The Mask of Dimitrios:
Objective and Subjective Approaches to judicial Enforcement of International Law on Common Interests

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ABSTRACT: This article conceptualises a novel objective-institutional approach to judicial enforcement of multilateral treaty where non-compliance by a State party threatens the underlying common interest. This objective approach drives a re-interpretation of the doctrines of international judicial procedure with the aim that any party can institute proceedings and secure compliance with the objective law. This objective approach drives re-interpretations of the procedural doctrines of jurisdiction, dispute, party and standing, with the aim of enhancing enforceability of the objective law and without regard to any subjective considerations. It rests on institutional interpretation and application of the substantive treaty through advisory opinions, United Nations General Assembly resolutions, and findings of United Nations' Human Rights or other technical bodies. The article argues that, at the same time, the traditional subjective approach to judicial enforcement acquires a new role. This objective-institutional approach can be reconciled with the traditional subjective approach that enforces rights of States, if States use their primary and secondary rights to secure compliance by others with obligations under multilateral treaties. The article develops this complementarity by reference to the International Court of Justice decisions in *The Gambia v Myanmar* and *Ukraine v Russia* under the Genocide Convention. It then applies it to other international law on common interests in the oceans, the environment, and international criminal justice and discusses the relating jurisprudence of specialist courts and tribunals.

KEYWORDS: Multilateral Treaties, Judicial Enforcement of International Law, International Court of Justice, UN Charter, UNCLOS, Genocide Convention, Concepts of International Law

I. Introduction

Much attention has recently been devoted to substantive international law recognising and protecting interests common to all States, separately

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from the interests of individual States.[1] The focus of this article is on the enforcement of such international law on common interests. Enforcement is used here in the sense of controlling and coercing law-compliance if need be. Generally, several mechanisms exist for such enforcement. International organisations and meetings of parties have executive powers to enforce compliance with their founding treaties and any relating decisions, although these remain perfunctory.[2] Judicial proceedings are an alternative mechanism. They serve enforcement purposes along three vectors, in that they clarify (1) what the law is, (2) whether it has been complied with, and (3) the consequences of non-compliance. Judicial enforcement relates to present disputes and prospectively increases future compliance.[3] It supports the international rule of law where treaty integrity is challenged by non-compliance. At the same time, it aids States in their cooperation through international law as the underlying deal is made to stick.

This is an opportune time to revisit the role that international courts and tribunals have in the enforcement of international law on common interests. The 1951 Genocide Convention ('the Convention') is a centrepiece of the international legal order post 1945 and epitomises the idea of a common interest.[4] In *The Gambia v Myanmar* case, the International

[1] See Wolfgang Benedek et al., *The Common Interest in International Law* (2014); but see Christine Buggenhoudt, *Common Interests in International Litigation: A Case Study on Natural Resource Exploitation Disputes* (2017).

[2] See Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70(1) *Modern Law Review* (2007) 1 (deformalisation of State responsibility as non-compliance); further Sandrine Maljean-Dubois, 'Une mécanisme originale: La procedure de "non-compliance" du protocole relatif aux substances appauvrissant la couche d'ozone', in Claude Imperiali (ed.), *L'efffectivité de droit international de l'environnement* (1998) 225; Volker Röben, 'The Enforcement Authority of International Institutions, in Armin von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (2010) 819.

[3] See International Court of Justice (ICJ), *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Declaration of Intervention of the Republic of Lithuania: Intervention Pursuant to Article 63 of the Statute of the International Court of Justice, 19 July 2022, ICJ Reports 2022 (forthcoming) (emphasises that the clarification of contested *erga omnes* obligations enables compliance and ensures their integrity also in the future).

[4] Common interest is used here synonymously with collective interest that features in Article 48 of the Draft Articles of Responsibility of States for Internationally Wrongful Acts (ASR) (2001), International Law Commission (ILC), 'Report of the International

Court of Justice ('ICJ' or 'The Court') has now laid new foundations for enforcing the common interest that all States parties and indeed humanity share in protecting groups and individuals from existential threats. [5] On application by The Gambia, the Court has provisionally ordered Myanmar not to take (and also to prevent) genocidal action against the Rohingya.[6] In the main, bifurcated proceedings, the Court has found that it has jurisdiction to adjudicate the dispute, rejecting preliminary objections of Myanmar including that The Gambia did not have standing to bring the proceedings.[7] The Gambia does not claim that any of its nationals are affected or that it has any other special interest in the case. The Court's reasoning both in ordering the provisional measure and in rejecting the preliminary objections is based on the object and purpose of this treaty: because the Convention protects an interest common to all, all States parties *ipso iure* are entitled to enforce respect for it. The case, which remains pending on the merits, should be seen together with another pending case, relating to the reverse situation of a potential abuse of the Convention.[8] In *Ukraine v Russian Federation*, Ukraine has brought proceedings to stop Russia from

Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)', UN Doc. A/56/10, 2001, at 29 et seq.

[5] Cf. ICJ, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Declaration of Intervention under Article 63 of the United Kingdom of Great Britain and Northern Ireland, 1 August 2022, ICJ Reports 2022 (forthcoming), at para. 11: 'The United Kingdom recognises that intervening in this case enables Contracting Parties to the Genocide Convention to reaffirm their collective commitment to upholding the rights and obligations contained in the Convention, including by supporting the crucial role of the Court and emphasising that international co-operation is required to prevent, adjudicate on and punish acts of genocide'.

[6] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Provisional Measures, Order, 23 January 2020, ICJ Reports 2020, 3.

[7] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Preliminary Objections, Judgment, 22 July 2022, ICJ Reports 2022 (forthcoming).

[8] Deepak Raju, *Ukraine v Russia: A "Reverse Compliance" case on Genocide*, 15 March 2022, available at https://www.ejiltalk.org/ukraine-v-russia-a-reverse-compliance-case-on-genocide/.

alleging that it is violating the Convention.[9] It also seeks to clarify that military intervention is not a lawful implementation means under Article VIII of the Convention. Separately, the Court is being requested by several other States parties to permit intervention in the proceedings.

The Gambia and *Ukraine* cases turn on enhancing judicial enforcement of the Convention through a reinterpretation of judicial procedure, rather than any reform of the substantive or organisational law. The purpose of this article is to analyse this innovation and explore the implications for international law beyond the Genocide Convention. The article proposes a conceptual framework to do this work that distinguishes a novel objective-institutional approach from the traditional subjective approach to judicial enforcement. It uses the term 'approach' in the sense of a rationale that directs, justifies, or limits legal innovation.

The rationale of the objective approach is to protect the objective law of multilateral treaty, where it is challenged. This rationale directs the dynamic re-interpretation of judicial procedure to secure access to international courts and effective decision-making, regardless of any subjective considerations. It also justifies use of the advisory jurisdiction of international courts and other institutional means to determine that objective treaty law.

By contrast, the rationale of the subjective approach is to protect rights of States, reflecting the traditional position in international law. It undergirds many procedural doctrines, including consensual jurisdiction, standing and the *Monetary Gold* principle. However, the subjective approach also comprises the rights that States hold under multilateral treaties against other parties. Such rights become powers of States to compel other parties to comply with treaty rules, enabling them to enforce the underlying common interests.

The objective and the subjective approaches then appear complementary rather than mutually exclusive, with both serving effective judicial

[9] ICJ, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Institution of Proceedings, Application Instituting Proceedings, 26 February 2022, ICJ Reports 2022 (forthcoming).

enforcement of multilateral treaty. The article applies this complementarity to common interests beyond the Genocide Convention in the fields of the law of the sea, the United Nations ('UN') Charter, and international criminal law. This will bring into focus a range of recent decisions of international courts and tribunals with specialist subject-matter jurisdiction that align themselves with the direction of the ICJ's jurisprudence.

The final part considers the role of States in this judicial enforcement and their possible motivation in bringing proceedings. It associates the objective approach with a motivation to stabilise international norms and the subjective with a realist interest in the exercise of rights albeit for a shared benefit.

II. The Objective Approach to Judicial Enforcement and Procedure

The rationale of the objective-institutional approach to judicial enforcement is to protect the integrity of the objective law of multilateral treaty. That integrity can be protected by any State for the collectivity of parties regardless of subjective factors, such as its own motivation or whether the interests of other States are specifically affected by the concrete situation on the ground. This rationale of rendering the objective law effective against non-compliance drives a re-interpretation of the procedural conditions of judicial enforcement.

In *The Gambia*, the objective approach to enforcement of international law through international courts and tribunals undergirds both the order on provisional measures and the judgment on preliminary objections. Both decisions proceed on the premise that the object and purpose of the Convention encompasses effective judicial enforcement. This linking of substance and procedure is already clear from the order on provisional measures, where the Court states that '[i]n view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity'.[10] The Convention is construed to generate

[10] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Provisional Measures, Order, *supra* note 6, at para 41.

erga omnes partes obligations for each party towards all others,[11] which corresponds to the interest of every party to secure compliance with those obligations in any instance.

The objective approach generates re-interpretations of the procedural doctrines of jurisdiction, dispute, party and standing, with the aim of enhancing enforceability. The first innovation relates to the jurisdictional basis. Of course, the requirement of consented jurisdiction by both parties remains intact. Yet, once jurisdiction is established, then it is isolated from considerations of reservations made by, or factual interests of, third parties. Reservations to jurisdictional clauses are an expression of States' ability to safeguard their subjective interests. It also irrelevant that another State is more affected by the situation. Neither can remove jurisdiction from the Court that is called upon to uphold treaty integrity. In *The Gambia*, the ICJ simply ascertained that both The Gambia and Myanmar were parties to the Convention and bound by the compromissory clause of Article XI. The reservation that another State – Bangladesh – had made on Article XI was irrelevant. It also did not matter that Bangladesh and not The Gambia was affected by Myanmar's actions because most of the Rohingya refugees were on its territory.

A second innovation relates to the requirement of a dispute. Again, the traditional definition of positively opposed views of the parties about law or fact remains intact. But under an objective approach, silence of the respondent does not negate the existence of a dispute. If there had been institutional engagement with the subject-matter, then this places a burden on that State to respond. In *The Gambia*, the Court found that a response by Myanmar to The Gambia's *note verbale* was called for because it had knowledge of the facts through the UN fact finding missions and The Gambia's statements before the General Assembly.

The third innovation relates to what constitutes a party to the dispute. Under an objective approach, the party that may bring proceedings is any State party to the ICJ Statute. The term should not be interpreted formally not materially and the motivation of the State as to why it is bringing the

[11] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Merits, Judgment, 3 February 2015, ICJ Reports 2015, 3.

proceedings should not matter. In the judgment on preliminary objections in *The Gambia*, the Court provides a formal interpretation, rejecting the attempt by the respondent State to identify the 'real party' that would not be applicant.

A fourth, related innovation concerns standing. Under the objective approach, the legal interest in the maintenance of the treaty's integrity matters.[12] A State should not have to demonstrate any specific interest that relates to its subjective position. In *The Gambia*, the applicant is not injured in the sense of being affected in its sovereign rights in any way by the action of Myanmar. The Rohingya are not its nationals nor are there any refugees on its territory. The Court nevertheless concludes that The Gambia has standing to institute proceedings to enforce the Convention, rejecting Myanmar's preliminary objection. The Court justifies this result indirectly by demonstrating why nationality of claim is not required. Such protection only by a State for its own nationals would go counter to the purpose of the Convention that protects individuals also against their own State. For if that State were to commit genocide against its own population, then the Convention would remain unenforceable.

Fifthly, the objective approach drives a limitation of the *Monetary Gold* principle. Rights of third parties should not preclude the courts' jurisdiction. Sixthly, intervention by third States in a pending dispute reflects the collective interest and should be facilitated. This is evident in *Ukraine v Russia*. In bringing these reverse proceedings, Ukraine is enforcing its right under the Convention not to be falsely accused of breaching it. It in this sense is the injured party. It at the same time is enforcing the objective integrity of the Convention. That objective integrity interest alone then underpins the intervention of several other States in the case. None of these third States is affected in its own interests. Finally, courts and tribunals should understand their competence widely once jurisdiction is established, also comprising other, relevant objective international law.

[12] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Preliminary Objections, Judgment, *supra* note 7, Declaration of Judge *ad hoc* Kress of 22 July 2022 ('*intérêt juridique*').

The objective approach to judicial enforcement is based on institutional determinations of the substantive treaty law. They are institutional in that they create legal facts independently of State consent. This institutional process comprises the ICJ in its advisory capacity, the UN General Assembly (GA), and States acting in their capacity as members of an international organisation.

Such institutional determinations are critical in *The Gambia* case. It is a sequence of institutional determinations that are non-binding but consolidatory of each other, which culminate in the binding order on provisional measures and then the judgment on preliminary objections. The advisory jurisdiction of the Court is not consent-based and triggered by the application of an international organisation. The 1951 ICJ Advisory Opinion shapes the conceptualisation of the humanity-oriented common interest under the Convention. It lays down the general interpretation that the respect of the Convention must be ensured, which is the basis of objective enforceability in *The Gambia* under the Court's contentious jurisdiction, devoid of any doctrines of State sovereignty and reciprocity.

The objective-institutional approach also involves the General Assembly. The GA through resolution 74/246 of 27 December 2019 effectively applied the Genocide Convention to the situation of the Rohingya, finding that they are extremely vulnerable as a group. The GA stated 'its grave concern that, although Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process'.[13] The GA then concluded

> its deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces, including extrajudicial, summary or arbitrary killings, systematic rape and other forms of sexual and gender-based violence, arbitrary detention, enforced disappearance and government seizure of Rohingya lands from which Rohingya Muslims were evicted and their homes destroyed.[14]

[13] United Nations General Assembly (UNGA) Res. 74/246, 27 December 2019, at para. 14.

[14] *Ibid*., at para. 16.

In addition, the detailed fact-finding of the Human Rights Council leads it to 'conclude on reasonable grounds that the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention'.[15] It also infers genocidal intent from the facts. These UN findings are determinative for in both ICJ decisions in *The Gambia*. They first suffice to meet the standards of the provisional measures' procedure. As the separate opinion of Judge Xue to the order makes clear, based on those institutional determinations alone provisional measures had to be indicated. They demonstrate the plausibility of the right to be protected and the urgency. The Gambia did not have to prove the specific genocidal intent, which requires that the only possible inference to be drawn from the evidence is that the destruction of the group was intended.[16] The UN institutional engagement with the situation also then also establishes a dispute between The Gambia and Myanmar, shifting the burden on to Myanmar to justify herself on the merits, confirming the Court's jurisdiction over that State's preliminary objection. The final institutional determination is that the case is being instituted by a State representing an international organisation. The Gambia currently has the presidency of the Organisation of Islamic Cooperation, which is the second largest inter-governmental organisation after the United Nations with a membership of 57 States. It represents the interests of Muslims all over the world. In bringing the case, the Gambia has made the institutional determination that the situation affects the collective interests that this organisation represents.

III. The Subjective Approach

Despite the obvious justification from an international rule of law perspective, the objective approach undoubtedly is a novelty and departs from established practice in that it concludes from the objective law to its

[15] United Nations Human Rights Council, 'Detailed Findings of the Independent International Fact- Finding Mission on Myanmar', UN Doc. A/ HRC/42/CRP.5, 16 September 2019, at para. 242; see also paras. 58, 240 and 667.

[16] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 16 February 2007, ICJ Reports 2007, 43.

enforceability. Indeed, as Judge Xue points out in her dissent to the judgment on preliminary objections, the Court has in the past been careful to draw that line and not to infer from the former to the latter.[17]

In contrast with the objective approach stands a subjective approach to judicial enforcement of international law. This subjective approach reflects the *status quo* in international law. It takes protecting the rights and legal interests of States as its main rationale. This certainly supports rights of States deriving from bilateral or contract-making treaties and from customary international law. More recently, the subjective approach has also supported the rights that States and individuals have under multilateral treaty, including international human rights.[18] This subjective approach underpins much of international judicial procedure. Standing, for instance, traditionally requires that the applicant alleges own rights or interests.[19] It may not invoke rights of other States. Under the so-called *Monetary Gold* principle, rights of a third State that the decision would necessarily bar the exercise of jurisdiction. These requirements work as constraints on judicial enforceability of multilateral treaties.

However, the gap between the objective approach and the traditional subjective approach can be bridged so that both become complementary. The bridge is that objective multilateral law confers obligations and rights on parties. Obligations and rights are in correspondence. To the obligation on a party corresponds the right of another party that this obligation be complied with. In this construction, States have not just an interest but a

[17] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), Preliminary Objections, Judgment, *supra* note 7, Dissenting Opinion of Judge Xue of 22 July 2022, at para 38, referring to ICJ, *Case concerning East Timor* (*Portugal v. Australia*), Merits, Judgment, 30 June 1995, ICJ Reports 1995, 90, at para. 29; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007, ICJ Reports 2007, 43, at para. 147; and ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), Merits, Judgment, 3 February 2012, ICJ Reports 2012, 99, at para. 93 (*ius cogens* norm does not by itself confer jurisdiction for the Court).

[18] ICJ, *Case concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, Judgment, 30 November 2010, ICJ Reports 2010, 639.

[19] ICJ, *Reparation for Injuries Suffered in The Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports 1949, 174, at 181: '[...] that (only) the parties to whom the international obligation is due can bring a claim in respect of its breach'.

right to see the treaty complied with. The content of that right is specific and of limited scope. It is a right to enforce the responsibility of other States to meet their obligations. The right of that other party becomes a power for it to force the other party to adopt a course of action as prescribed by the obligation.

The same structural relation between obligation and rights operates on the secondary tier of the international legal order, which is governed by the customary international law of State responsibility. If a State breaches its primary obligations under a multilateral treaty that will give rise to new, secondary obligations. To these correspond secondary rights of an injured State[20] or of the non-injured States.[21] Both primary and secondary rights will ground the standing of States under the subjective approach.

The position of the Court on multilateral treaties that protect a common interest follows this model. The Court has held that the Genocide and Torture Convention provisions generated 'obligations [which] 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'.[22] It follows, in the view of the Court, that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end. *The Gambia* then demonstrates both types of rights of States. There, The Gambia enforces primary rights it holds as a State party to the Convention. This is the primary right to see the primary *erga omnes* obligation incumbent on another party – Myanmar - being complied with in any instance.

[20] Article 42 ASR: 'A State is entitled as an injured state to invoke the responsibility of another State if the obligation is owed to […] (b) a group of States including that State […] and the breach of the obligation specifically affects that State […]', see ILC, *supra* note 4, at 29.

[21] Article 48 ASR: '*Any State other than an injured State* is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of collective interest of the group; or (b) the obligation breached is owed to the international community as a whole' (emphasis added). The wording of the article seems to require the cumulative condition of a collective interest of the group, but this is implicit in Article 42, see ILC, *supra* note 4, 118-119, at para. 11 in fine.

[22] ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), Merits, Judgment, 20 July 2012, ICJ Reports 2012, 422, at para. 68.

This is apparent in the provisional measures stage. This procedure requires that rights of the applicant need urgent protection, not just the treaty's integrity. The Court recognised just that. The rights of the Gambia that the order protects are solely primary rights derived from the Convention. Outside of that treaty, The Gambia does not hold any other rights that would be relevant under the circumstances. *The Gambia* case also demonstrates that a multilateral treaty can generate secondary rights of non-injured States. The Gambia acts as a non-injured State within the meaning of Article 48 of the Draft Articles on State Responsibility, when it requests cessation of the violation of the Convention. In *Ukraine*, the applicant acts as the injured State within the meaning of Article 42 of these articles, because it is specially affected by the breach of the Convention that lies in the genocide it is alleged to have committed.[23] By contrast, the State of nationality of any member of the Rohingya group at risk of genocide would exercise its customary right to diplomatic protection before the Court. This would be a classic manifestation of the subjective approach, and the Court is clear that this remains an alternative option to enforce the treaty.

Where the subjective approach refers to the rights of individuals or groups, there it acquires a rationale of judicial protection. Indeed, non-State actors may also hold primary and secondary rights. In *The Gambia*, provisional measures, the Court accepts that the Convention creates rights of non-State groups, there of the Rohingya, that may need to be protected through provisional measures. The Gambia is seeking compliance with its rights under the Convention. But there is also a right of the Rohingya not be subjected to genocide, which The Gambia is protecting because it has capacity to act before the ICJ. The parallels with the *Diallo* and *LaGrand* line of cases are clear, although at issue there were a human right and a functional individual right respectively rather than a group right. Akin to the objective approach, judicial protection is an expansive principle that overcomes extant procedural barriers. In a first consequence, the subjective approach then overcomes obstacles as to the plausible rights.

[23] ILC, *supra* note 4, 119, at para. 12 in fine, defines that a State is to be considered injured, if it is affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

The right of the group requires and receives protection in this instance, regardless of any prove of genocidal intent.

IV. Applying the Complementarity of the Objective and the Subjective Approaches to Judicial Enforcement Beyond the Convention

In the previous section, this article has demonstrated that the objective and the traditional subjective approaches to international judicial enforcement complement each other. This complementarity relates to three structural elements, the common interest underlying multilateral treaty that ought to be protected, *erga omnes* obligations on each State, and primary and secondary rights of other States. This structure is not limited to the Genocide or Anti-Torture Conventions, which have served as focal points of ICJ jurisprudence. It underlies potentially all multilateral treaties enshrining common interests in all areas. The structure of obligations *erga omnes* obligations and corresponding enforcement rights for all parties also is not just a feature of human rights but of all treaties where parties share the same common interest in the rules and in compliance with the rules by all others. They are a means of making the treaty rules effective by concretising the required courses of action of addressees in specific instances.[24] It therefore applies to a category of international law based on the interests it protects. Into that category fall multilateral treaties protecting a common interest, which are enforceable by all States parties through the objective approach or the subjective approach. Into a second category fall other international rules that protect the interests of individual States, which are enforceable by that State alone. Multilateral treaties enshrine several types of common interests. The paradigmatic common interest underlies the Genocide Convention, that is protection of the existence of certain groups against existential threats from any State, including the State of nationality. This common interest has a positive and a negative substantive element.[25] Positive is that the interest has the quality of a value, it is not instrumental. This value must be shared by all States,

[24] See Neil MacCormick, *Institutions of International Law* (2008).

[25] Rüdiger Wolfrum, 'Identifying Community Interests in International Law: Common Spaces and Beyond', in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests*

not just bilaterally or by a group of States. Negatively, it must be beyond the power of any single State to safeguard and should therefore be judicially enforceable by all. The positive and negative elements provide a general test for the common interest or interests that a treaty enshrines. In what follows, this will be demonstrated with reference to the UN Convention on the Law of Sea (UNCLOS), the Rome Statute of the International Criminal Court, and the UN Charter.

Under UNCLOS, governance of areas beyond national jurisdiction is a common interest, generating *erga omnes* obligations. That is certainly the case for the marine environment of the Area and the High Seas. The Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) states the following:

> Each State Party [to UNCLOS] may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area.[26]

Through these rights held by every State the obligation not to pollute the High Seas on all States, which is the common interest, becomes unenforceable. But the same logic applies to pollution by the coastal State of the marine environment of its Exclusive Economic Zone (EEZ). Again, only if other State parties can invoke the coastal State's responsibility will the obligation be enforceable.

Yet the logic of common interests under UNCLOS extends beyond the marine environment. It also comprises the status of UNCLOS as an objective legal regime providing legal certainty as to competences and boundaries for areas under national jurisdiction. An example is the status of certain lands in the oceans as islands, rocks, or low-tide elevations. If UNCLOS is an objective legal regime, then any State party has an interest in clarify-

(2018) 19, at 34 (substantive-factual and procedural conditions); 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.), *id*. 36, at 36-37; Wolfgang Benedek et al, *supra* note 1, at 1.

[26] International Tribunal for the Law of the Sea (ITLOS), *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (*Request for Advisory Opinion submitted to the Seabed Disputes Chamber*), Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, at para. 180.

ing that status. Any State party can bring that case, representing the common interest in legal certainty. Of course, the coastal State may have a special interest, for instance because the land lies in its EEZ. But this is not necessary because all parties are affected by the legal uncertainty created by unclear status and relating maritime boundaries. Taking this to its logical end, even the obligation on the concerned States to delimit maritime boundaries could be enforced in this way as the objective territorial rules are in the common interest of legal certainty.[27]

International courts and tribunals with jurisdiction under Part XV of UNCLOS have started to implement this position and taken an objective approach to enforcing the common interests enshrined in UNCLOS. The recent decision of the ITLOS Special Chamber in *Mauritius v Maldives* was concerned with the rules and rights that parties hold on maritime delimitation under UNCLOS, but also with the principle of self-determination under the UN Charter.[28] The approach of *Mauritius* is objective as to jurisdiction and definition of the dispute by reference the objective UNCLOS rules only, excluding consideration of the 'real dispute'. At the same time, the ITLOS Special Chamber marks the boundaries of its objective approach. A dispute which requires the determination of a question of territorial sovereignty would not be regarded as a dispute concerning the interpretation or application of the Law of the Sea Convention under Article 288(1).[29]

Mauritius is in stark contrast with the earlier approach that the Annex VII arbitral tribunal took in the *Chagos* case.[30] There, the majority accepted the subjective claim of the respondent that the dispute really con-

[27] International law recognises regimes for land and water, see ICJ, *Dispute regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), Merits, Judgment, 13 July 2009, ICJ Reports 2009, 213.

[28] ITLOS, Special Chamber, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), Preliminary Objections, Judgment, 28 January 2021 (hereinafter *Mauritius*).

[29] *Ibid*., at paras. 110-111.

[30] Permanent Court of Arbitration (PCA), *Chagos Marine Protected Area Arbitration* (*Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland*), Award, 18 March 2015, PCA Case No. 2011-03.

cerned sovereignty over Chagos, rather than the interpretation and application of UNCLOS rules.[31] Judges Wolfrum and Kategа reject this materialisation of the dispute and advance that the dispute be defined by the claim of the applicant that relates to the UNCLOS rules on the establishment of marine protected areas.[32]

Mauritius is also objective in regard to the sovereign rights of third States that the *Monetary Gold* principle protects procedurally. In the *Monetary Gold* case,[33] the ICJ stated that it cannot exercise its jurisdiction over a question when a third State's legal interests would 'form the very subject-matter of the decision'.[34] But, according to the Special Chamber, the United Kingdom was not deemed an indispensable State Party within the *Monetary Gold* principle. In *Mauritius*, delivered in in January 2021, the Special Chamber relied in its determination of the status of the Chagos Archipelago on the preceding *Chagos Archipelago Advisory Opinion* ('*CAO*')[35] and GA Resolution 73/295. The Special Chamber opined that the status of the Chagos Archipelago has been 'clarified' by the *CAO* and Resolution 73/295, and there was no longer a sovereignty dispute between Mauritius and the United Kingdom, contrary to what the Arbitral Tribunal in *Chagos* had maintained.[36] Currently, the UK's claim to territory could be characterised as a 'mere assertion',[37] while its continued administration was a breach of international law.[38] The Special Chamber, referring to the *CAO*, emphasised that the detachment of the Chagos Archipelago by the UK from Mauritius in 1965 (3 years before it declared independence) violated

[31] *Ibid*., at para. 457.

[32] *Ibid*., Dissenting Opinion and Concurring Opinion of Judges Kateka and Wolfrum, at paras. 17 and 20.

[33] ICJ, *Case of the Monetary Gold Removed from Rome in 1943* (*Preliminary Question*) (*Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America*), Preliminary Objections, Judgment, 15 June 1954, ICJ Reports 1954, 19.

[34] Zachary Mollengarden and Noam Zamir, 'The Monetary Gold Principle: Back to Basics', 115(1) *American Journal of International Law* (*AJIL*) (2021) 41.

[35] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports 2019, 95 (hereinafter *CAO*).

[36] ITLOS, *Mauritius*, *supra* note 28.

[37] *Ibid*., at para. 243.

[38] *Ibid*., at para. 245.

Mauritius' territorial integrity, the decolonization process, and that people's right to self-determination.[39] Hence it is Mauritius that possesses the rights to the EEZ around Chagos and to its delimitation from the opposite EEZ of the Maldives.[40]

The ITLOS Special Chamber bases these findings exclusively on institutional determinations. It refers to the prior GA resolutions with their bindingness as confirmed by the *CAO*, and then declaratorily States that their effect as to sovereignty is immediate. It makes no independent or *de novo* findings as to the status of Chagos. The Special Chamber thus treats this issue as having been determined by the GA and the ICJ under the principle of self-determination. It thereby strengthens the legal value of the GA resolutions and the ICJ advisory opinion. However, the Special Chamber ruling has a constitutive legal effect within UNCLOS. That effect concerns the right, as the coastal State, to consent to judicial delimitation of the maritime boundaries around Chagos. The Chamber *ipso iure* allocates that right to the former. Hence, it is Mauritius not the UK that is empowered to consent.

These legal consequences arise under UNCLOS but are grounded in standards and legal facts created outside of the Convention. The principle of self-determination in enshrined in the UN Charter, constituting international law on a common interest. In *CAO*, the ICJ underlined that the principle of self-determination creates an obligation *erga omnes* and all States have to cooperate with each other and comply with the General Assembly's proposals to complete the decolonisation of Mauritius, which includes the resettlement of previously expelled Chagossians.[41] The Court provided a rationale for the power of the General Assembly under the UN Charter to develop rules to concretise and operationalise the principle of self-determination.[42] The Charter had enshrined that expectation, and the General Assembly had acted upon it in its constant practice, specifying first in general terms that former colonies should gain their independence in territorial integrity and then applying this general rule in the case of

[39] *Ibid*., at paras. 172-174.
[40] *Ibid*., at para. 246.
[41] ICJ, *CAO*, *supra* note 35, at paras. 180-181.
[42] *Ibid*., at paras. 163-174.

Chagos. The GA further concretised the law with Resolution 73/295 in May 2019,[43] affirming that all States have an obligation to respect the Chagossians' right to self-determination,[44] demanding that 'the United Kingdom […] withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months',[45] and urging 'the United Kingdom […] to cooperate with Mauritius in facilitating the resettlement of Mauritian nationals''.[46] The Court then concluded that the UK was obligated to bring an end to its administration of the Chagos Archipelago, being a wrongful act entailing the international responsibility of the UK.[47] That obligation is partially enforced by Mauritius through the *Mauritius* litigation.

This distinctive integrating of institutional determinations into the objective approach to judicial enforcement becomes clearer if juxtaposed against Sarah Thin's critical, and more conventional assessment, of the ITLOS Special Chamber judgment.[48] Thin posits that the judgment did not change the perspective on the territorial sovereignty issues. As she argues, the Special Chamber, by resorting to the legal effect of the ICJ's Advisory Opinion, could not simply extinguish the dispute between the UK and Mauritius. For Thin, the institutional statements of law including non-binding advisory opinions do not necessarily have legal effects able to alter the rights or obligations of international legal subjects, especially if the parties to the dispute are different. Moreover, as she correctly observes, the Special Chamber did not unambiguously state that the Chagos Archi-

[43] UNGA Res. 73/295, 24 May 2019.
[44] *Ibid*., at para. 2.
[45] *Ibid*., at para. 3.
[46] *Ibid*., at para. 4.
[47] ICJ, *CAO*, *supra* note 35, at paras. 177-178. See Stephen Allen, *The Chagos Islanders and International Law* (2014); Marko Milanovic, *ICJ Delivers Chagos Advisory Opinion, UK Loses Badly*, 25 February 2019, available at https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/.
[48] Sarah Thin, *The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute*, 5 February 2021, available at https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/.

pelago fell within Mauritius' territory, but only noted that the ICJ's conclusions 'have implications for the legal status of' the Archipelago. It then attaches specific consequences to these implications under UNCLOS.

The already mentioned Annex VII Arbitral Tribunal's award in the *Crimea* case[49] involved the claim of Ukraine against Russia that it was the coastal State that had rights to the resources off Crimea under UNCLOS. The Tribunal there held that it did not have jurisdiction over most of these claims because they required it to rule on the preliminary question who held sovereignty over Crimea, a question it had no jurisdiction over. The *Crimea* tribunal thus appears to be taking the opposite view from the *Mauritius* tribunal. But on closer inspection this is not the case. It rather accepts the dispute is shaped by the claimant State. Here, Ukraine had deliberately shaped this as a matter of its rights, rather than the objective law of the Convention. The Arbitral Tribunal was even willing to consider the question whether Ukraine was the coastal State for this purpose. It referred in this context to the relevant GA resolution 68/262.[50] This resolution, so the Court found, did not make an unambiguous determination of the legal situation of Crimea. Whether or not this is a convincing interpretation of that resolution by the Arbitral Tribunal may remain open. It confirms, however, the essential role of the ICJ. The Court ICJ through advisory opinions formalises the GA determination within structures and doctrines of international law and confirms the authority of that determination within the international legal order, creating an institutional legal fact. Without that legal formalisation, which was missing here, it is difficult for specialist courts to infer any consolidatory determinations. The *Crimea* case thus does not refute that courts and tribunal refer to institutional determinations. It rather demonstrates that the ICJ advisory jurisdiction is an indispensable element of such reference.

The Rome Statute of the International Criminal Court is a further multilateral treaty embodying a common interest where judicial enforcement has recently been tested. The Statute's integrity is being secured against

[49] PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine v. The Russian Federation*), Preliminary Objections, Award, 21 February 2020, PCA Case No. 2017-06.

[50] UNGA Res. 68/262, 27 March 2014.

the risk of non-application through the objective approach. In *Palestine*, the International Criminal Court's (ICC) Pre-Trial Chamber I ruled on jurisdiction of the ICC over the situation in Palestine. On 5 February 2021, Pre-Trial Chamber I determined that Palestine was a State for the purpose of the Rome Statute.[51] It interpreted the controlling Article 12(2)(a) of the Statute in the light of the object and purpose of the Statute.[52] According to the Chamber '[t]he territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty'.[53] Alike *Mauritius*, the Pre-Trial Chamber in *Palestine* rejected a materialisation of the dispute. The ICC was not competent to determine matters of Statehood but, it was neither adjudicating a border dispute under international law nor prejudging the question of any future borders.[54] That was not required for the purposes of the present proceedings or the general exercise of the court's mandate.[55]

The Pre-Trial Chamber in *Palestine* supports this finding by referring to institutional determinations on the position of Palestine in a process involving the GA and the ICJ in its advisory jurisdiction, in a parallel manner with the ITLOS Special Chamber in *Mauritius*. The Pre-Trial Chamber relied on GA Resolution 67/19 concluding that the subsequent UN determinations could clarify the entity's legal status – Palestine has in effect become a State, yet only in relation to accession to treaties.[56] GA Resolution 67/19, apart from upgrading Palestine's status to non-member observer State, reaffirmed former resolutions, stressing 'the need for the withdrawal of Israel from the Palestinian territory occupied since 1967, including East Jerusalem, the realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to

[51] International Criminal Court (ICC), Pre-Trial Chamber I, *Situation in the State of Palestine*, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 5 February 2021, ICC-01/18-143 (hereinafter *Palestine*).

[52] '[t]he State on the territory of which the conduct in question occurred', see Article 12(2)(a) of the Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.

[53] ICC, *Palestine*, *supra* note 51, para. 62.

[54] *Ibid*., at para. 113.

[55] *Ibid*., at para. 108.

[56] *Ibid*., at para. 98.

their independent State, and a just resolution of the problem of the Palestine refugees'.[57] Further, the Pre-Trial Chamber, also referring to GA Resolution 67/19, noted that the territories of Palestine since 1967 have been under Israeli occupation and that the Palestinian people have the right to self-determination and independence in their State of Palestine. On that basis, it concluded that the Court's territorial jurisdiction extends to Gaza and the West Bank, including East Jerusalem.[58]

GA Resolution 67/19 in turn builds on the 2004 *Wall Advisory Opinion*[59] in which the ICJ confirmed that since 1967 Israel has illegally occupied Palestinian territories,[60] and recalled UNSC Resolution 242 providing that no territories could be acquired by force and that Israel should withdraw from the occupied territories.[61] The Court declared that the Palestinians have the inalienable right to self-determination and that Israel by ignoring this right is in breach of the *erga omnes* obligation. It was also in breach of the Fourth Geneva Convention.[62]

The Pre-Trial Chamber in *Palestine* also ruled that the *Monetary Gold* principle did not require Israeli presence in the case (the ICC is not an inter-State court and Israel was indeed invited but declined to participate). The Pre-Trial Chamber, like the ITLOS Special Chamber in *Mauritius*, ruled with constitutive effect on the treaty-based right to permit the exercise of ICC jurisdiction over a certain territory. Admittedly, the ICC Pre-Trial Chamber's decision was supported by a smaller majority than the essentially unanimous ITLOS judgment, where only Judge *ad hoc* Oxman dissented and on an unrelated ground. It was a 2-1 decision with presiding

[57] UNGA Res. 67/19, 4 December 2012.

[58] ICC, *Palestine*, *supra* note 51, at paras. 116-123.

[59] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, 136 (hereinafter *WAO*).

[60] *Ibid*., at paras. 73, 78, and 120: 'The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law'.

[61] United Nations Security Council Res. 2334, 23 December 2016 (stating the Security Council: '[r]eaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law', at para. 1). See Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', 84(1) *AJIL* (1990) 44, at 83-86.

[62] ICJ, *WAO*, *supra* note 59, at paras. 155 and 159.

Judge Kovács partly dissenting. Judge Kovács argued that the Oslo Accords, where Palestine transferred jurisdiction to Israel in respect of offenses by Israeli, may constitute an obstacle to the ICC's jurisdiction. The dissent sits alongside *amicus curiae* submissions against the ICC jurisdiction.

In line with the objective approach, the ITLOS Special Chamber in *Mauritius* and the ICC Pre-Trial Chamber in *Palestine* broaden their competence to encompass legal standards that lie beyond the treaty conferring jurisdiction. Self-determination and Statehood are part of UN Charter and general international law, not of UNCLOS or the Rome Statute. They are in that sense external standards to these treaties. The rationale of the objective approach to judicial enforcement of these treaties requires that courts and tribunal extend their competence to such external standards if that is necessary to render the objective treaty law effective. In both *Mauritius* and *Palestine* that was the case. The ITLOS Special Chamber needed to so do to overcome the *Monetary Gold* preliminary objection of a third party right precluding its jurisdiction. The Pre-Trial Chamber for its part needed to do so to overcome the essentially similar territoriality objection to the ICC jurisdiction.

This competence extension to external standards has a further effect that is consistent with the objective approach to judicial enforcement. This effect concerns those multilateral treaties that enshrine common interests but are not underpinned by compulsory dispute settlement. The UN Charter falls into this category. The UN Charter's self-determination principle evidences a common interest of all parties. However, for lack of a jurisdictional clause, it remains potentially unenforceable when violated. Yet, specialist courts use their competence to spell out the consequences under their constitutive treaties of the institutional determinations by UN organs on the right and principle of self-determination enshrined in the Charter. The specialist courts thereby indirectly enforce the UN Charter over which neither has direct jurisdiction, and this indirect enforcement overcomes the lack of a jurisdictional base for UN Charter law.

V. Judicial Enforcement and the Role of States

Both the objective and the subjective approaches to judicial enforcement build on a model of decentralised enforcement of international law. They ensure that States have access to international justice and that courts and tribunals are effective decision-makers, rather than. an any central body. The novel objective-institutional approach complemented by a reoriented subjective approach increases the powers that States have to enforce multilateral treaties on common interests, the backbone of modern international law. These create a role for States that addresses if not solves the paradox that international law increasingly protects common interests of humankind but continues to restrict access to international courts and tribunals largely to States. This, in turn, rests on assumptions about the possible motives for States to do so.

The objective approach to judicial enforcement empowers all States parties to institute proceedings. Why would States exercise this power, incurring the cost and risk of litigation, without any direct interest of a State in the litigation? The unarticulated assumption of the objective approach is that a sovereign State may well be motivated to act altruistically to support the international rule of law and a humanitarian objective, reaffirming norms of the international system. The objective approach then is based on a constructivist account of international law and within it, it defines a new role for States as public interest litigants. It seeks in this way to harness their access to international courts and tribunal, which remains exclusive with only few exceptions in the fields of human rights and investor-State disputes.

The subjective approach, by contrast, is closer to a realist understanding of States motivated to protect their rights. If one follows the view of the club of sovereign States, the analogy would be the *actio pro socio* where one party conducts proceedings against another in the common interest of all with concrete benefits.[63]

[63] Where a shareholder files claims for the company against a co-shareholder in their own name but in favour of the company. See Holger Fleischer and Lars Harzmeier, 'Die actio pro socio im Personengesellschaftsrecht – Traditionslinien, Entwicklungsverläufe, Zukunftsperspektiven – (The actio pro socio in Partnership Law)' Research Paper Series

On the evidence of the cases discussed in this article, States recognise this new role that international law assigns them with and avail themselves of the new powers that they have.

VI. Conclusions

The article has conceptualised an objective-institutional approach to the judicial enforcement of multilateral treaty enshrining common interests. The rationale of that approach is to render the objective treaty effective against non-compliance. It drives a re-interpretation of the procedural conditions of judicial enforcement. The re-interpretation cuts across jurisdiction, the status of party, existence of a dispute, standing, provisional measures, and intervention. The objective approach is reinforced by and integrates institutional law-determinations that do not depend on State consent. These involve the interpretation and application of the objective treaty law through advisory opinions of courts and tribunals, but also General Assembly resolutions, and the findings of UN Human rights or other technical bodies. All institutional determinations create legal facts that courts and tribunal refer to in under their contentious jurisdictions resulting in binding decisions.

This definition of an objective approach highlights that the traditional subjective approach had only occupied one side of the concept of judicial enforcement, leaving the other open. But that subjective approach also evolves, and it acquires a new role in the enforcement of multilateral treaty on common interests. States parties may use primary rights to secure compliance by others with their primary *erga omnes* obligations. They may also use secondary rights under the customary law of State responsibility against another party to cease violations and to provide restitution. Under the subjective approach, a State can use both its primary and secondary rights to enforce compliance by any other party. They are powers of the complaining party in the sense that they enable it to compel a certain course of action by the non-compliant party. Seen in this light,

No. 17/14, Max Planck Institute for Comparative and International Law, June 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043653.

the subjective approach provides familiar doctrinal structures that provide legal certainty.

Both the objective and the subjective approaches support effective enforcement of international law on common interests. They become complementary in this function. It comes down to States' choices in framing the dispute whether it will come under either approach. This complementarity is evident in *The Gambia* and the *Ukraine* cases of the ICJ under the Genocide Convention, but it is general and applicable to all multilateral treaties that protect common interests. The article has demonstrated this by reference to UNCLOS, the UN Charter and the ICC Statute.

The novel objective-institutional approach complemented by a reoriented subjective approach increases the powers that States have to enforce multilateral treaties on common interests, the backbone of modern international law. These create a role for States that addresses if not solves the paradox that international law increasingly protects common interests of humankind but continues to restrict access to international courts and tribunals largely to States. On the evidence of the cases discussed in this article, States recognise this new role that international law assigns them with and avail themselves of the new powers that they have.