‘Proxy States’ as Champions of the Common Interest? Implications and Opportunities

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Abstract

During the 2022 preliminary objections proceedings in the case of *Gambia v. Myanmar* before the International Court of Justice (ICJ), Myanmar argued that the state initiating proceedings – the Gambia – was merely a ‘proxy state’, and that the ‘real’ applicant was the Organisation of Islamic Cooperation (OIC).[1] The OIC had appointed the Gambia, had ‘tasked’ it to bring the case, and had provided all the necessary resources to do so. As a result, Myanmar contended, the case was inadmissible.[2] This argument was summa-

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1 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 (34).

2 ICJ, *Gambia v. Myanmar* (n. 1), 34.

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rily dismissed by the ICJ,[3] yet the question of proxy statehood deserves further inquiry. The ICJ's permissive approach has potentially important implications, including for the promotion of common interests through international adjudication.[4]

This article critically examines the phenomenon of 'proxy states' through the lens of the integration and furtherance of common interests in and through ICJ proceedings. First, it outlines and analyses Myanmar's 'proxy state' argument and the ICJ's response. This allows a picture to be painted of the 'proxy-state model' and the legal landscape in this regard, at least insofar as it has been interpreted by the ICJ. Section II. then delves into the potential of the proxy-state model to provide new routes for bringing issues of common interest before the ICJ. It critically examines the role of international organisations in furthering such interests, and highlights some key potential advantages that they can provide within this dynamic. Finally, section III. assesses three key concerns that have been raised in relation to cases being brought to by states acting as a proxy for an international organisation or other entity. Section IV. offers some conclusions on the implications and opportunities presented by the proxy-state phenomenon.

Keywords

Jurisdiction – International Court of Justice – Myanmar – international organisations – abuse of process – admissibility

I. *Gambia v. Myanmar* and the 'Proxy State' Argument

The *Gambia v. Myanmar* case is not the first and will certainly not be the last brought before the ICJ as a result of campaigning by non-state, third-party actors.[5] The *Nuclear Weapons* Advisory Opinion of 1996 and the more recent advisory proceedings on climate change were both the outcome of considerable campaigning by Non-Governmental Organisations (NGOs) and other civil society actors.[6] Similarly, such actors have played key roles in

3 ICJ, *Gambia v. Myanmar* (n. 1), 44-46.

4 Common interests will be discussed in more detail in section II. In short, these concepts are understood as interests which are shared by a group of actors and which transcend the individual interests of those actors.

5 See Michael A. Becker, 'Pay No Attention to that Man behind the Curtain: the Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice', Max Planck UNYB 26 (2023), 90-107 (92-103) for an overview.

6 Becker 'Pay No Attention' (n. 5), 92-95.

the instigation of proceedings by Belgium and Australia in the *Questions relating to the Obligation to Prosecute or Extradite* and *Whaling in the Antarctic* cases.[7]

Unlike in those cases, however, *Gambia v. Myanmar* concerned the role played by an international organisation, a type of non-state actor with very different powers and position in international law than civil society actors. Also unlike in those cases, the respondent state, Myanmar, specifically raised the role played by the OIC as an objection to the ICJ's jurisdiction and the admissibility of the case.[8] The Gambia had brought proceedings before the Court alleging that the treatment of the Rohingya (an ethnic and religious minority in Myanmar) by the Myanmar authorities amounted to a violation of a number of different obligations in the Genocide Convention, requesting a number of forms of relief.[9] In initiating these proceedings, Myanmar argued that in reality, the Gambia was merely acting as a 'proxy' for the OIC, and that therefore the Court should refuse to exercise jurisdiction. The following sections analyse in turn the role of the OIC in the bringing of the case, Myanmar's argument that the Gambia could not bring such proceedings as it was only a 'proxy' of the OIC, and the Court's findings in that regard.

1. The Role of the OIC

The OIC is an international organisation made up of 57 states across four continents.[10] It styles itself as the 'collective voice of the Muslim world'[11] and its diverse objectives as identified in its Charter include: 'to safeguard and protect the common interests and support the legitimate causes of the Member States' and 'to protect and promote human rights and fundamental freedoms'.[12] For over a decade, the Organisation has regularly expressed grave concern over the treatment of Rohingya Muslims in Myanmar and has mobilised a number of diplomatic, legal, and other efforts (including the

7 See Becker 'Pay No Attention' (n. 5), 98 f.

8 ICJ, *Gambia v. Myanmar* (n. 1), 34.

9 ICJ, *Preliminary Objections of the Union of Myanmar in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), 20 January 2021, 112.

10 OIC, 'History' <https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en>, last access 31 January 2025.

11 OIC, 'History' (n. 10).

12 Charter of the Islamic Conference (OIC Charter) (UNTS 1972) Article 1 (2) and (14). There is a list of 20 separate and overlapping objectives in this article.

provision of aid to refugees) to support them and to bring attention to their cause.[13]

More recently, the OIC has taken a leading role in bringing this matter before the ICJ. To summarise what is a relatively complex series of resolutions,[14] meetings, and statements, by and within the auspices of the OIC, the chain of most relevant events was as follows. In 2018, the OIC passed Resolution 59/45-POL which established an Ad Hoc Committee on Accountability for Human Rights Violations Against the Rohingyas.[15] This Committee was chaired by The Gambia and its inaugural session was held in Banjul, The Gambia, on 10 February 2019.[16] The Ad Hoc Committee decided upon a plan of action to utilise legal avenues for the protection of the Rohingya which was approved by the OIC, and which, it later became clear, included the bringing of proceedings before the ICJ.[17] These proceedings were to be initiated by The Gambia as the chair of the Ad Hoc Committee, on behalf of the OIC.[18] In the words of Myanmar, The Gambia was 'appointed' by the OIC for this role.[19] The cost of the proceedings were funded by contributions from OIC Member States, and the funds themselves were managed by the Chair of the OIC Ad Hoc Committee and the OIC Secretary-General.[20]

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13 See e. g. Organization of Islamic Cooperation, 'The OIC expresses grave concern over the situation of Myanmar Rohingya Muslims', <https://www.oic-oci.org/topic/?t_id=7023&ref=2894&lan=en>, last access 31 January 2025; Organization of Islamic Cooperation, 'OIC continues efforts to provide humanitarian aid to Rohingya refugees', <https://www.oic-oci.org/topic/?t_id=10322&ref=4077&lan=en>, last access 31 January 2025. See also OIC, Resolution 4/46-MM on the Situation of the Muslim Community in Myanmar (46th session of the Council of Foreign Ministers, 1-2 March 2019), <https://oic-oci.org/docdown/?docID=4447&refID=1250>, last access 31 January 2025.

14 See *Preliminary Objections of Myanmar* (Gambia v. Myanmar) (n. 9) for a detailed overview.

15 OIC, Resolution 59/45-POL on the Establishment of an OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas (45th Session of The Council Of Foreign Ministers, 5-6 May 2018), <https://www.oic-oci.org/docdown/?docID=1868&refID=1078>, last access 31 January 2025.

16 See OIC, 'OIC Convenes Coordination Meeting for Ministerial Committee on Accountability for Human Rights Violations against the Rohingya' (22 January 2019), <https://oic-oci.org/topic/?t_id=20506&ref=11671&lan=en>, last access 31 January 2025.

17 See ICJ, *Preliminary Objections of Myanmar* (n. 9), 76-84.

18 ICJ, *Preliminary Objections of Myanmar* (n. 9). As chair of the Ad Hoc committee, it may be assumed that the Gambia had considerable agency with regard to this decision by the Committee.

19 ICJ, *Preliminary Objections of Myanmar* (n. 9).

20 ICJ, *Preliminary Objections of Myanmar* (n. 9), 100; OIC, 'Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya' (25 September 2019), <https://www.oic-oci.org/docdown/?docID=4519&refID=1255>, last access 31 January 2025.

2. The 'Proxy State' Argument

During the preliminary objections stage, Myanmar argued that 'the actual seisin of the Court in this case was performed by The Gambia […] in [its] capacity as an organ of the OIC, or alternatively as "proxy" (or agent) of the OIC, and not in its capacity as a Contracting Party to the Genocide Convention'.[21] Myanmar relied on the Court's definition of a dispute as 'a matter of substance',[22] and 'a matter for objective determination by the Court'[23] to argue that it is up to the Court itself to determine 'who *in substance* is the real applicant in the case'.[24]

Following this line of argumentation, 'the mere assertion by a State formally named as applicant in the application that it is the real applicant in the case will not suffice to establish that this is indeed the case'.[25] The Gambia, Myanmar argued, 'is merely acting on [the OIC's] behalf' as its proxy, 'having been expressly tasked by the OIC' to bring proceedings.[26] This characterisation of the 'real applicant' was based on a number of factual considerations, including the funding of proceedings,[27] the prior endorsement and approval by the OIC of The Gambia's application,[28] and the fact that The Gambia allegedly did not bring proceedings on its own initiative, but rather was 'tasked' to do so by the OIC, 'not only on behalf of, but at [its] behest'.[29] Much was made by Myanmar of the language used in press releases and other documentation that emphasises the role of the OIC and which presents The Gambia as an agent or appointee of the OIC.

In concluding that the OIC was the 'real applicant', Myanmar argued that the Court did not have jurisdiction over the case for two reasons: first, because the OIC was not a state, as required by Article 34(1) of the ICJ Statute;[30] and second, because the OIC was not a party to the Genocide

21 ICJ, *Preliminary Objections of Myanmar* (n. 9), 34.

22 See e. g. ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), preliminary objection, judgment of 5 October 2025, ICJ Reports 2016, 833 (38); ICJ, *Preliminary Objections of Myanmar* (n. 9), 40.

23 ICJ, Preliminary Objections of Myanmar (n. 9), 40, referring to inter alia ICJ Marshall Islands (n. 22), 38.

24 ICJ, Preliminary Objections of Myanmar (n. 9); ICJ Marshall Islands (n. 22), 38, 42 (emphasis in original).

25 ICJ, Preliminary Objections of Myanmar (n. 9), 43.

26 ICJ, *Preliminary Objections of Myanmar* (n. 9), 43 and 45.

27 ICJ, *Preliminary Objections of Myanmar* (n. 9), 100; OIC, 'Report of Ad Hoc Ministerial Committee' (n. 20).

28 ICJ, Preliminary Objections of Myanmar (n. 9), 87.

29 ICJ, *Preliminary Objections of Myanmar* (n. 9), 94, 96.

30 Article 34(1) Statute of the International Court of Justice (UNTS 1945).

Convention and thus could not make use of the compromissory clause in Article IX as a jurisdictional basis.[31] The Gambia, by contrast, argued that it was the 'real applicant', and not the OIC, the decision to bring proceedings having been made individually and independently by the Gambian government.[32] It also emphasised that it was The Gambia who initially raised and spearheaded the matter within the framework of the OIC, rather than being a mere agent of that organisation.[33]

3. The Court's Response

The Court gave 'short shrift' to these arguments by Myanmar.[34] After summarising the arguments of the parties, each of Myanmar's arguments on this point are rejected rather summarily.[35] Noting that the proceedings were instituted in The Gambia's name, as a party to both the ICJ Statute and the Genocide Convention, the Court observed that

> 'the fact that a State may have accepted the proposal of an intergovernmental organization of which it is a member to bring a case before the Court, or that it may have sought and obtained financial and political support from such an organization or its members in instituting these proceedings, does not detract from its status as the applicant before the Court'.[36]

It emphasised that, in line with previous jurisprudence, whatever motivation a state may have in bringing a case 'is not relevant for establishing the jurisdiction of the Court'.[37] It thus takes what might be described as a strongly formalist position with regard to the Gambia's right of *locus standi*. The focus here appears to be very much of the letter of the law and Gambia's right to bring proceedings, rather than the motivation behind or spirit in which such proceedings are brought.

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31 ICJ, Preliminary Objections of Myanmar (n. 9), 185.

32 ICJ, *Gambia v. Myanmar* (n. 1), 39 f.

33 ICJ, *Gambia v. Myanmar* (n. 1), 41.

34 Becker 'Pay No Attention' (n. 5), 102. See ICJ, *Gambia v. Myanmar* (n. 1), Dissenting Opinion of Judge Xue, 3 et seq. who seems to agree with Myanmar on this point. Some of Judge Xue's objections to the exercise of jurisdiction in this case are discussed below in section 4.3.

35 ICJ, *Gambia v. Myanmar* (n. 1), 42-46.

36 ICJ, *Gambia v. Myanmar* (n. 1), 44.

37 ICJ, *Gambia v. Myanmar* (n. 1), 44. On this point, the Court refers to its previous pronouncement in ICJ, *Border and Transborder Armed Actions* (Nicaragua v. Honduras), judgment of 20 December 1988, ICJ Reports 1988, 69 (52).

It is rather notable that the Court did not engage with the factual extent of the OIC's influence at all, or on the question more generally as to whether in fact The Gambia was acting as a proxy. The Gambia and Myanmar both presented opposing arguments on this point, as noted above, but the Court appeared to deem this irrelevant: it did not matter if The Gambia had acted as a proxy for the OIC or not; regardless, it was exercising its right to bring proceedings before the ICJ.

The Court was thus crystal clear in its formalism: as a matter of law, a state may indeed bring proceedings on behalf of an international organisation or indeed another body or group of actors. Whether it is accurate to describe The Gambia as an appointee or proxy is beside the point; The Gambia is free to exercise its sovereign right to bring a case as it chooses. This '*laissez faire*' approach[38] could therefore open up international adjudication to a new pattern and dynamic when it comes to the institution of proceedings. The implications of this dynamic for common interests in international law are explored in the next section.

II. Proxy-States: A New Route for Promoting Common Interests?

This situation whereby an individual state acts as an agent or proxy to institute proceedings on behalf of an international organisation could provide interesting opportunities for the protection and promotion of common interests in international law. In contrast with individual state interests, common interests in international law transcend individual concerns, uniting a group with a shared purpose.[39] They are more than just the sum of individual interests within a group and instead reflect a shared quality that surpasses the coincidental alignment of individual interests.[40]

38 Michael A Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in the Gambia v Myanmar at the International Court of Justice', Melbourne Journal of International Law 21 (2020), 428-450 (440).

39 See Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law', in: Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 79-89 (81). See also Sarah Thin, 'In Search of Community: Towards a Definition of Community Interest', in: Gentian Zyberi (ed.), *Protecting Community Interests Through International Law* (Intersentia 2021), 11-30 (12 f., 16 f.).

40 Stephen M. King, Bradley S. Chilton and Gary E. Roberts, 'Reflections on Defining the Public Interest', Administration and Society 41 (2010), 954-978 (957); see also ICJ, *Reservations to the Convention on Genocide,* advisory opinion of 28 March 1951, ICJ Rep 1951, 15, 23. See also Sarah Thin, 'Community Interest and the International Public Legal Order', NILR 68 (2021), 35-59 (40).

International organisations similarly appear to operate on the basis of common purposes. By acting as an agent of an international organisation, the proxy state creates a new route through which the interests of international organisations rather than individual states *per se* can be brought before an international court or tribunal. A key question is therefore the extent to which international organisations can and do represent common interests. This is addressed in the first subsection. Although it is possible that a state may act as an agent or proxy for an informal group of states, or even another individual state, the proceeding analysis will focus on the pattern established in *Gambia v. Myanmar*; i. e. an individual state instituting proceedings at the behest of an international organisation. The second subsection analyses three key ways in which international organisations could contribute to the furtherance of common interest through the use of proxy states.

1. On Behalf of the Community? International Organisations and the Common Interest

International organisations are the product of interstate cooperation and the recognition of shared goals; as such, there are clear connections between them and common interests.[41] Such arrangements can provide more detail, more focus, 'a more comprehensive response' to global problems such as climate change and environmental problems.[42] They bring issues out of the state-vs-state paradigm. That said, international organisations are still essentially made up of states, each of which has its own individual interests.[43]

Is it possible for such state-based creations to transcend the individual interests of their creators and act instead in the *common* interest? It seems difficult to answer this question in anything but the affirmative. Indeed, Virally has famously defined an international organisation specifically in reference to the common interest as 'an association of States […] whose

41 Jan Klabbers, 'What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism', in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 86-100 (93); Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009), 16-20.

42 See Michael Bowman, 'Righting the World Through Treaties: The Changing Nature and Role of International Agreements in the Global Order', Legal Information Management 7 (2007), 124-132 (126).

43 Klabbers, 'Promotion of Community Interests?' (n. 41), 87.

task it is to pursue objectives of common interest'.[44] It might be argued to the contrary that states are inherently self-interested and therefore do not or cannot establish organisations that may act contrary to their own individual interest. However, this overlooks the fact that states themselves act in furtherance of common interests, sometimes at the expense of certain of their individual interests.[45] States are essentially socio-legal constructs made up of a plethora of differing and often conflicting interests and ideas and so the idea that their only interests would be purely individualist is a strange one.[46] They can and do also act in the common interest as well as in their individual interest.[47] Gambia's application to the Court in this case is a good example of that, alongside many other recent applications by non-injured states.[48] It is therefore illogical to claim that states could not themselves act in furtherance of a common interest that might contradict their individual interests.

The relationship between the organisation itself and its member states is also key here. It is traditional to speak of the possession of a 'distinct will' or '*volonté distincte*' as a defining characteristic of an international organisation.[49] Such a distinct will establishes the organisation or its organs as an

44 Michel Virally, 'Definition and Classification of International Organizations: A Legal Approach', in: Georges Abi-Saab (ed.), *The Concept of International Organization* (1981), 50-66 (51). See also Angelo Golia Jr and Anne Peters, 'The Concept of International Organization', in: Jan Klabbers (ed.), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022), 25-49 (29).

45 Huber wrote as early as 1910 that states conclude(d) treaties for essentially two reasons: interest and common interest: Max Huber, 'Die Soziologischen Grundlagen des Volkerrechts', Archiv für Rechts- und Wirtschaftsphilosophie 4 (1910), 21-35, as cited in Klabbers, 'Promotion of Community Interests?' (n. 41), 16.

46 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 (46); Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' LJIL 29 (2016), 289-316 (295 f.).

47 See Besson, 'Whose Interests?' (n. 46), 46; Besson, 'Dissolving the Paradox' (n. 46), 295 f.

48 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), judgment of 31 March 2014, ICJ Reports 2014, 226; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012, ICJ Reports 2012, 422; 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 (1); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Application Instituting Proceedings of 29 December 2023, ICJ Reports 2024, 1; ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (Nicaragua v. Germany), Application Instituting Proceedings of 1 March 2024, ICJ Reports 2024, 1.

49 Golia and Peters (n. 44), 34; Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007), 19.

independent actor, separate, 'more than the sum of its members'.[50] It has, nonetheless, been criticised in more recent literature as 'outdated, obscure'[51] and 'metaphysical'[52] – a difficult concept to pin down in practice. An arguably more practicable concept is that of (institutional) autonomy.[53] Rather than referring to the elusive notion of 'will', this approach focuses on the factual and legal capacity of an organisation to act independently of its members.[54] The international legal personality of an international organisation can be considered an important contributing factor in establishing the legal side of this autonomy, being a prerequisite for the organisation to possess legal rights and obligations under international law.[55] The extent and degree of autonomy of a particular organisation will depend on numerous factors related both to the constitutive set-up of the organisation and to the particular context.[56] It is nonetheless clear that the autonomy of international organisations is essential in their ability to further and represent common interests that extend beyond the individual interests of their member states.

In sum, international organisations are by definition legally and institutionally independent of their members, at least to a certain degree. This means that there is no inherent barrier to an international organisation adopting and furthering common interests which transcend and are distinct from the individual interests of its constituent states. The extent to which a particular international organisation actually does represent common interests will depend on the nature and set-up of that organisation and the particular circumstances at hand. It will normally be necessary to assess this on a case-by-case basis, not only on an organisation-by-organisation basis, as the same organisation may act to reflect a range of goals and purposes. There may always be a certain degree of tension between the individual interests of member states and these organisation-level common interests.[57]

Key elements that can signal a greater degree of commonality include the intensity and types of cooperation, including the method of decision-making.

50 Henry G. Schermers and Niels Blokker, *International Institutional Law* (6th edn, Brill 2018), 48; Golia and Peters (n 44), 34.

51 Golia and Peters (n. 44), 34.

52 Brölmann (n. 49) 21.

53 Brölmann (n. 49) 19, Golia and Peters (n. 44) 34.

54 Golia and Peters (n. 44) 38.

55 On international legal personality as a defining characteristic of an international organisation, see notably ILC, 'Articles on the Responsibility of International Organisations' (ARIO) (2011) ILCYB, Vol. II, Part Two, 2, Article 2(a); Golia and Peters (n. 44), 34-37; Brölmann (n. 49), 19. On the relationship between legal personality and autonomy, see Golia and Peters (n. 44), 39.

56 Golia and Peters (n. 44), 41.

57 Klabbers, *International Institutional Law* (n. 41), 4 f.

If decisions are made by majority decision rather than requiring all states to agree, this is evidence of an interest greater than that of those individual states that do not concur.[58] Some commentators also point to the nature of the organ itself or the other organs that are present in the same wider organisation. Certain types of organs, particularly parliamentary and judicial bodies 'are supposed to be genuinely devoted to the organisation's overall interest and are supposed to operate as a complement, and corrective, to those organs chiefly entrusted with balancing the competing national interests'.[59] Organisations that contain such organs are generally thought to be more aligned with a communitarian perspective than an individual statist one. Finally, the functions or purposes of an institution or organisation as set out in law can also be relevant.[60] Many international institutions lack clearly defined functions and purposes, but many others are explicit (for example, in their constitutive treaty) with regard to the core common purposes for which they were created.[61]

The OIC itself certainly exhibits some of these characteristics. Decisions are regularly made by majority,[62] and organs such as the OIC Independent Permanent Human Rights Commission would certainly appear to reflect a common-interest-based perspective.[63] Perhaps even more clearly, many of the objectives and principles listed in the OIC Charter are communitarian in nature, e. g. 'To promote and to protect human rights and fundamental freedoms' and 'To cooperate and coordinate in humanitarian emergencies such as

58 E. g. some MEAs operate on the basis of qualified majority voting (QMV). See Ellen Hey, 'Common Interests and the (Re)constitution of Public Space', Env. Policy & Law 39 (2009), 152-159 (155).

59 Werner Schroeder and Andreas Th. Müller, 'Elements of Supranationality in the Law of International Organisations' in: Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 358-378 (361).

60 Mario Prost and Paul Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?', Chinese Journal of International Law 5 (2006), 341-370 (355): 'IOs are not innate legal beings which spontaneously come to life. They are entities created by States which stem from the desire of governments to organize collectively their co-operation in particular elements of their international relations. Accordingly, IOs are entirely defined by the function, or purpose, for which they have been created […] these functions can, within the same organization, vary in time according to the organization's changing needs, or those of its members.'

61 Klabbers, *International Institutional Law* (n. 41), 34.

62 See e. g. Rules of Procedure of the OIC Council of Foreign Ministers, Rule 19(1), <https://bdrive.oic-oci.org/index.php/s/LomDpRWWdkpoeD7>, last access 31 January 2025; Rules of Procedure the OIC Executive Committee, Rule 11(1), <https://bdrive.oic-oci.org/index.php/s/Y7eDCSWgTq3q5WS>, last access 31 January 2025.

63 See <https://www.oic-iphrc.org/>, last access 31 January 2025.

natural disasters'.[64] It is thus reasonable to conclude that the OIC is at least capable of representing common interests.

In this particular case, and as already noted above, The Gambia's application is clearly in furtherance of common interests. As a non-injured state, The Gambia does not have a direct legal interest in the outcome of the case beyond its status as a party to the Genocide Convention and the *erga omnes partes* status of the prohibition on genocide therein.[65] The Genocide Convention has previously been recognised as reflecting such an interest.[66] In this circumstance, therefore, the OIC's role may indeed be seen as promoting common interests – by way of a 'proxy state'.

2. Common Interest and the Proxy State Model

The previous section established that international organisations can and do act in furtherance of common interests. This section refocuses on the proxy-state dynamic, outlining the ways in which this model can serve the promotion of such interests. It highlights the positive contribution that international organisations can bring to international litigation instigated at their request or behest.

a) Forum for Deliberation and Identification of Common Interest

The first contribution that international organisations can provide is to act as a forum for deliberation and for the identification of issues of common interest. Referred to as 'the *agorae* of the global community',[67] international organisations provide fora in which participants can transcend the purely domestic and see from a global perspective.

There are numerous ways in which international organisations may be said to be well-positioned to 'facilitate and structure co-operation and deliberation in time and space'.[68] First, institutionalising discussion within a permanent or regular forum has an important impact on the nature of such communication.[69] Without such an infrastructure, negotiation and deliberation generally occur between fewer actors, making it less representative and harder to

64 OIC Charter (n. 12), Article 1.
65 ICJ, *Reservations to the Convention on Genocide* (n. 40), 23.
66 ICJ, *Reservations to the Convention on Genocide* (n. 40), 23.
67 Klabbers, 'Promotion of Community Interests?' (n. 41), 93.
68 Prost and Clark (n. 60), 348.
69 Prost and Clark (n. 60), 349.

make the link between any decisions made and broader common interests.[70] Even if more widespread negotiation occurs, it is commonly sporadic and less predictable.[71] This permanency can ensure that the issue in question remains 'on the radar' and there can be a system in place for re-assessment and development of how the regime operates.

Next, the existence of an international forum creates a certain distance or level of detachment from national administrations.[72] This, combined with the collective international nature of that forum, allows the discussion (in theory) to transcend the domestic and the self-interest of states to discuss matters from a global perspective. States are engaged in a common endeavour; they 'are now part of an integrated regime, through which precarious *inter partes* equilibria are replaced by a sort of "co-tenancy" of each member with all the others'.[73]

Third, these deliberative fora facilitate the development of a shared, common agenda.[74] They provide a platform for discussion and action.[75] This helps to both 'facilitate the articulation and aggregation of national interests'[76] while looking at the same time to the common interest. International institutions 'are essential fora for the socialization of international relations'.[77] They allow for the elaboration of shared values and social understandings that are the basis, firstly, of any negotiation, but also of any understanding of common interests in international law.[78]

International organisations also commonly introduce a level of structure and professionalism to the conduct of negotiations and deliberation. They lead to 'a large and continuous mobilization of human resources'.[79] Prost and Clark argue that 'Permanent mobilization of international agents encourages

70 Prost and Clark (n. 60), 349.
71 Prost and Clark (n. 60), 349.
72 Prost and Clark (n. 60), 350.
73 Prost and Clark (n. 60), 350.
74 Prost and Clark (n. 60), 351.
75 Klabbers, 'Promotion of Community Interests?' (n. 41), 94.
76 Prost and Clark (n. 60), 351.
77 Prost and Clark (n. 60), 353.
78 See Prost and Clark (n. 60), 350. See also Georg Nolte, 'The International Law Commission and Community Interests', in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 101-118 (103): 'A community interest is not something which exists objectively, but needs to be socially established (constructed, recognized). The establishment of a community interest in international law usually begins with a claim by a certain actor which then becomes politically more widely accepted, by persuasion or by different forms of pressure. The process by which a community interest is established is usually fed by many informal (political or other) impulses whose legal relevance is determined by secondary rules of international law.'
79 Prost and Clark (n. 60), 352.

the development of a coherent body of technical expertise, necessary for the handling of contemporary challenges, the nature of which is often complex and multidimensional'.[80] They highlight too that 'international agents are agents of the organization, not of their national State' and are, thus, 'in principle, devoted to the collective interests of the organization over narrow national interests'.[81]

International organisations therefore provide a great number of benefits in relation to the identification of common interests themselves, and strategies for their promotion and protection. These benefits stem from the ability of an international organisation to act as a forum for deliberation on such topics.

b) Practical Support

The second key contribution that an internal organisation can provide in this context is practical and political support. It has often been remarked that there is a relative paucity of cases before the ICJ, the primary objective of which is the promotion or protection of common interests (as opposed to individual state interests).[82] While detailed consideration of the reason for this is beyond the scope of this article, it may be presumed that to take on such proceedings also is deemed to carry significant risk and potential costs – political, financial, legal. We do not yet have an international legal culture of individual states acting as 'guardians' of the common interest.[83] Acting on behalf of another, or on behalf of a collective, changes this dynamic.

The proxy state model allows for the risk to be shared. One element of this risk-sharing is resource-based. Bringing proceedings before the ICJ is an expensive business. The ICJ Trust Fund has provided financial support for some litigants, but there is always a limit to the amount of support that such funds can provide.[84] As noted above, the cost of the proceedings to The Gambia in *Gambia v. Myanmar* were funded by contributions from OIC Member States, and the funds themselves were managed by the Chair of the

80 Prost and Clark (n. 60), 352.

81 Prost and Clark (n. 60), 352.

82 See André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure', EJIL 23 (2012), 769-791 (790 f.); Christian Tams, 'Individual States as Guardians of Community Interests' in: Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 397-405 (387 f.).

83 Tams (n. 82).

84 See Gbenga Oduntan, 'Access to Justice in International Courts for Indigent States, Persons and Peoples' I. J. I. L. 58 (2019), 265-325 (274 f.).

OIC Ad Hoc Committee and the OIC Secretary-General.[85] This pooling of resources might also be seen to extend beyond finances to expertise and experience in the formulating of positions and arguments before the ICJ. It also creates a (comparatively) transparent and predictable financial support structure for common interest cases to be brought and funded.

c) Transparency

Closely related to the above point is the role that international organisations (can) play in increasing transparency, particularly in relation to the funding of proceedings. If we compare the *Gambia v. Myanmar* proceedings with other ICJ cases, it would be naive to presume that all states that have initiated proceedings before the ICJ without help of the trust fund have covered the costs entirely by themselves.[86] The lack of transparency on this point is notable. In the proxy-state model, there is arguably a much greater prospect for the accessibility and (public) availability of information regarding the reasons for bringing the case, the interests that lie behind the application, and the practical arrangements for financial and legal support. Of course, this is not a *necessary* consequence of the proxy-state model, as much will depend on the particular facts surrounding an application and the value that the particular international organisation puts in transparency. Yet, international organisations are arguably far more likely to provide and document such information publicly than individual states acting alone and in their individual interest.

The value of transparency in and of itself may be the subject of some debate,[87] but it is clear that transparency has an important 'accessory, secondary role'[88] to play in the protection and promotion of other aims and interests. Transparency has an important contribution to make to good governance and the rule of law, to accountability of public actors and democracy,[89] to the legitimacy of international legal processes, and to the empower-

85 ICJ, Preliminary Objections of Myanmar (n. 9), 100; OIC, Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya, OIC/ACM/AD-HOC ACCOUNTABILITY/REPORT-2019/FINAL, 25 September 2019, <https://www.oic-oci.org/docdown/?docID=4519&refID=1255>, last access 31 January 2025.

86 See further discussion on this point below, section III. 2.

87 See Anne Peters, 'The Transparency Turn of International Law', Chinese Journal of Global Governance 1 (2015), 3-15 (9 f.).

88 Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in: Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013), 1-10 (5).

89 Bianchi (n. 88.)

ment and engagement of the public and civil society. Many of these factors intersect with common interests in international law. Transparency may thus be seen as an important potential contribution of the proxy-state model, as compared with more traditional dynamics that lie behind applications to the Court.

III. Concerns and Hurdles

During the proceedings in the *Gambia v. Myanmar* case, Myanmar argued that, even if the Court were to find that it did have jurisdiction, it should decline to exercise that jurisdiction (i. e. declare the case inadmissible). The reasons given for this predominantly related to the judicial function of the ICJ, and particularly procedural fairness and the avoidance of abuse of process.[90] Although these arguments were not successful in that particular case, they do raise some potential hurdles or concerns with regard to the proxy-state model. Myanmar raised a number of such matters, some of which related more generally to the initiation of proceedings by a non-injured state (what they term an *actio popularis*).[91] This section focuses in particular on those concerns which relate to the proxy state model, and not to broader issues related to the standing of non-injured states.

1. Circumvention of Jurisdictional Limitations

Myanmar argued in *Gambia v. Myanmar* that even if the Court did have jurisdiction, it should have declined to exercise that jurisdiction (i. e. declare the case inadmissible) 'if the effect of [exercising jurisdiction] would in substance lead to a circumvention of the limitations on the Court's jurisdiction'.[92] They argue in their submissions:

> 'The function of the Court is to decide legal disputes between States entitled to appear before it. If, in substance, an exercise of jurisdiction would lead the Court to decide a dispute brought by a State or entity not entitled to appear before it, then a refusal by the Court to exercise that jurisdiction would be necessary to safeguard the Court's judicial function.'[93]

90 ICJ, Preliminary Objections of Myanmar (n. 9), 50, 53.
91 ICJ, *Preliminary Objections of Myanmar* (n. 9), Preliminary Objection II(C).
92 ICJ, *Preliminary Objections of Myanmar* (n. 9), 50.
93 ICJ, *Preliminary Objections of Myanmar* (n. 9), 50.

The contention or concern here appears to be that to allow a state to act as a proxy for an international organisation undermines the *locus standi* requirements of the Court. Despite the wording of this objection in terms of admissibility, it is difficult to see it as anything other than a repackaged version of Myanmar's objection to the Gambia's standing.[94] In no previous case has the Court found any such limitation to admissibility. In order to apply such a rule of admissibility, the ICJ would need to resort to analysis of the applicant state's motivation in bringing a case – something which it is clear the Court is reluctant to do.[95] It would also, arguably, place an undue restriction on the faculty of states to bring proceedings before the ICJ, and their discretion in deciding which cases to bring.

Myanmar's objection here may be understood as highlighting the problem of the creation of *artificial* disputes. In other words, if a state acts merely as a proxy, then the 'formal' dispute between applicant and respondent could be distinct from the 'real' dispute between respondent and the actor who engaged the proxy state to bring the application. One could potentially draw an analogy between this artificiality and the ICJ's jurisprudence in relation to the extinction of a dispute where it has become 'without object'.[96] The Court has previously found that a dispute has ceased to exist either in part or in its entirety for this reason. In these cases the Court can be seen to have looked at the motivation of parties in bringing proceedings.[97] However, that jurisprudence relates more to the outcome of the case and whether it would be 'devoid of purpose',[98] rather than the nature of the dispute between the parties as such. It thus seems unlikely that this notion of the artificiality of a dispute would have any legal effect when raised before the ICJ.

The Court has also previously dealt with claims that the application at hand is distinct from the 'real dispute' in situations where a broader conflict

94 Indeed, Gambia's submissions frame it as such: ICJ, 'Written Observations of The Gambia on The Preliminary Objections Raised By Myanmar', written observations of 20 April 2021, 2.27.

95 See e. g. ICJ, *Gambia v. Myanmar* (n. 1), 44; ICJ, *Border and Transborder Armed Actions* (n. 37), 52.

96 ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002, ICJ Reports 2002, 3 (18, 44); ICJ, *Nuclear Tests* (New Zealand v. France), judgment of 20 December 1974, ICJ Reports 1974, 457 (59); ICJ, *Nuclear Tests* (Australia v. France), judgment of 20 December 1974, ICJ Reports 1974, 253 (51-55); ICJ, *Dispute over the Status and Use of the Waters of the Silala* (Chile v. Bolivia), judgment of 1 December 2022, ICJ Reports 2022, 614, (163).

97 See e. g. ICJ, *Nuclear Tests* (New Zealand v. France) (n. 96), 31; ICJ, *Nuclear Tests* (Australia v. France) (n. 96), 30.

98 ICJ, *Silala* (n. 96), 42; ICJ, *Case concerning the Northern Cameroons* (Cameroon v. United Kingdom), judgment of 2 December 1963, ICJ Reports 1963, 15 (38).

situation has been recharacterised so as to fit within the scope of material jurisdiction of the Court. Examples include several of the cases brought on the basis of compromissory clauses in the Convention on the Elimination of Racial Discrimination and in the Genocide Convention.[99] In such cases, there is no doubt that a dispute of sorts exist between the parties, but rather whether the subject matter brought before the ICJ is a mischaracterisation of the true substance of the dispute. Although concerned with material jurisdiction rather than personal jurisdiction, so-called 'recharacterised disputes' cases are comparable in the sense that they may also be argued to circumvent jurisdictional limitations. The Court has thus far refrained from engaging with this notion of the 'real dispute', and has instead focused on whether the specific claims made by the applicant actually fall within the terms of the compromissory clause in question.[100] It seems therefore that there exists no additional criterion in the practice of the Court that the claims brought before it must reflect the 'real dispute' at hand, provided that the application fulfils formal criteria related to jurisdiction and admissibility.

It is worth considering the logical endpoint of Myanmar's reasoning here in relation to the judicial function. If proxy statism were to become a regular feature of the Court's jurisprudence and docket, would this be inherently in opposition to the Court's judicial function? This question arguably touches upon the heart of the matter. Myanmar contends that the essential function of the Court is to resolve disputes between states.[101] Seen from this perspective, it is at least possible to perceive a tension between this function and the situation in which cases are regularly brought on behalf of international organisations. Although formally an interstate case, in reality the Court could be seen as resolving a dispute which went beyond or fell outside this interstate dynamic. This could denote the existence of an additional, implicit criterion that only disputes which are *truly* interstate in nature, based on this conception of the judicial function.

However, this argument is premised upon a highly limited view of the international judicial function. One would certainly not be alone in understanding the judicial function of the ICJ in broader and more communitarian

99 See e. g. ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections of the Russian Federation (1 December 2009), available at <https://www.icj-cij.org/sites/default/files/case-related/140/16099.pdf>, last access 11 February 2025, paras 1.4, 1.10, where Russia argues that the 'real dispute' concerned the broader conflict and was not truly a dispute over the CERD, but rather one over international humanitarian law and the international law on the use of force, and therefore that the case should be declared inadmissible.

100 See Lawrence Hill-Cawthorne, 'International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study' ICLQ 68 (2019), 779-815 (794), for discussion.

101 *Preliminary Objections of Myanmar* (n. 9), 50.

terms.[102] The notion of dispute settlement as the exclusive function of international courts and tribunals is based on the traditional idea that international law serves individual state interests; that international law's core purpose is to facilitate and regulate interstate relations: a law *between* states, not above them.[103] International law, however, does much more than just this. There are countless international legal obligations binding on states which, if breached, would not generate an injured state. From environmental law to human rights and beyond, international law is no longer purely about protecting individual state rights or interests.[104] The international legal order recognises the legal effect of concepts like common interest, as expressed most clearly through obligations *erga omnes (partes)* and peremptory norms.[105] Returning to the role of the Court, the international judicial function may thus be seen as not only resolving disputes between states, but ensuring state compliance with their international legal obligations more generally.[106] As observed by Judge Lachs in his separate opinion to the *Lockerbie* case, 'the Court is the guardian of legality for the international community as a whole' and the 'general guardian of legality within the system'.[107]

This wider view of the international judicial function – one that incorporates principles and concerns like the international rule of law, legality, and common interests in compliance with international law – is far more compatible with the proxy-state dynamic. From this perspective, provided the procedural rules are complied with, the Court is primarily concerned with whether a rule has been broken or not. It is not limited to disputes of a purely interstate nature beyond formal admissibility criteria. In determining that the

102 See e. g. Joan E. Donoghue, 'The Role of the World Court Today', Ga. L. Rev. 47 (2012), 181-201; Geert De Baere, Anna-Louise Chane and Jan Wouters, 'International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities', N. Y. U. J. Int' l L. & Pol 48 (2016), 715-793; Dinah Shelton, 'Form, Function, and the Powers of International Courts', Chi. J. Int'l L. 9 (2009), 537-571 (564).

103 See Lassa Oppenheim, *International Law: A Treatise*, Vol. 1 (2nd edn, Longmans, Green, and Company 1905), 209 et seq., as quoted in Amos J. Peaslee, 'The Sanction of International Law', AJIL 10 (1916),328-336 (333).

104 Sarah Thin, *Beyond Bilateralism: A Theory of State Responsibility for Breaches of Non-Bilateral Obligations* (Edward Elgar 2024), 28 et seq.

105 See ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), judgment of 5 February 1970, ICJ Reports 1970, 3 (33-34); ILC, Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Articles 40-41; Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Article 53; Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 217, 322.

106 See Sarah Thin, 'Guardians of Legality? The International Judicial Function in an Era of Community Interest', Nord. J. Int'l L. 92 (2023), 499-527, particularly 11 et seq.

107 ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), provisional measures, order of 14 April 1992, ICJ Reports 1992, 3, 26.

Gambia does indeed have standing in this case and no rule of law or procedure would prevent the Court from exercising jurisdiction, the Court may be seen to have (at least partially) accepted this broader conception of its judicial function.

2. Potential for Abuse

In its submissions, Myanmar highlighted the 'wide range of potential abuses' that could stem from the precedent that would be set by accepting to hear a case brought by a proxy state.[108] These scenarios included corporations paying a willing state to bring a case, or a state agreeing to be the 'nominal applicant' in proceedings on behalf of another state as a diplomatic favour or bargaining piece.[109] This, they argue, would run contrary to the ICJ's judicial function and to the consent of state parties to the ICJ Statute.[110]

Despite the concerns that such scenarios might give rise to, there was never any real prospect of arguing that the Gambia's application represented a comparable abuse of process.[111] In and of itself, therefore, this objection by Myanmar was always likely to fail. The question remains, however, whether such scenarios are a real concern. In other words, what would or could the Court's approach be in relation to scenarios such as those raised by Myanmar, i. e. states agreeing to initiate proceedings on behalf of other actors, including potential corporations, as a diplomatic favour or for economic return?

Taking a closer look at the types of supposedly nightmare scenarios highlighted by Myanmar, the question arises as to how likely (or unlikely) these scenarios really are. Let us first draw a distinction between these scenarios which involve a proxy state bringing a case of their own free will, potentially in exchange for financial or diplomatic benefit, on the one hand, and a situation of coercion on the other. If it could be proven that a state had been compelled against their will to make an application to the Court, it is submitted that this would be an obvious case of abuse of process. It could alternatively be treated, analogous with the consent to be bound by a treaty, as being devoid of legal effect.[112] Indeed, exercising jurisdiction over an application brought through coercion would arguably 'risk circumventing

108 *Preliminary Objections of Myanmar* (n. 9), 53.

109 ICJ, *Preliminary Objections of Myanmar* (n. 9), 53.

110 ICJ, *Preliminary Objections of Myanmar* (n. 9), 53.

111 *Written Observations of The Gambia* (n. 94), 15 et seq; ICJ, *Gambia v. Myanmar* (n. 1), 49.

112 See Vienna Convention on the Law of Treaties, Article 51: The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

the consent requirement'.[113] Such clear-cut cases are, however, highly unlikely to arise in practice. The threshold of coercion itself is famously difficult to define, and even more difficult to establish.[114]

By contrast, that a state might bring a case in exchange for a financial or other benefit seems a comparatively realistic prospect. Such situations are also more complex as a matter of law as *prima facie* the decision to bring a case, if made freely, is a sovereign act.[115] It is difficulty to identify any positive law that would limit the state's right to take such an act as they saw fit, whether influenced by extraneous concerns or interests or otherwise.

Let us take the scenario of a state acting as proxy for a corporation or corporations. It is certainly not unheard for industry to take an interest in interstate adjudication. Following the introduction of plain packaging for cigarettes, tobacco companies were at the forefront of formulating arguments that these measures were contrary to international trade law,[116] shortly before proceedings were brought before the World Trade Organization (WTO).[117] Industrial actors have been less vocal in relation to cases before the ICJ, but that is not to say that important private interests are not in play. The pending dispute of *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* is essentially a territorial dispute over the Essequibo region,[118] a region in and around which ExxonMobil has been actively exploiting oil reserves worth billions of dollars since 2015.[119] Venezuela has denounced Guyana's decision to license these activities,[120] and has ordered ExxonMobil and other industrial

113 Becker 'Pay No Attention' (n. 5), 104.

114 See Marko Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', AJIL 117 (2023), 601-650, especially at 612 et seq.

115 Becker 'Pay No Attention' (n. 5), 104.

116 Andrew D. Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility', Asian Journal of WTO & International Health Law and Policy 5 (2010), 405-426, e. g. at 407, 414, 421. See also Tobacco Tactics, 'Industry Arguments Against Plain Packaging', <https://tobaccotactics.org/article/industry-arguments-against-plain-packaging/>, last access 30 January 2024.

117 See e. g. WTO, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for Consultations by Indonesia of 25 September 2013, WT/DS467/1.

118 See ICJ, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, ICJ Reports 2023, 262 (22).

119 See ExxonMobil, 'Guyana Project Overview', <https://corporate.exxonmobil.com/locations/guyana/guyana-project-overview#DiscoveriesintheStabroekBlock>, last access 11 February 2025; ExxonMobil, '2022 Annual Report', <https://corporate.exxonmobil.com/-/media/global/files/locations/guyana-operations/em-guyana-annual-report-2022.pdf>, last access 11 February 2025.

120 See 'Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29th, 2018' of 28 November 2019, <https://www.icj-cij.org/sites/default/files/case-related/171/171-20191128-WRI-01-00-EN.pdf>, last access 11 February 2025, 40.

actors to leave the region.[121] In Venezuela's submissions to the Court, they even refer to the role of ExxonMobil and other multinational companies as being 'behind Guyana's belligerent approaches'.[122] This is by no means the first territorial dispute before the ICJ which affects potential oil profits, nor will it be the last.[123] Is it possible, or even probable, that at least one of these proceedings were brought using funding from and following pressure or encouragement by the oil and gas industry? The present author would suggest that the likelihood appears rather high. It seems reasonable to assume, therefore, that this nightmare scenario put forward by Myanmar already exists, and indeed could even be rather commonplace.

In addressing Myanmar's arguments, the Court did acknowledge its power to refuse to exercise jurisdiction on grounds of abuse of process. The Court has so far been reluctant to use this power, holding repeatedly that an application will only be found inadmissible on such grounds 'in exceptional circumstances',[124] and where there is 'clear evidence' of abusive conduct.[125] The threshold is therefore high. The question remains as to whether and under what conditions the proxy state model would or could amount to such abusive conduct.

In a recent case involving alleged abuse of process, *Equatorial Guinea v. France*, France argued that the case should be declared inadmissible on grounds of abuse of process on the basis that Equatorial Guinea's objective in bringing proceedings was solely to shield its Vice President (who was also the son of the President) from pending criminal proceedings in France.[126] Although the Court found that neither the 'exceptional circumstances' nor the 'clear evidence' thresholds were met and therefore that this was not a bar to

121 Argus Media, 'Venezuela Gives 90-Day Warning to Guyana Producers', 6 December 2023, <https://www.argusmedia.com/en/news-and-insights/latest-market-news/2516564-venezuela-gives-90-day-warning-to-guyana-producers>, last access 11 February 2025.

122 Venezuelan Memorandum (n. 120), 44.

123 See e. g. ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), judgment of 3 February 2009, ICJ Reports 2009, 61; Dana Spinant, 'Romania Wins Black Sea Border Dispute', Politico, 3 February 2009; ICJ, *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), judgment of 12 October 2021, ICJ Reports 2021, 206; Peter Muiruri, 'Kenya Rejects UN Court Judgment Giving Somalia Control of Resource-Rich Waters', Guardian, 14 October 2021.

124 ICJ, *Gambia v. Myanmar* (n. 1), 49; *ICJ, Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), Preliminary Objections, judgment of 13 February 2019, ICJ Reports 2019, 7 (107 et seq.). See also in ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Preliminary Objections, judgment of 6 June 2018, ICJ Reports 2018, 292 (150); ICJ, *Jadhav* (India v. Pakistan), judgment of 17 July 2019, ICJ Reports 2019, 418 (49).

125 ICJ, *Immunities and Criminal Proceedings* (n. 124), 150.

126 ICJ, *Immunities and Criminal Proceedings* (n. 124), 140.

admissibility,[127] Judge Donoghue appended a Separate Opinion in which she strongly disagreed on this point. She determined that 'The President of Equatorial Guinea made clear that the purpose of these actions is a personal one, to address difficulties faced by his son.'[128] This purpose, she found 'is entirely at odds' with the law of diplomatic privileges and immunities relied upon by Equatorial Guinea.[129] As such, she reasoned, the dismissal of the case 'would pose no threat to diplomatic functions'; it would, however, allow Equatorial Guinea to continue to benefit from the shield provided by earlier provisional measures awaiting the Court's judgment on the merits.[130]

Judge Donoghue's conclusion appears to stem from an understanding that certain primary rules of international law (in *Equatorial Guinea v. France*, rules on diplomatic privileges and immunities) have a particular purpose, and if they are put to a use 'entirely at odds' with the purpose for which they were designed, then this could amount to abuse of process. This would certainly not appear to be the case in *Gambia v. Myanmar*, as there is no clear evidence that The Gambia or the OIC brought or supported the application for any reasons other than the prevention and punishment of genocide. If a state were to agree to bring an application in exchange for financial gain or diplomatic benefit, this motivation might not align with the purpose underlying the international obligation(s) at issue, but it is difficult to think of a scenario where it would be 'entirely at odds' in the manner described by Judge Donoghue. It is therefore highly unlikely that the 'exceptional circumstances' threshold would be met in these imaginary proxy state situations. Even if it were, it would not be the proxy state model itself that amounted to an abuse of process, but the manner in which it was used.

It is also worth highlighting the 'clear evidence' criterion. Judge Donoghue was of the opinion that this threshold was met in *Equatorial Guinea v. France* in part because the supposedly diplomatic premises in question were clearly not being used as such (French investigative teams had searched the buildings and found no diplomatic correspondence or documentation; this was not refuted by Equatorial Guinea), and because the statement of the President of Equatorial Guinea supposedly demonstrated that his purpose was 'a personal one', namely 'to address difficulties faced by his son'.[131] It

127 ICJ, *Immunities and Criminal Proceedings* (n. 124), 150.

128 ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 15.

129 ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 15.

130 ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 18.

131 ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 14-16.

will be rare that the evidence is this apparent – and even in this situation, the Court found contrary to Judge Donoghue that the evidence was insufficient.

Even if the 'exceptional circumstances' threshold were met, evidence is likely to be a significant hurdle. Inherent in the supposedly abusive scenarios set out above, whether real or imagined, is a lack of transparency. If Exxon-Mobil did indeed finance or otherwise encourage the application in *Guyana v. Venezuela*, the arrangements are certainly not on public record. It would be extremely difficult if not impossible for the ICJ to be provided with sufficient information and evidence to determine the factual circumstances and whether or not they amounted to an abuse of process. This may be contrasted with the comparatively transparent and public process that led to the Gambia's application.[132] Indeed, the more 'abusive' a situation is, the less information is likely to be available about it.

In sum, the proxy state model is not inherently an abuse of process. Even considering the nightmare scenarios whereby proxy states bring cases purely for personal gain are unlikely to be inadmissible on such grounds. The two main criteria of 'exceptional circumstances' and 'clear evidence' are simply unlikely to be met largely due to the high threshold that has been set by the Court for both of them. Provided, therefore, that the case is brought by a state of its own free will and not subject to coercion, it seems likely that the abuse of process threshold will not be met.

The conclusion that the proxy state model is not inherently abusive of judicial processes is of course favourable towards the use of this dynamic in the furtherance of common interests. The possibility that the same dynamic could be used for personal (state) financial or political gain without any likely finding of inadmissibility on grounds of abuse of process does, however, mean that the proxy state model does not exclusively serve the common interest. It could indeed be used to counter such interests as well as to further them. The fact that the ICJ has accepted the operation of this model in *Gambia v. Myanmar* means that the tool undoubtedly exists, but does not determine how that to may be used, nor by whom.

3. Equality of the Parties and Procedural Fairness

Although Myanmar raised the issue of the equality of the parties only in relation to the standing of a non-injured state more generally,[133] Judge Xue linked this concern specifically with the proxy-state model. She noted that:

132 See above, especially section II. 2. c).

133 *Preliminary Objections of Myanmar* (n. 9), 340.

> 'When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. […] With the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties, one of the fundamental principles of the Court for dispute settlement.'[134]

Judge Xue highlights in particular the potential inequity where the judges deciding a case happen to be nationals of states which are members of the international organisation backing the application.[135] She makes a comparison with the International Tribunal for the Law of the Sea which has specific rules for equivalent situations. Certain specific international organisations can bring cases before the International Tribunal for the Law of the Sea (ITLOS) and the Seabed Disputes Chamber under certain circumstances.[136] Article 22 of the Rules allows *inter alia* for judges to be withdrawn from the bench at the President's discretion, and in consultation with the parties, if 'two or more judges on the bench are nationals of member States of the international organization concerned'.[137]

The potential for bias in judicial decision making, or even the perception of such bias, could indeed be a problem under the proxy-state model. The ICJ Statute and Rules contain no equivalent provision for the withdrawal of judges in these circumstances. It is not, however, an entirely new problem. As has previously been acknowledged, ICJ procedure has evolved in relation to bilateral, adversarial disputes that did not tend to involve broader common interests of this type.[138] We are increasingly seeing such tensions in a variety of aspects of Court procedure.

The increased use of third party intervention at the ICJ has also highlighted the potential tension between judicial independence and nationality of a state with a stake in the case at hand. In the ongoing *Allegations of Genocide (Ukraine v. Russia)* case, 7 out of the 16 judges (including the President) were nationals of states that had lodged declarations of interven-

134 ICJ, *Gambia v. Myanmar* (n. 1), Dissenting Opinion of Judge Xue, 10.

135 ICJ, *Gambia v. Myanmar* (1), 10.

136 Statute of the International Tribunal for the Law of the Sea (1982), Arts 20 and 37.

137 ITLOS Rules of the Tribunal, ITLOS/8, <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf>, last access 11 February 2025, Article 22(4).

138 See ICJ, *Gambia v. Myanmar* (n. 1), Dissenting Opinion of Judge Xue, 10 and Declaration of Judge *Ad Hoc* Kress, 35; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), judgment of 25 September 1997, ICJ Reports 1997, 7, Separate Opinion of Judge Weeramantry, 118; 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 (eds), *Public Interest Litigation in International Law* (Routledge 2023), 75-97.

tion.[139] According to Russia, 'multiple interventions and public statements made by such States undoubtedly put undue and unnecessary pressure on the Judges and the Court as a whole, and concerns regarding conflicts of interests may also arise'.[140] The Court, Russia argued, should not allow intervention 'to be used as a vehicle to circumvent the procedural safeguards in the Statute and the Rules of Court to maintain equality of the parties, in particular, in terms of the composition of the Court, to the detriment of the Russian Federation. This would irretrievably upset the balance between the Parties.'[141]

The parallels are clear. Just as the *Ukraine v. Russia* raised concerns regarding connections between sitting judges and intervening states, the proxy-state dynamic raises similar concerns related to the connections between judges and states parties to the organisation behind the application. One could imagine that a judge of the nationality of one of these state parties might look more favourably on such an application. In *Ukraine v. Russia*, however, the Court's response was brief:

> 'The Court observes that the fact that some judges on the Bench are nationals of States seeking to intervene cannot affect the equality of the Parties because intervening States do not become parties to the proceedings. In any event, all judges are bound by their duty of impartiality.'[142]

This 'duty of impartiality' refers to the understanding that ICJ judges are independent from their nation state and do not represent their state in any way. All members of the bench are formally understood and expected to be impartial as regards the interests and desires of states to which they have some form of connection.[143] The Court has thus far appeared to be satisfied with this formal impartiality, and it certainly seems from the *Ukraine v. Russia* intervention proceedings that the Court is unlikely to entertain such arguments to the extent that they would act as a bar to jurisdiction. There will, of course, always be pressures on judges related to their state of nationality and its allies or political position. In that sense this is an issue that is

139 ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Provisional Measures , The Russian Federation's Written Observations on Admissibility of The Declarations of Intervention Submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, The United Kingdom and The United States of 24 March 2024, 48.

140 ICJ, *Allegations of Genocide* (n. 139).

141 ICJ, *Allegations of Genocide* (n. 139).

142 ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russia), provisional measures, order of 5 June 2023 on the admissibility of the declarations of Intervention, ICJ Reports 2023, 354 (51).

143 See ICJ Statute, Article 20; Rules of Court, Article 4.

inherent in having an international judiciary, and not one that is any worse in relation to the proxy-state model.

One way of removing or reducing such tensions is to allow for judges to withdraw themselves where it would be inappropriate to maintain their position on the bench. In the proceedings relating to the admissibility of the declarations of intervention in *Ukraine v. Russia*, Judges Donoghue, Tomka and Abraham declined to assume the functions of the presidency on the ground that each of them was a national of a state seeking to intervene.[144] This was merely noted in the Order on the admissibility of the declarations of intervention and there is therefore no publicly-available explanation as to precisely why these judges took this decision, nor on what basis this recusal was carried out. It is worth noting that this voluntary withdrawal only relates to the presidency, and not to the bench as such. This would suggest that it is primarily an issue of *perceived* procedural fairness, since the powers of a president do not differ greatly from the powers of a 'normal' sitting judge, except in situations where the bench is split equally and the president exercises the deciding vote.[145]

Such voluntary steps or informal expectations could go some way to reducing this particular concern, at least as regards the perception of bias. However, their impact is necessarily limited. For one thing, as just noted, thus far such voluntary withdrawals only related to the presidency and therefore do not alter the make-up of the bench as such. Second, it is entirely possible that most or even all judges might be connected by nationality to a particular international organisation, as several such organisations are global in nature and have hundreds of member states. Formalising the expectation that a judge connected to the initiating international organisation must refrain from exercising the functions of the presidency could result in a situation where no member of the bench would be able to take on the role of president. In short, these voluntary withdrawals may be helpful in some situations but are essentially sticking plasters to a deeper concern related to impartiality. For now at least, the Court has deemed it sufficient to rely on formal guarantees of independence, but there may come a time where this proves inadequate.

144 ICJ, *Allegations of Genocide*, order of 5 June 2023 (n. 142), 24.
145 ICJ Statute, Article 55.

IV. Conclusions

This article has explored the potential benefits and implications of the proxy-state model for the promotion and protection of common interests. It established, first, that international organisations are indeed capable of representing and furthering common interests in certain circumstances. It then identified key benefits the international organisations can bring to the furtherance of common interests through international adjudication.

There are, however, still concerns. Section III. of this article analysed three key issues that have been raised in relation to the proxy-state model. In particular, this section highlights that the proxy state model broadly understood could also facilitate (and could already be facilitating) the influence of other nonstate actors (such as corporations) in international adjudication. It is thus best understood as a tool which could be used to either further or to counter the common interest, depending on the user. This section also highlights the need to bear in mind the implications of such a model for key aspects of adjudication, such as the equality of the parties and procedural fairness. The formalist approach of the Court has so far meant a lack of engagement with these challenges.

Nonetheless, these notes of warning are not so great as to overshadow the benefits that this role of international organisations could offer. Overall, this article has established that the proxy-state model could indeed hold the key to more and better examples of common interest adjudication before the ICJ. It represents a new form of engagement by international organisations with the Court and arguably with international law more generally. The international legal landscape is changing, and common interests are a significant part of that change. Proxy states, it seems, may have an important role to play.

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