual states – as in the case of contentious proceedings before the ICJ – or for collective entities such as Non-Governmental Organisations (NGOs) – as in the case of proceedings before the European Court of Human Rights (ECtHR) – to act on behalf of the international community to redress community interests as right-holders. This prompts questions as to how one can imagine the institutional centralisation of the international community – for instance, in the context of the enforcement of common interests beyond single states – and what are the normative limits of this reconfiguration.

The institutionalisation of the international community encompasses both general managerial functions and dispute settlement functions in relation to common spaces. Among the most developed examples of such a regime is found in Part XI of the UN Convention on the Law of the Sea (UNCLOS), which establishes the legal architecture of the International Seabed Area ('the Area'). Under UNCLOS, the seabed beyond the limits of national jurisdiction and its mineral resources comprise 'the common heritage of mankind'.[70] The Area is primarily managed by the International Seabed Authority (ISA),

68 Besson (n. 4), 38.

69 Besson (n. 4), 41.

70 United Nations Convention on the Law of the Sea, Article 136, 21 ILM 1261 (1982) (UNCLOS).

which is mandated to 'organize, regulate and control' all mineral resource activities in the Area for the benefit of humankind as a whole.[71] This mandate reflects three core objectives: the establishment of rules, regulations, and procedures for deep seabed mining; the protection of the marine environment from harm caused by activities carried out in the deep seabed; and the representation of humankind.[72]

On this last point, however – representing the common interests of humankind – public participation at the ISA is generally limited and increasingly difficult.[73] It is doubtful whether individuals or directly concerned communities are sufficiently heard and represented. In this light, participation at the ISA may be understood within the broader context of the limited consideration of human rights compliance (and more broadly, common interests of a non-spatial character) within the ISA's mandate.[74]

These limitations on participation in ISA affairs are exacerbated by the decision-making processes of the ISA's respective organs in practice.[75] For example, while the Council is a political organ that adopts resolutions regarding mineral explorations and awards contracts for mining in the Area, the Legal and Technical Commission – a body composed of state-nominated experts – advises the Council on critical decisions,[76] raising questions of effective oversight of managerial decision-making.[77] This perceived lack of transparency in the institutional governance of the common heritage of mankind has attracted questions by various stakeholders regarding potential human rights abuses and destruction of culture and livelihood through mineral resource extraction.[78]

Common interests such as these, which exist independently of the *lex specialis* regimes of common spaces, do not frequently arise at the ISA's

71 'About ISA' (International Seabed Authority) <https://www.isa.org.jm/about-isa/>, last access 14 February 2025.

72 UNCLOS, Article 137, 140, 145.

73 Elisa Morgera, 'Participation of Indigenous Peoples in Decision Making Over Deep-Seabed Mining', AJIL Unbound 118 (2024), 93-97.

74 Morgera (n. 73) (arguing that ISA member states do not raise compliance issues regarding international human rights obligations towards indigenous peoples in decisions regarding deep seabed mining).

75 Elisa Morgera and Hannah Lily, 'Public Participation at the International Seabed Authority: An International Human Rights Law Analysis', RECIEL 31 (2022), 374-388 (385).

76 Morgera (n. 73), 94.

77 Morgera and Lily (n. 75), 384-385.

78 'Deep sea mining: mineral exploration in the pacific' (Business & Human Rights Resource Centre, 2021) <https://media.business-humanrights.org/media/documents/2021_TMT_deep_sea_mining.pdf>, last access 14 February 2025.

formal meetings of States Parties and recognised observer institutions.[79] It is not entirely surprising that such interests may be sidelined in the deliberative and managerial frameworks established in common-space regimes. Yet the dispute settlement mandate established in such regimes – or, perhaps more cynically, the interpretation of this mandate by the relevant judicial or quasi-judicial body – may be constrained by legal requirements such as *audi alteram partem*. In this manner, they may be empowered (or required) to air and assess common interests more effectively than the political and technical institutions of common-space regimes, such as those established in Part XI of UNCLOS.

Indeed, as noted above, the Seabed Disputes Chamber of ITLOS observed in its first and only opinion that obligations in the Area may arise from 'a collective interest' of a group of States.[80] In its plenary form, ITLOS has moreover framed other obligations under this 'Constitution for the Ocean'[81] in terms of common interests (or 'elementary considerations of humanity'),[82] which 'must apply in the law of the sea, as they do in other areas of international law'.[83] Bearing in mind the Tribunal's unique power to prescribe provisional measures *proprio motu* in order 'to prevent serious harm to the marine environment',[84] it is apparent that the judicial architecture of the deep seabed can accommodate the simultaneous protection of common interests and common spaces. Given the criticism which the ISA has attracted – as taking into account as well the specialised nature of individual common-space regimes – the question arises as to whether Part XI of UNCLOS may yet serve as an institutional model for emergent common interests or spaces.

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79 ISA, 'Observers' <https://www.isa.org.jm/observers>, last access 14 February 2025. In terms of alternative channels, see the ISA's March 2023 Informal Working Group on the Protection and Preservation of the Marine Environment at the ISA, where five Pacific Indigenous Islanders were invited by Greenpeace's delegation to share their ancestral and cultural ties to the deep sea. 'Your TOF Debrief on the March International Seabed Authority Meetings' (The Ocean Foundation) <https://oceanfdn.org/tof-debrief-on-the-march-isa-meetings/>, last access 14 February 2025.

80 ITLOS, *Responsibilites and Obligations* (n. 56), para. 180.

81 See Remarks by Tommy T. B. Koh, President of the Third United Nations Conference on the Law of the Sea <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>, last access 14 February 2025.

82 ITLOS, *Juno Trader* (Saint Vincent and the Grenadines v. Guinea-Bissau) (prompt release), judgment of 18 December 2004, ITLOS Reports 2004, 17 (para. 77).

83 ITLOS, *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, ITLOS Reports 1999, 10 (62); ITLOS, *M/V "Virginia G"* (Panama v. Guinea-Bissau), judgment of 14 April 2014, ITLOS Reports 2014, 101 (para. 359); ITLOS, *"Enrica Lexie"* (Italy v. India) (provisional measures), order of 24 August 2015, ITLOS Reports 2015, 182 (para. 133).

84 UNCLOS, Article 290(1).

2. The Prospect of Multilateral Arbitration Regarding Common Interests and Common Spaces

Perhaps the clearest expression of the tension between the traditional bilateralism of international dispute settlement and the advancement of common interests through multilateral participation is third-party intervention. Much has been written on the relation between intervention and common interests in recent ICJ practice under Articles 62 and 63 of its Statute.[85] Less attention has been paid to the institutional dimension of intervention in the light of differences in the treatment of third-State interests (or potentially non-State interests) in different dispute settlement frameworks.

As such, it is worth querying arbitration as an appropriate forum for common-interest and common-space dispute settlement, and the prospect of multilateral participation in such proceedings. This prospect recalls the arbitral origins of Article 63 of the ICJ Statute,[86] and concepts of party autonomy discussed in judicial proceedings. In some respects, the heightened autonomy of arbitration increases the likelihood of affecting the rights and interests of third States, particularly when such proceedings are conducted confidentially.[87]

To date, there has been no instance of an intervention by a third State in an inter-State arbitration.[88] Yet several developments and circumstances have

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85 See, e. g., Craig Eggett and Sarah Thin, 'Third-Party Intervention Before the International Court of Justice: A Tool for Litigation in the Public Interest?' in: Justine Bendel and Yusra Suedi, *Public Interest Litigation in International Law* (Routledge 2023); Benjamin Salas Kantor and Massimo Lando, 'Intervention and Obligations *erga omnes* at the International Court of Justice', CIL Dialogues, 20 April 2023, <https://cil.nus.edu.sg/blogs/intervention-and-obligations-erga-omnes-at-the-international-court-of-justice>, last access 12 April 2024. See *contra*, Brian McGarry, 'Decoding Nicaragua's Historica Request to Intervene in *South Africa v. Israel*', EJIL:Talk!, 21 February 2024, <https://www.ejiltalk.org/decoding-nicaraguas-historic-request-to-intervene-in-south-africa-v-israel>, last access 12 April 2024.

86 Article 63 finds clear antecedents in an 1875 Resolution of the *Institut de Droit international* ('Draft regulations for international arbitral procedure'), the 1899 and 1907 conventions establishing the Permanent Court of Arbitration, and the 1907 draft convention and 1910 draft protocol of the International Prize Court.

87 See William Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971), 330 (referring to the 'relatively secret context' of many arbitrations). This could be true as concerns awards or important procedural decisions which are not made public, as well as allegations in pleadings which are not made public.

88 See Rosenne's (still accurate) assertion in Shabtai Rosenne, *Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff 2006), 1441 ('[s]o far as is known, there has been no instance of an attempt at intervention in an arbitral proceeding in which the construction of a multilateral convention was in question'). See further John L. Simpson and Hazel Fox, *International Arbitration* (Stevens 1959), 184.

recently aligned in practice, raising this possibility on the basis of both formative and modern arbitration treaties – in particular, annex VII to UNCLOS,[89] a treaty concerned with both common spaces and common interests, as noted above.

In the ICJ's first hearings on an application filed under Article 62 of its Statute, *Tunisia v. Libya*, Sir Elihu Lauterpacht argued for Malta's intervention by distinguishing ICJ proceedings from arbitration: 'It is in the nature of an arbitration that it is limited to the States that have signed the *compromis* unless in their *compromis* they have accorded to third States the facility or faculty of intervening.'[90] This reflects a contractual view of the arbitral tribunal as the custodian of a bilateral treaty,[91] free from the ICJ's concerns regarding third States' legal interests.[92] States may opt for arbitration rather than judicial proceedings precisely because of this strong tradition of autonomy.

As with international adjudication, however, this autonomy may be limited by the powers and duties conferred through the tribunal's constitutive treaty, particularly in compulsory arbitration treaties such as UNCLOS. They may also be conferred by default provisions in the architectural treaties of arbitral institutions, such as the 1907 Hague Convention.[93]

Arbitration is in principle a highly autonomous process, governed by paramount concern for party consent in the choice of procedures. In such cases, the parties – removed from the confines of a judicial institution with an established Statute and Rules – are generally considered free to shape the proceedings according to whatever norms they (or their designated arbitral institution) may choose. In practice, an inter-State arbitration tribunal will resolve procedural questions by first referring to the terms of the jurisdictional instrument agreed by the parties, as well as the rules of procedure

89 See generally Shabtai Rosenne, 'Arbitrations Under Annex VII of the United Nations Convention on the Law of the Sea' in: Tafsir Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007), 989.

90 ICJ, *Continental Shelf* (Tunisia v. Libya), Oral Proceedings, 19-23 March and 14 April 1981, 448. For comparative assessments of adjudication and arbitration in this context, see Robert Y. Jennings, 'The Role of the International Court of Justice', BYIL 68 (1998), 7-9; William Michael Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', RdC 258 (1996), 49-55.

91 See generally Omar M. Dajani, 'Contractualism in the Law of Treaties', Mich. J. Int'l L. 34 (2012), 1-85.

92 See Freya Baetens, 'Procedural Issues Relating to Shared Responsibility in Arbitral Proceedings', Journal of International Dispute Settlement 4 (2013), 319, 337; Christine Chinkin, *Third Parties in International Law* (Oxford University Press 1993), 250-251.

93 Convention on the Pacific Settlement of International Disputes (The Hague, 18 October 1907), 205 CTS 233.

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adopted by the tribunal in consultation with the parties. The tribunal will thus resort to uncodified principles and powers only when needed to fill gaps in these instruments. Such treaties regularly include 'catch-all' provisions which govern the adoption of procedural rules, in the same manner as provided in Article 48 of the ICJ Statute.[94]

In UNCLOS dispute settlement, where the vast majority of cases submitted under Part XV of the Convention have resulted in PCA-administered arbitrations, Part IV(III) of the PCA's constitutive 1907 Hague Convention appears to constitute a set of rules that fill procedural gaps in any agreement to arbitrate between States which are parties thereto. This is true unless such gap-filling is expressly excluded by the parties; the parties have agreed to provisions addressing (and displacing) the specific subject-matter of the relevant provisions of the 1907 Convention; or the parties have agreed to provisions which provide their own gap-filling mechanism.

In arbitrations instituted under Part XV of UNCLOS, the parties may fall into this last category, having agreed to the gap-filing mechanism in Article 5 of annex VII to UNCLOS ('[U]nless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case'). This view accords with the proposal and omission of reference to the 1907 Convention during the drafting of annex VII.

A PCA-administered UNCLOS tribunal might thus draw its power to admit intervention from Article 5 of annex VII, without taking the 1907 Convention into account. In this context, the principal characteristic distinguishing contemporary inter-State arbitration and judicial settlement is not a broad prohibition against intervention in the former, but rather its emphasis on tribunal discretion in the absence of clear and binding statutory rules ratified by the parties.[95]

While the UNCLOS tribunal in the *South China Sea* arbitration admitted third States to participate merely as observers (without rights or recognition akin to intervention under Article 62 and 63 of the ICJ Statute), the admission of non-parties to receive unpublished case documents and attend closed

94 'The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.'

95 On the ICJ's limited discretion in this context, see ICJ, *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Application to Intervene, Judgment, ICJ Reports 1981, 3 (para. 12). See also ICJ, *Continental Shelf* (n. 95), para. 22 (citing Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920*, 593).

hearings[96] is a notable innovation in the management of procedural questions arising from common interests. This may prove particularly interesting when connected to the same tribunal's implication that environmental protection obligations under Part XII of UNCLOS are *erga omnes* irrespective of whether they clearly pertain to common spaces or, as in *South China Sea*, the environmental damage occurs in waters adjacent to rock features that are subject to sovereignty claims.[97]

In this light, current practices and hurdles to the peaceful settlement of common interests and common spaces disputes prompt us to reflect and – to some extent also imagine – how the changing structure of international law (and international justice) may look like in the years to come. As aptly observed by Anne Peters in the context of the increasing importance of public-law principles in global governance, a broader overarching transformation is already taking place as the manifestation of 'a paradigm shift, namely international law's shift from a "private" to a "public" character'.[98]

IV. Conclusions

Common interests and common spaces are becoming central pivots in international justice. States are increasingly resorting to them not only to achieve judicial pronouncements with respect to longstanding matters such as climate change or the prevention of genocide, but also to exhibit political commitment and alignment. Community interests are thus argued and litigated in a way that gives expression to the international community, understood not as a uniform, likeminded conglomerate of units, but as a concept that presupposes the existence of common interests to be tackled through cooperation, and thus also through public international law.

Along these lines, the progressive mobilisation of arguments based on common interests or common spaces prompts a threefold reflection. Firstly, international courts appear to enjoy enduring centrality to the life of the very concept of common interest since its first articulation in the jurisprudence of

96 See Permanent Court of Arbitration, *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 80, 84. The Philippines raised no objection to these requests '[i]n light of its oft-stated interest in transparency'. Permanent Court of Arbitration, *South China Sea Arbitration* (n. 96), para. 82.

97 This inference derives from, e. g., conclusions found in paras 992-993 of the tribunal's 2016 award.

98 Anne Peters, 'Towards Transparency as a Global Norm' in: Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013), 534-607 (600).

the ICJ in 1951, including the culmination of the process of 'juridification' with its first concrete application in 2012. After a decade of relative dormancy, the concept is now being unearthed in a sequence of cases which directly bear on the operation of common interests.

Secondly, this lineage of cases – taken in the aggregate – tells something more about the nature of public international law as a 'public' field of law. For as long as international dispute settlement was confined to bilateral disputes raising little or no interest among third parties, the public character of international law was probably hard to detect. Today, instead, the sought decentralisation of enforcement and the types of issues that have reached the docket of international courts tend to emphasise this public dimension in an unprecedented manner. Remarkably, however, the public dimension has become visible first and foremost in the courtroom, not only through the legal action of non-injured parties, but also via third-party interventions that have multiplied in cases dealing with community interests and common spaces. Since Holland's famous statement in 1898 that 'the law of nations is but private law "writ large"',[99] the *public* character of public international law is certainly more within sight.

Looking beyond the courtroom, the activity of quasi-judicial bodies designed to pronounce authoritatively on common interests and common spaces similarly contributes to the public dimension of those interests and spaces, for instance by enabling broader participation of various 'stakeholders'.[100] Of course, it still remains to be seen whether the materialising 'publicness' of public international law in and out of the courtroom is, normatively speaking, a positive development in international affairs, and what challenges and opportunities may arise in this regard from the continued centralisation and multilateralisation of forums for international justice.

Thirdly, while international courts are becoming the vehicle of expression of the public dimension of international law, their respective institutional approaches to adjudication also warrant adaptation. This plays out in respect of what is required to perform their function effectively – in particular when common interests and common spaces are involved – as well as with respect to the possibilities of judicial process within their respective legal frameworks. The development of innovative concepts such as the 'proxy state'

99 Thomas Erskine Holland, *Studies in International Law*, 152, cited in: Jenks (n. 16), 13, correcting the erroneous attribution of the sentence to Hersch Lauterpacht. Holland's privatistic conception of international law, international law is concerned with the 'Persons' for whose sake rights are recognised; with the 'Rights' thus recognised; and with the 'Protection' by which those rights are made effective.

100 See Malgosia Fitzmaurice, 'Bringing in Community Interests under International Environmental Law: Substantive and Procedural Paths', HJIL 85 (2025), 183-198.

model,[101] and the characterisation of international organisations as representatives of common interests,[102] indicate that courts are where the architecture of international law – including questions of representation and responsibility – will continue to be stress-tested in years to come. In this regard, international courts seized with questions relating to common interests and common spaces have demonstrated a pragmatic willingness to adapt from the traditional bounds of dispute settlement.[103] This adaptation, which appears so incremental when viewed across the historical arc of international justice, is nevertheless driven by the sudden breakthroughs of individual cases, and the creativity of judges and counsels.[104] These are the architects drafting new blueprints for justice in the global commons.

101 See *The Gambia v. Myanmar* (n. 10).

102 ICC, *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Public Reparation Order (17 August 2017), para. 107, in which the Trial Chamber awarded 'one symbolic euro […] to the international community, which is best represented by UNESCO'.

103 See e. g. Alexander Wentker and Robert Stendel, 'Taking the Road Less Travelled: The ICJ's Pragmatic Approach to Provisional Measures in Nicaragua v. Germany', *EJIL: Talk!*, 3 May 2024, available at <https://www.ejiltalk.org/taking-the-road-less-travelled-the-icjs-pragmatic-approach-to-provisional-measures-in-nicaragua-v-germany/>, last access 17 February 2025.

104 Indeed courts' pronouncements often take highly significant cues from arguments put forward by the parties. In *Barcelona Traction*, for instance, counsel Roberto Ago for Spain had submitted the argument distinguishing between bilateral obligations and obligations owed to the whole international community, which the ICJ later accepted in its famous obiter dictum. See n. 32.