

ON OBLIGATIONS ERGA OMNES PARTES

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ABSTRACT

This Article addresses the development of obligations erga omnes partes and their legal status, and clarifies the extent to which the notion has had an impact on the enforcement of multilateral treaties and, in particular, human rights conventions by examining international and regional case law, soft law instruments, and state practice. It argues that the endorsement of the concept by the International Court of Justice (ICJ) has the potential to dramatically expand its application to breaches of all kinds of multilateral treaties where such breaches amount to violations of obligations pertaining to a treaty's object and purpose. In this sense, a violation of an obligation erga omnes partes is conceptually identical to a "material breach" envisaged under Article 60(2) of the Vienna Convention on the Law of Treaties, but the development of the relevant rules gives the claimant state an additional procedural remedy to institute proceedings against the violating state to end the breach.

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I. INTRODUCTION

For many years, it was unclear whether a state might have standing before the International Court of Justice (ICJ) to initiate proceedings against another for alleged human rights violations. Unless a country was somehow directly affected by the breach (for example, if the violation was committed against its nationals abroad, upon which diplomatic

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protection might be invoked,¹ or if the violation, though perpetuated by another state, occurred within its territory),² it was not certain whether a state had a legal interest (as opposed to a moral interest) in seeing human rights norms enforced.³ The perception that no state may bring a case to the ICJ on behalf of foreign individuals or groups was reinforced by the ICJ's observations in the *South West Africa (Second Phase)* case that "an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest . . . is not known to international law as it stands at present."⁴ Therefore, when the ICJ pronounced in its dictum in *Barcelona Traction* that certain human rights obligations are obligations *erga omnes*, insofar as "all States can be held to have a legal interest in their protection,"⁵ it was not clear whether the ICJ intended to

1. See, e.g., *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, Judgment, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); *Nottebohm (Liech. v. Guat.)*, Second Phase, Judgment, 1955 I.C.J. 4, at 24 (Apr. 6).

2. See, e.g., *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43 (Feb. 26); see also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits Judgment, 1986 I.C.J. 14 (June 27) (concerning the sponsoring of paramilitary activities by a foreign State within domestic territory; other examples including extraterritorial abductions within domestic territory).

3. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, ¶ 41–59 (July 18) [hereinafter *1966 South West Africa case*] ("Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character. . . . In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form."). See also Judge ad hoc Skubiszewski in his dissenting opinion in the *East Timor* case, where he pointed out that there is always "a myriad of interests" (social, economic, political, and moral) that States have, as individual members of the international community, in compliance with certain rules of international law. However, in order for such an interest to be legally enforceable, it must be one that is legally protected. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, 224, ¶ 103–104 (June 30) [hereinafter *East Timor*] (dissenting opinion by Skubiszewski, J.); see *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Preliminary Objections, 1962 I.C.J. 455 (Dec. 21) [hereinafter *1962 South West Africa case (Preliminary Objections)*] (dissenting opinion of Winiarski, J.) (remarking that, in order to find the applicant States to have obtained the capacity to raise a claim against the respondent State before the ICJ, there must exist "a subjective right, a real and existing individual interest which is legally protected.").

4. *1966 South West Africa case*, *supra* note 3.

5. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3, ¶ 33, 35 (Feb. 5) [hereinafter *Barcelona Traction*].

overturn its finding in *South West Africa* and, if not, how these two seemingly incompatible positions could be reconciled.⁶

The disjunction in the ICJ's remarks triggered an extensive debate on the requirements for acquiring legal standing.⁷ Some doubt the idea that a breach of an international obligation may give rise to universal standing for all states, because responsibility under international law has traditionally been premised on the conceptions of "tort" or "delict"⁸ and was thus "acknowledged only in relation to another state."⁹ Furthermore, the acknowledgment of obligations *erga omnes* implies that states can be held accountable to all members of the international community based on judicial endorsement of the significance and importance of the obligations involved for all other states.¹⁰ This has the effect of disrupting the horizontal structure of international law, wherein states are the only legislators.¹¹ It also threatens to impose a decentralized mode of law enforcement that may, it is feared, encourage an abusive and/or political use of international law.¹²

The general dismissal of the concept of obligations *erga omnes* also underpins much of the skepticism in relation to obligations *erga omnes partes*. Like the idea of obligations *erga omnes*, obligations *erga omnes*

6. See, e.g., Egon Schwelb, *The Actio Popularis and International Law*, 2 ISR. Y.B. HUM. RTS. 46 (1992).

7. *Id.*; see also CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 15 (2005); Krystyna Marek, *Criminalizing State Responsibility*, 14 REVUE BELGE DE DROIT INT'L 460, 481–82 (1978–79); Stephen McCaffrey, *Lex Lata or the Continuum of State Responsibility*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 OF STATE RESPONSIBILITY 242, 244 (Joseph Weiler, Antonio Cassese & Marina Spinedi eds., 1989); Peter D. Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GER. Y.B. OF INT'L L. 285, 296–97 (1996); Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269, 329 (2015).

8. Clyde Eagleton, *International Organization and the Law of Responsibility*, 76 RECUEIL DES COURS 319, 423 (1950) ("Responsibility [under traditional international law] was acknowledged only in relation to another state; it was based on 'tort' or 'delict' . . . The two states concerned fought it out as between themselves, and no one else had the right to interfere.").

9. *Id.* Therefore, it was thought that a breach of an *erga omnes* obligation only gave rise to a right to self-help remedies, such as to insist on fulfilment of the obligation or call for the breach to be discontinued and, when such remedies failed, to impose countermeasures/retorsions falling short of the use of force (such as imposing unilateral sanctions) with a view to pressuring the violating States into compliance.

10. See *Barcelona Traction*, *supra* note 5, ¶ 33 ("In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.").

11. Coffman, *supra* note 7, at 297; Criddle, *supra* note 7, at 329.

12. TAMS, *supra* note 7, at 14; Marek, *supra* note 7, at 481–82 (describing universal standing as potentially leading to "mob justice"); McCaffrey, *supra* note 7, at 244 ("It would seem that any situation allowing each member of the international community to take individual action would amount to a state of vigilantism, and thus simply be an invitation to chaos.").

partes purport to provide legal standing for states not directly injured, provided that these states are also parties to the same treaty.¹³ In so doing, the concept challenges the deeply held belief that multilateral treaties consist of bundles of bilateral, reciprocal rights and obligations.¹⁴ It has therefore been argued that the concept of *erga omnes partes* stretches the interpretation of treaties and therefore of state consent.¹⁵ Similar to obligations *erga omnes*, the concept of obligations *erga omnes partes* also threatens to give rise to a scattered mode of enforcement where every state party to a convention may invoke responsibility for a breach.

In November 2019, The Gambia filed a request for provisional measures against Myanmar, alleging that Myanmar had committed genocide against the Rohingya population contrary to the Genocide Convention.¹⁶ For decades, tensions had been growing between the Rohingya, who are mostly Muslim, and the majority Bamar Buddhist population, leading to an armed conflict between the Arakan Rohingya Salvation Army (ARSA) and Myanmar's military.¹⁷ Violent clashes between insurgents and government forces intensified after August 2017, leaving many, including children, killed or maimed.¹⁸ Rape and sexual violence "were perpetrated on a massive scale."¹⁹

In its judgment for the indication of provisional measures, the ICJ found that The Gambia had *prima facie* standing against Myanmar, despite the fact that the African country is situated more than 7,000 miles from Myanmar, and therefore seemingly lacked a tangible connection to the dispute.²⁰ The ICJ ruled that "[i]n view of their shared values, all

13. See, e.g., Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 68 (July 20) [hereinafter *Belgium v. Senegal*].

14. See, e.g., Christian Dominicé, *The International Responsibility of States for Breach of Multilateral Obligations*, 10 EUR. J. INT'L L. 353, 354 (1999).

15. *Belgium v. Senegal*, *supra* note 13 (dissenting opinion of Xue, J. ¶ 12); *id.* (dissenting opinion of Sur, J. ¶ 38).

16. An ethno-religious minority with an estimated population of 1–1.5 million, the Rohingya are a heavily deprived stateless nation residing in the Rakhine State of Myanmar. Over the decades, the government of Myanmar has sought systematically to deprive the group of their civil and political rights. See A. K. M. Ahsan Ullah, *Rohingya Crisis in Myanmar: Seeking Justice for the "Stateless"*, 32 J. CONTEMP. CRIM. JUST. 285 (2016).

17. See Hum. Rts. Council, Rep. of the Indep. Int'l Fact-Finding Mission on Myan., ¶¶ 31–35, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

18. *Id.* ¶ 37.

19. *Id.* ¶ 38.

20. See Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Provisional Measures, ¶ 42 (Jan. 23, 2020) [hereinafter *The Gambia v. Myanmar*], <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented.²¹ The Gambia, being a party to the Genocide Convention, therefore has a legal interest in compliance with the convention obligations, as they are obligations *erga omnes partes*, i.e., obligations owed “by any State party to all the other State parties.”²² The finding that The Gambia had standing on the basis of the *erga omnes partes* obligations revived the fierce disagreements over this novel concept.²³

The purpose of this Article is to evaluate the legal status of obligations *erga omnes partes* and their implications for the law regarding legal standing.²⁴ Sections II and III discuss the *South West Africa*²⁵ and *Barcelona Traction* cases,²⁶ the two most cited yet highly controversial authorities on the subject.²⁷ Among other issues, the Article will demonstrate that far from being a mysterious idea that came out of nowhere, the concept that a state may have legal standing to call for the enforcement of international legal obligations, even if it has not suffered a direct injury, existed well before the *South West Africa* cases. Section IV examines the International Law Commission’s (ILC) efforts to codify the law on legal standing and how its body of work influenced the decisions of regional courts and international tribunals. Section V discusses how the ICJ reacted to the concept in case law and how its view on the subject potentially transforms how the notion should be approached. Section VI offers some conclusions from this study.

21. *Id.* ¶ 41.

22. *See id.*

23. *See id.* ¶¶ 4–8 (separate opinion by Xue, V.P.), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-01-EN.pdf>; *see also* *Belgium v. Senegal*, *supra* note 13 (dissenting opinion of Sur, J. ¶ 44) (stating that the notion of “*erga omnes partes*” was described in Judge *ad hoc* Sur’s dissenting opinion in *Belgium v. Senegal* as “a rabbit from a magician’s hat”)

24. The notion of standing (*locus standi*) in international law has never been clearly defined. A commonly accepted understanding of legal standing is that it constitutes “the requirement that a State seeking to enforce the law establishes a sufficient link between itself and the legal rule that forms the subject matter of the enforcement action.” TAMS, *supra* note 7, at 26. Note that legal standing in international law does not only refer to being a party to a court proceeding, but also describes one of the legal requirements on the basis of which a State may lawfully take self-help enforcement actions against another State, including, for instance, countermeasures and retorsions. Nevertheless, this article focuses on the standing to pursue legal proceedings.

25. 1962 *South West Africa case (Preliminary Objections)*, *supra* note 3; 1966 *South West Africa case*, *supra* note 3.

26. *Barcelona Traction*, *supra* note 5.

27. The significance of the two cases for legal standing has been fiercely debated. *See infra* Sections II and III below.

II. THE *SOUTH WEST AFRICA* CASES: WHERE THE CONTROVERSY BEGAN

The *South West Africa* cases are a common starting point for understanding under what circumstances a state may acquire standing before the international court.²⁸ Namibia (then German South West Africa) was placed under South Africa's mandate after Germany's defeat in World War I.²⁹ After World War II, South Africa lodged a request with the General Assembly for Namibia to be incorporated into its territory.³⁰ The request was declined by the General Assembly, but South Africa continued its occupation of Namibia.³¹ In 1960, Ethiopia and Liberia instituted proceedings against South Africa, seeking a declaration from the world court that South Africa had been in breach of its duties as a mandatory power, that Namibia remained a mandate, and that, because of South Africa's failures, Namibia should be placed under the supervision of the United Nations.³² In the ICJ's *1962 South West Africa case (Preliminary Objections)*, the issue was whether Ethiopia and Liberia had standing before the ICJ over South Africa's alleged breaches of the terms of the Mandate, an instrument entered into between South Africa and the Allied Powers.³³ The majority of the bench took note of the compromissory clause under Article 7(2) of the Mandate, which provided that:

[I]f any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate . . . if it cannot be settled by negotiation, [it] shall be submitted to the Permanent Court of International Justice.³⁴

Commenting on the way the provision is worded, the ICJ observed that:

[T]he manifest scope and purport of the provisions of this Article indicate that the Members of the League were

28. *1962 South West Africa case (Preliminary Objections)*, *supra* note 3; *1966 South West Africa case*, *supra* note 3.

29. For an excellent background to the case, see Richard A. Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORG. 1, 2-5 (1967).

30. *Id.* at 2.

31. *Id.* at 3.

32. *Id.* at 3.

33. *1962 South West Africa case (Preliminary Objections)*, *supra* note 3.

34. *Id.* at 335.

understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.³⁵

Thus, the majority found—by a narrow vote of eight to seven—that Ethiopia and Liberia had standing in the dispute.³⁶

The above decision was, however, met with strong dissent. Judges Spender and Fitzmaurice, in their joint dissenting opinion, observed that Article 7 of the Mandate could not be understood in the abstract; rather, the Article must be interpreted in light of other provisions of the international agreement.³⁷ They further observed that:

The Mandate . . . has two main classes of substantive provisions. The first . . . comprises the provisions inserted for the benefit of the peoples of the territory [the ‘conduct clauses’]. The other . . . comprises those which were inserted for the national benefit of the Members of the League and their nationals (commercial rights, open door, freedom for missionary activities, etc.) [the ‘special interest clauses’]. . . . Article 7 must be understood as referring to a dispute in the traditional sense of the term, as it would have been understood in 1920, namely a dispute between the actual parties before the Court about their own interests, in which they appear as representing themselves and not some other entity or interest.³⁸

35. *Id.* at 343 (“The Respondent’s contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions ‘any dispute whatever’ arising between the Mandatory and another Member of the League of Nations ‘relating to the interpretation or the application of the provisions of the Mandate.’ The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to ‘the provisions’ of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.”).

36. *Id.* at 347.

37. *Id.* at 550–54 (Spender & Fitzmaurice, JJ., dissenting).

38. *Id.* at 549–50, 558–59.

The majority's conclusion in the 1962 *South West Africa* case—that Ethiopia and Liberia had standing—was essentially reversed at the merits stage.³⁹ This time, the vote was split six to six and the judgment was only decided by Judge (now President) Spender's casting vote.⁴⁰ The majority in the 1966 judgment followed a line of reasoning that closely reflected the approach adopted by Judge Spender and Fitzmaurice in their joint dissent in 1962:

[T]he question which has to be decided is whether, according to the scheme of the mandates and of the mandates system as a whole, any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually and each in its own separate right to call for the carrying out of the mandates as regards their "conduct" clauses; — or whether this function must, rather, be regarded as having appertained exclusively to the League itself, and not to each and every member State, separately and independently.

In order to determine what the rights and obligations of the Parties relative to the Mandate were and are . . . the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation.⁴¹

The majority in the 1966 judgment observed that the context in which the Mandate was established suggested that its performance under the conduct clauses was a matter for the League Council and not for the Permanent Court.⁴² The wording of Article 7 of the Mandate was not express enough to change this position, and therefore standing was only conferred upon states to challenge breaches of the special-

39. See *1966 South West Africa case*, *supra* note 3.

40. *Id.* ¶ 100.

41. *Id.* ¶ 14, 16.

42. *Id.* ¶ 34 (“[U]nder the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League [and later, the United Nations]—in particular to its Council—and were not additionally and separately responsible to each and every individual State member of the League.”).

interest clauses.⁴³ In consequence, if standing were to be construed in favor of Ethiopia and Liberia over the conduct clauses, it would amount to *actio popularis* (i.e. a class action)—a doctrine that, in the opinion of the majority, did not exist in international law at the time.⁴⁴

The 1966 *South West Africa* judgment was heavily criticized. First, it was thought that the issue of standing ought to have been settled in 1962, and because of the ICJ's approach, it did not ultimately make a judgment as to the merits of the case despite it being in the merits stage.⁴⁵ The majority sought to justify reviving the debate by making a distinction between a state's standing to bring a case to court (which the majority in the 1966 judgment argued was the subject of contention in the 1962 judgment) and its standing to the relief sought (which was the issue in the 1966 judgment).⁴⁶ This distinction was widely thought to be unconvincing.⁴⁷ Second, the reference to *actio popularis* was viewed as unnecessary, if not unwarranted. It was unnecessary because the issue was resolved by way of treaty interpretation and so there was no need to ascertain the concept of *actio popularis*.⁴⁸ It was unwarranted because the practice of creating a general legal interest for states parties to an international agreement to invoke responsibility in the event of another's breach clearly did exist at that time.⁴⁹ In fact, Judge Jessup was correct when he remarked in his separate opinion in the 1962 *South West Africa* case that “[f]or over a century, treaties have specifically recognized the legal interests of States in general humanitarian causes and have frequently provided procedural means by which States could

43. *Id.* ¶ 63. In arriving at this conclusion, the ICJ compared the mandate with the Minorities Treaties. The latter expressly conferred legal standing upon members of the Council to bring a case before the PCIJ, while the wording of the former is more obscure.

44. 1966 *South West Africa* case, *supra* note 3, ¶ 88.

45. See 1962 *South West Africa* case (*Preliminary Objections*), *supra* note 3, at 328; see also Falk, *supra* note 29, at 6.

46. 1966 *South West Africa* case, *supra* note 3, ¶ 15; FARID AHMADOV, THE RIGHT OF *ACTIO POPULARIS* BEFORE INTERNATIONAL COURTS AND TRIBUNALS 90 (2018).

47. See, e.g., Falk, *supra* note 29, at 10. Note, however, that later development on this aspect of the law seems to suggest that the distinction was not entirely wrong. In short, as the law developed, it became clear that there is a difference between a situation where a State is injured by an internationally wrongful act and is thereupon entitled to a claim for reparations, and one where a State is not directly injured but is nevertheless entitled to sue in order to compel the wrongdoer to comply with an international law norm. See *infra* Section IV (describing Article 48 of the ARSIWA and its subsequent development).

48. TAMS, *supra* note 7, at 68.

49. *Id.*

secure respect for these interests.”⁵⁰ To name a few examples, the Minorities Treaties expressly provide for the legal standing of all Allied Powers and members of the Council of the League of Nations to bring a case before the Permanent Council of International Justice (“PCIJ”) when there is a “difference in opinion as to questions of law or fact arising out of [any of the provisions contained therein].”⁵¹ The Genocide Convention provides that

Disputes between the Contracting Parties relating to the interpretation, application or *fulfilment* of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.⁵²

The obligations that the Convention requires states to “fulfil” include the prohibition and criminalization of genocide within their respective territories.⁵³ Other examples are the provisions of the Constitution of the International Labour Organisation (“ILO”). Article 26 of the ILO Constitution provides that “[a]ny of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.”⁵⁴ Articles 27 and 28 further provide for a commission of

50. 1962 *South West Africa case (Preliminary Objections)*, *supra* note 3, at 425 (separate opinion of Jessup, J.); another example of a treaty providing for third-party standing irrespective of any direct material injury can be found in the Peace Treaty of Versailles to the Kiel Canal. In the case *S.S. Wimbledon* Judgement of August 17, 1923 (Series A, No. 1), the PCIJ observed that “each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags. They are therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, paragraph I of which is as follows: ‘In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations.’” *S.S. Wimbledon* (U.K., Fr., It., & Japan v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

51. *See, e.g.*, Minorities Treaty Between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland art. 12, June 28, 1919, 225 C.T.S. 412.

52. Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added).

53. *Id.* art. I.

54. Constitution of the International Labour Organization art. 26, Oct. 9, 1946, 15 U.N.T.S. 35.

inquiry to be established where necessary to find facts and make recommendations.⁵⁵ Articles 29 and 31 provide that should the governments “concerned in the complaint” be unable to accept the recommendations made, the matter may be referred to the ICJ and the latter’s decision would be final.⁵⁶ The Constitution of the ILO thus envisages the legal standing of any of its members to invoke the responsibility of another in relation to the observance of the ILO Convention before the ICJ. Furthermore, in the 1961 case *Austria v. Italy* before the European Commission of Human Rights (“the Commission”), the Commission explained, in relation to the European Convention on Human Rights, that as:

Article 24 provides that “any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party” . . . *the High Contracting Parties have empowered any one of their number to bring before the Commission any alleged breach of the Convention, regardless of whether the victims of the alleged breach are nationals of the applicant State or whether the alleged breach otherwise particularly affects the interests of the applicant State.*⁵⁷

None of the examples above required that a state have a “direct material interest” in the subject matter of the dispute.⁵⁸ As Sir Hersh Lauterpacht explained in his non-judicial capacity:

55. *Id.* arts. 27, 28.

56. *Id.* arts. 29, 31.

57. *Austria v. Italy*, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 4, 19–20 (Eur. Comm’n on H.R.); see also *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B), ¶ 239 (1976). Since the adoption of Protocol 11 of the European Convention on Human Rights in 1998, the current article 33 of the European Convention on Human Rights has provided that “[a]ny High Contracting Party may refer to the Court [i.e. the European Court of Human Rights] any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.” Convention for the Protection of Human Rights and Fundamental Freedoms art. 33, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter ECHR] (emphasis added).

58. See *1962 South West Africa Case (Preliminary Objections)*, *supra* note 3, at 432 (Jessup, J., separate opinion). Owing to the above failures, it was observed that the 1966 judgment was “a decision that severely damaged the reputation of the ICJ for many years.” See Christof Heyns & Magnus Killander, *South West Africa/Namibia (Advisory Opinions and Judgments)*, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e209> (last visited Jul. 20, 2020).

States conclude multilateral treaties not only in order to secure for themselves concrete mutual advantages in the form of a tangible give and take, but also in order to protect general interests of an economic, political or humanitarian nature, by means of obligations the uniformity and general observance of which are of the essence of the agreement. The interdependence of international relations frequently results in States having a vital interest in the maintenance of certain rules and principles, although a modification or breach of these principles in any particular single case is not likely to affect adversely some of them at all or at least not in the same degree.⁵⁹

Thus, the quotation on *actio popularis* taken from the ICJ's 1966 judgment is frequently misconstrued.⁶⁰ At the very most, the majority in the 1966 judgment simply stated that the concept of *actio popularis* did not exist in general international law at that time. It did not determine whether a treaty may provide for situations where non-injured states parties can have standing to lodge a claim. On the contrary, the observation of the ICJ that Article 7 of the Mandate was not explicit enough to suggest universal standing in the event of a breach seems to imply that this standing may in fact be expressly provided for.

III. BARCELONA TRACTION—WHAT HAS REALLY CHANGED?

Four years after the controversial 1966 *South West Africa* judgment, the ICJ appeared to have reversed course again on the question of legal standing. In *Barcelona Traction*, the issue before the ICJ was whether Belgium might bring a claim to the ICJ against Spain on behalf of Belgian shareholders of a Canadian corporation whose business was declared bankrupt by a Spanish court.⁶¹ In its now-famous dictum, the ICJ remarked:

59. Hersch Lauterpacht, *The Chinn Case*, 16 BRITISH Y.B. INT'L L. 164-66 (1935) (by reference to interests of an economic and political nature, Lauterpacht was likely alluding to the treaties providing for the creation of objective regimes); see, e.g., Convention Concerning the Memel Territory art. 17, signed at Paris, May 8, 1924, U.N. Doc. A/AC.25/Com.Jer/W.13. The clause was discussed in Interpretation of Statute of Memel Territory (U.K., Fr., It. & Japan v. Lith.), Preliminary Objection, 1932 P.C.I.J. (ser. A/B) No. 47, at 251 (June 24).

60. See, e.g., *Belgium v. Senegal*, *supra* note 13, (Xue, J., dissenting ¶ 13); *id.* (Sur, J., dissenting ¶ 29).

61. For a commentary on the case, see Richard B. Lillich, *Two Perspectives on the Barcelona Traction Case*, 65 AM. J. INT'L L. 522 (1971).

[A]n essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.⁶²

The concept of obligations *erga omnes* was reaffirmed in subsequent judgments,⁶³ and is now generally regarded as creating, in and of itself, a category of international obligations. However, as is well known to international lawyers, the view expressed in the above quotation was not received without criticism. In fact, much of the scepticism over the above dictum came from other members of the ICJ, voiced on various occasions.⁶⁴ The main objection was that the facts of the case did not justify such a far-reaching proclamation.⁶⁵ In consequence, it was not known whether the ICJ was merely describing the distinctive qualities

62. *Barcelona Traction*, *supra* note 5, ¶ 33–34.

63. *See, e.g.*, Legal Consequences of Separation of Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 180 (Feb. 25); *see also* Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 157 (July 9) (“In the Court’s view, these rules [of humanitarian law applicable in armed conflict] incorporate obligations which are essentially of an *erga omnes* character.”).

64. *See, e.g.*, Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, at 387 (Dec. 20), (de Castro, J., dissenting) (“I am unable to believe that by virtue of this dictum the Court would regard as admissible, for example, a claim by State A against State B that B was not applying ‘principles and rules concerning the basic rights of the human person’ . . . with regard to the subjects of State B or even State C.”); *see also* *Belgium v. Senegal*, *supra* note 13.

65. *See* McCaffrey, *supra* note 7, at 243; Gleider Hernández, *International Court of Justice and the Concept of “International Community”*, 83 BRITISH Y.B. INT’L L. 13, at 32 (2013).

of various types of international obligations and/or whether it intended that the disparate types of obligations should entail different legal consequences (such as that pertaining to legal standing).⁶⁶

On closer examination, the real problem with the ICJ's pronouncement lies with the examples given. In short, the ICJ found that certain obligations are so important that all states must be considered to have an interest in the compliance of others, and correctly identified the obligation to refrain from acts of aggression as one of these obligations.⁶⁷ Yet, it is questionable whether human rights obligations can be construed in the same manner. In fact, the obligation to refrain from acts of aggression is so important that its breach arguably threatens the security of every other state, collectively *and* individually. Thus, the significance of an obligation to every other state—collectively *and* individually—would itself probably justify standing on the part of any state to ensure compliance with the relevant obligation. The self-interest involved would also suggest that these are not pure cases of *actio popularis* (i.e., they do not represent instances of states intervening solely in vindication of a public interest), as opposed to attempts to enforce human rights obligations. As for the human rights-related examples noted by the ICJ, including obligations to outlaw acts of genocide and to protect people from slavery and racial discrimination, it is rather difficult to imagine why a breach would necessarily have affected all other states sufficiently as to justify a legal interest in ensuring compliance; after all, the express rights holders of human rights obligations are individuals and not third-party states.⁶⁸

The suggestion that states have a legal interest in ensuring compliance with human rights obligations thus requires us to adopt a particular perspective. It requires us to set aside the traditional conception of states as self-interested sovereign actors⁶⁹ and to imagine them as

66. Further, the ICJ had not clearly articulated the theoretical basis from which obligations *erga omnes* derive their *erga omnes* character, whether it is because (i) these obligations, by their nature, cannot be viewed as bilateral (unlike a case of diplomatic protection), (ii) they are so important that States must be considered to have an interest in ensuring compliance, or (iii) both.

67. See *Barcelona Traction*, *supra* note 5, ¶ 33–34.

68. See, e.g., Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 1996 I.C.J. 595, 626, ¶ 4 (July 11) [hereinafter *Bosnian Genocide*] (declaration of Oda, J.).

69. See Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT'L L. 961, 967 (2002) (explaining the process through which States have reached the stage “of determining whether [the international community] knows of values other than the sovereign identities of its individual members [states]”); Samantha Besson, *Community Interests in International Law: Whose*

entities having a collective duty to safeguard the welfare of humanity as a whole.⁷⁰ Only from this viewpoint can obligations pertaining to human rights be understood to satisfy the ICJ's observation that they are so important that all states must be held to have an interest in their fulfilment. This idea of states mutually pledging to protect human rights was not a mere assertion, but was supported by states' practice in concluding human rights treaties.⁷¹ The Genocide Convention is one of the most-cited examples of a convention that was, according to the *Genocide Convention Advisory Opinion*, "manifestly adopted for a purely humanitarian and civilizing purpose."⁷²

In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages of States, or of the maintenance of a perfect contractual balance between rights and duties.⁷³

The adoption of human rights treaties, and the design that was incorporated into the drafting of these treaties, in turn, evidently influenced the development of the law of treaties, as is reflected in the 1970 Vienna Convention on the Law of Treaties ("VCLT") (adopted a few months before the *Barcelona Traction* judgment), which incorporates

Interests Are They and How Should We Best Identify Them, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 36, 37 (Eval Benvenisti & George Nolte eds., 2018).

70. See Criddle, *supra* note 7.

71. Prior to 1970, these conventions included, e.g., the 1926 Slavery Convention; the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the 1951 Refugee Convention; the 1952 Convention on Political Rights of Women; the 1954 Convention on the Status of Stateless Persons; and the 1961 Convention on the Reduction of Statelessness. TAMS, *supra* note 7, at 75.

72. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 23 (May 28).

73. *Id.*; see also The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 29 (Sept. 24, 1982) ("The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States.").

specific provisions that govern treaties of a “humanitarian character.”⁷⁴ As Professor Mariko Kawano observes, because the concepts of *erga omnes* and of pre-emptory norms were not well established during the earlier stages of the development of international law, the role of treaties in protecting fundamental humanitarian interests became very important.⁷⁵

To conclude, the real bone of contention regarding the significance of the ICJ’s dictum in *Barcelona Traction* is not the (essentially objective) observation that there may be some international obligations significant enough to justify universal standing, but the view on a state’s role with respect to human rights. This development in international law in general, and human rights law in particular, was later characterized as a part of states’ broader duty to safeguard “community interests”⁷⁶ or “community values”⁷⁷—one that recognizes the “limits of the principles

74. Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

75. Mariko Kawano, *Standing of a State in the Contentious Proceedings of the ICJ*, 55 JAPANESE Y.B. INT’L L. 208, 215–16 (2012).

76. For instance, writing in 1994, Judge Simma observed that “[a] rising awareness of the common interests of the international community, a community that comprises not only States, but in the last instance all human beings, has begun to change the nature of international law profoundly.” Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 234 (1994) (“International law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings. In so doing, it begins to display more and more features which do not fit into the . . . bilateralist structure of the traditional law.”); see also Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265, 297 (2009); see also Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests are Protected in International Law*, 21 EUR. J. INT’L L. 387 (2010). The potential applications of obligations *erga omnes* in international environmental law in protecting community interests were raised by Judge Weeramantry in *Gabčíkovo-Nagymaros Project* (Hung. v. Slvk.), Judgment, 1997 I.C.J. Rep. 7 (Sep. 25) (separate opinion by Weeramantry, J.).

77. Judicial endorsement of “community values” could be seen in *Austria v. Italy*, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 4, 19–20 (Eur. Comm’n on H.R.) 18, where the European Commission on Human Rights remarked that “the purpose of the high Contracting Parties in concluding the [European] Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to . . . establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law”; Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 393, U.N. Doc. A/CN.4/L.682 (2006); Sandesh Sivakumaran, *Impact on the Structure of International Obligations*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 133, 146 (Menno Kamminga & Martin Scheinin eds., 2009) (describing

of reciprocity”⁷⁸ that so deeply influenced (and constrained) the way international legal relationships are constructed.

IV. THE ARSIWA: TWO TYPES OF LEGAL STANDING

The conditions from which standing may be derived to invoke responsibility before an international court were further examined by the ILC in a series of reports that later became the Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”).⁷⁹ The relevant provisions are Articles 42 and 48. Article 42 of the ARSIWA, entitled “Invocation of responsibility by an injured State,” provide that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.⁸⁰

While the article does not expressly use the words “legal standing,” it is observed in the Commentary that a right to invoke responsibility includes the right to institute proceedings before an international court.⁸¹

notions such as *jus cogens* as representing a minimum threshold for community values in international law).

78. Yoshifumi Tanaka, *Protection of Community Interests in International Law: The Case of the Law of the Sea*, 15 MAX PLANCK Y.B. U.N. L. ONLINE 15 (2011).

79. *Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, [2001] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), 43 [hereinafter ARSIWA].

80. *Id.* art. 42.

81. See Commentary to Article 42, ¶ (2), in *Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session* (“Invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal.”), cited in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT*

Article 42 of the ARSIWA, in defining the idea of an injured state, focuses on obligations that, if breached, would have a direct/specific impact on a state (Articles 42(a) and 42(b)(i)) or the breach of which would radically change the position of all other states with respect to future performance (Article 42(b)(ii)). The type of obligation described in Article 42(b)(ii) is often referred to as an “integral obligation,” envisaged under Article 60(c) of the VCLT.⁸² The obligations contained in disarmament agreements are typical examples of “integral obligations.”⁸³ While a breach of an obligation contained in a disarmament agreement cannot be said to specifically affect a particular state, “they are nonetheless dominated by a sort of global reciprocity in the sense that each state disarms because the others do likewise.”⁸⁴ This type of “global reciprocity” is generally lacking in human rights treaties, in the sense that one state violating its human rights obligations does not change the position of other states parties in fulfilling theirs.⁸⁵

The more relevant provision to human rights law is Article 48 of the ARSIWA. Entitled “Invocation of responsibility by a State other than an injured State,” it provides that:

1. 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 a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.⁸⁶

AND COMMENTARIES 57–61 (2002); Annie Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. INT’L L. 883, 891 (2010) (“[T]he distinction between legal interests to invoke responsibility and standing to institute ICJ proceedings has not usually been drawn in practice; the latter was considered to be a consequence of the former.”). Note also that by utilizing the distinction between an “injured state” and situations involving a party “other than an injured state,” Articles 42 and 48 intended to provide exhaustively for situations that might give rise to a right to invoke the responsibility of another.

82. VCLT, *supra* note 74, art. 60(c).

83. Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT’L L. 1127, 1135 (2002).

84. *Id.*

85. *Id.*

86. ARSIWA, *supra* note 79 art. 48(1)(a).

Article 48(1)(a) is intended to address situations when obligations are created to protect the collective interest of a group of states.⁸⁷ It describes the relationship that is often incorporated into multilateral treaties concerning the collective security of a group or region, the environment, or human rights.⁸⁸ Such obligations were established with the intention of “transcending the ‘sphere of the bilateral relations of the States parties,’”⁸⁹ thus creating obligations that are “genuinely multilateral.”⁹⁰ Consequently, every state party has an interest in the compliance of others. Meanwhile, Article 48(1)(b) was created to address obligations *erga omnes* outside of treaty law, resonant with the type of obligation described in the dictum of *Barcelona Traction*, whereby “all States can be held to have a legal interest in [its] protection.”⁹¹ Furthermore, Article 48(1)(b) may be read together with Articles 40 and 41 of the ARSIWA; the latter provide for situations where there are serious breaches of obligations under the preemptory/*jus cogens* norms of general international law.⁹² They suggest that, where there is a gross or systematic failure by any responsible state to fulfil obligations prescribed for under *jus cogens* norms, states have an additional duty to cooperate with each other to bring such breaches to an end through lawful means.⁹³

The thinking behind the very wording of Articles 42 and 48 is that there should not be a need to determine the nature (moral or material) or the extent of damages or harm suffered before a state can invoke responsibility.⁹⁴ Rather, standing depends solely on whether an obligation in breach is owed to the claimant state.⁹⁵ This approach was inspired by the second Special Rapporteur Roberto Ago (and survived Professor James Crawford, the fifth and last Special Rapporteur on the subject), and was meant to ensure that “every internationally wrongful act of a State entails the international responsibility of that State.”⁹⁶ In

87. *Id.*

88. See Commentary to Article 48, in *Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session*, cited in CRAWFORD, *supra* note 81.

89. Sicilianos, *supra* note 83, at 1135.

90. JAMES CRAWFORD, *BROWNIE'S PRINCIPLE OF PUBLIC INTERNATIONAL LAW* 21 (8th ed. 2012).

91. Schwelb, *supra* note 6.

92. ARSIWA, *supra* note 79, arts. 40 and 41.

93. *Id.* art. 41(1).

94. *Id.*

95. *Id.*

96. Alain Pellet, *The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 75, 77 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010). As Articles 1 and 2 of the ARSIWA provided, “[e]very internationally wrongful act of a State entails the international responsibility of that State” and

practice, these Articles established two types of legal standing: (i) standing derived from injury (Article 42) and (ii) standing derived from common interests (Article 48).⁹⁷ These two types of standing differ not only in terms of the circumstances giving rise to them, but also in terms of the claim that a state is entitled to raise. According to Article 48(2) of the ARSIWA:

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.⁹⁸

In other words, a non-injured state may not claim reparation for itself; the legal interest involved for non-injured states under Article 48 is strictly limited to seeing the violated obligations enforced. This position, again, echoes the dictum in *Barcelona Traction*,⁹⁹ and is, in fact, consistent with the view taken by a series of PCIJ decisions affording legal standing to treaty parties not on the basis of having suffered a material injury, but merely because they have an interest in ensuring that compliance with treaty obligations.¹⁰⁰ The International Criminal Tribunal for the former Yugoslavia (“ICTY”), in *Prosecutor v. Anto Furundzija*, explained that a breach of an obligation *erga omnes* “gives

“[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission . . . constitutes a breach of an international obligation of the State.” This position can in turn be traced to the *Chorzów Factory* case, where it was determined that every breach of international law “involves an obligation to make reparation.” See *Factory at Chorzów (Claim for Indemnity) (Jurisdiction) (Ger. v. Pol.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

97. Annemarieke Vermeer-Künzli, *Invocation of Responsibility*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 251, 257* (André Nollkaemper & Ilias Plakokefalos eds., 2014).

98. ARSIWA, *supra* note 79, art. 48(2).

99. *Barcelona Traction*, *supra* note 5, ¶ 33–34 (i.e., that these concern rights and obligations in whose protection States have a “legal interest”).

100. *S.S. Wimbledon*, *supra* note 50; see, e.g., *Interpretation of Statute of Memel Territory (Preliminary Objection) (U.K., Fr., It. & Japan v. Lith.)*, Judgment, 1932 P.C.I.J. (ser. A/B) No. 47 (June 24); *Interpretation of Statute of Memel Territory (U.K., Fr., It. & Japan v. Lith.)*, Judgment, 1932 P.C.I.J. (ser. A/B) No. 49 (Aug. 11).

rise to a claim for compliance accruing to each and every member, which then has *the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued*" (emphasis added).¹⁰¹ Similar observations have been made by the European Commission of Human Rights.¹⁰²

The merit in ARSIWA's approach is that it avoids the difficulty (and uncertainty) of having to determine the *extent* of the injury that a state must have suffered in order to acquire legal standing (which is invariably a matter of degree). It was further observed that the ILC's approach:

has brought about an objective understanding, pursuant to which a State incurs responsibility whenever it fails to comply with its international obligations, irrespective of factors such as damage or fault, thus freeing the law of responsibility from fruitless doctrinal controversies about the definition of damage and fault, and the restrictive focus on the reparation of material wrongs.¹⁰³

Support for the focus on obligations (not "interests," "injury," or "damage") can be found in the 1949 *Reparations* case, where the ICJ remarked that "only the party to whom an international obligation is due can bring a claim in respect of its breach."¹⁰⁴ Another perceivable merit is that, by distinguishing the two types of standing and the limitations as to what a state may claim when invoking standing on the basis of common interests, the ARSIWA clarifies that the right of a state with a common interest in compliance with obligations is not foreclosed by the right of the injured state (if any). In other words, where there is an injured state, the non-injured state's right to invoke responsibility cannot be waived by the injured state.¹⁰⁵ As Article 48(1) expresses in

101. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 151 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

102. See *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) ¶ 239 (1976).

103. TAMS, *supra* note 7, at 13.

104. *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I. C.J. 174, 181–82 (Apr. 11). Note that the Statute of the ICJ does not specify conditions for standing.

105. For instance, in the case *S.S. Wimbledon*, the French Company (France) suffered a pecuniary loss as a result of Germany's refusal of passage and therefore sought reparations. That did not preclude Japan's standing to seek a declaration of illegality. See *S.S. Wimbledon*, *supra* note 50. Judge Weeramantry opined that when considering *erga omnes* obligations, one must look

unqualified terms, “[a]ny State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2” (emphasis added).¹⁰⁶ This would prove very important for enforcing human rights and humanitarian treaties, particularly in cases involving refugees and/or stateless populations crossing from one state to another.¹⁰⁷ Moreover, as non-injured states are only entitled to demand the cessation of the wrongful act, a claim is unlikely to be admissible if the wrongful act has been discontinued by the time the case appears before an international court. This narrows the effect of the standing invoked on the basis of common legal interests, and thus helps alleviate the worry that acknowledging the concept of obligations *erga omnes* and/or *erga omnes partes* will lead to abusive litigation by states driven by political concerns.¹⁰⁸

The extensive discussions that the ILC study provoked on the topic have clearly influenced judicial thinking. In its 1997 judgment, the ICTY in *Prosecutor v. Blaskic*,¹⁰⁹ while expressly referring to the ILC’s efforts described above and the ICJ’s dictum in *Barcelona Traction*,¹¹⁰ remarked that Article 29 of the Statute of the ICTY¹¹¹ amounts to an obligation *erga omnes partes*:

beyond *inter partes* rules, procedures, and remedy, because fairness as between parties may not be sufficient to do justice to rights and obligations of an *erga omnes* character. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sep. 25) (separate opinion by Weeramantry, J.).

106. ARSIWA, *supra* note 79, art. 48(1).

107. For example, if a stateless population from State A fled to State B as a result of gross systematic oppression toward them in State A, the right of third States to demand State A’s compliance with international human rights obligations should not be subject to State B’s institution of proceedings against State A, even though State B could be said to be specifically affected, nor should it be extinguished by State B’s waiver of its right to reparations. See discussions on *The Gambia v. Myanmar* below. Similar concerns may arise in cases of human trafficking.

108. See Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798, 805 (2002).

109. *Prosecutor v. Blaškić*, Case No. IT-95-14/14-T, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997), <https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

110. *Barcelona Traction*, *supra* note 5, ¶ 33–34.

111. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 29, S.C. Res. 827 (May 25, 1993) (“Article 29 Co-operation and judicial assistance 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons;

[I]t is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. . . . This obligation is laid down in Article 29 Article 29 is an obligation which is incumbent on every Member State of the United Nations *vis-à-vis* all other Member States. . . . The nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an “obligation *erga omnes partes*.” By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29.¹¹²

The approach to obligations *erga omnes partes* acknowledged in *Blaškić* was further endorsed in a series of decisions laid down by the International Criminal Tribunal for Rwanda (“ICTR”).¹¹³ The very idea of *erga omnes partes* was also ardently championed by Judge Cançado Trindade during his time as a judge at the Inter-American Court of Human Rights.¹¹⁴

(b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.”)

112. *Blaškić*, Case No. IT-95-14/14-T, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 26 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997). *See id.* at 24 n.33 for the Tribunal’s references to the ILC’s work and *Barcelona Traction*.

113. *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, ¶ 9 (June 5, 2003), <https://jrad.irmct.org/view.htm?r=216405&s=>; Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France’s Cooperation with the Tribunal, ¶ 29 (Mar. 4, 2010), http://www.worldcourts.com/ictf/eng/decisions/2010.03.04_Prosecutor_v_Nzabonimana.pdf.

114. *See* Las Palmeras v. Colombia, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶¶ 9–12 (Feb. 4, 2000) (separate opinion by Trindade, J.); Communities of the Jiguamiandó and the Curbaradó Regarding Colombia, Provisional Measures, Order of the Court, “Having Seen,” ¶¶ 4–6 (Inter-Am. Ct. H.R. Mar. 6, 2003) (concurring opinion by Trindade, J.), http://www.corteidh.or.cr/docs/medidas/jiguamiando_se_01_ing.pdf; Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 66, 77, 79, 82–83 (Sept. 17, 2003) (concurring opinion by Trindade, J.); Pueblo Indígena de Kankuamo Regarding Colombia, Provisional Measures, Order of the Court, “Having Seen,” ¶¶ 2–3 (Inter-Am. Ct. H.R. July 5, 2004) (concurring opinion by Trindade, J.), <http://www.corteidh>.

Nevertheless, the rules as proposed in the ARSIWA do not definitively settle the question of standing for all treaties. This is because states are generally free to establish rules *lex specialis* through the adoption of specifically drafted treaty provisions, whether these tighten or relax the requirements for legal standing.¹¹⁵ In short, whether a treaty obligation could properly be characterized as an obligation *erga omnes partes*, and whether parties intended universal standing for all contracting parties before an international court in the event of a breach, remains a matter of treaty interpretation.¹¹⁶ The concept of obligation *erga omnes partes* merely postulates that the violation of a treaty provision by one State Party alters the legal interests or position of every other State Party to a treaty and “[t]o the extent that such a treaty foresees international judicial settlement of disputes in the framework of that treaty, the violation can . . . have a procedural remedy.”¹¹⁷

As such, difficult questions remain to be addressed. First, it is relatively clear that there are instances where a treaty expressly provides for third-party standing in the event of breach (as the examples above involving the ECHR, the Constitution of the ILO, and the Minorities Treaties demonstrate); in these cases, third-party standing should indeed be recognized. But what if the relevant provision of a treaty (typically the compromissory clause) is not so clear?¹¹⁸ In other words, what rules are to be applied in a situation where a compromissory clause is ambiguous as to the enforcement mechanisms for third parties? Second, do all human rights treaties provide for obligations *erga omnes*

or.cr/docs/medidas/kankuamo_se_01_ing.pdf; Communities of Jiguamiandó and Curbaradó Regarding Colombia, Provisional Measures, Order of the Court, “Having Seen,” ¶ 8 (Inter-Am. Ct. H.R. Feb. 7, 2006) (concurring opinion by Trindade, J.), http://www.corteidh.or.cr/docs/medidas/jiguamiando_se_04_ing.pdf.

115. TAMS, *supra* note 7, at 70.

116. In addition to potentially providing for special rules in relation to standing, a treaty may also provide for particular avenues/mechanisms for collective enforcement or restrict dispute settlement to the procedures established by the treaty, thereby restricting the jurisdiction of the ICJ. For instance, art. 33 of the ECHR (as amended by Protocols Nos. 11 and 14) provides for a rather relaxed threshold for legal standing (i.e. concerning “any alleged breach of the provisions”) for all State parties while restricting collective enforcement to the mechanisms created by the Convention, i.e. the European Court of Human Rights. *See* ECHR, *supra* note 57. The relevant provisions of the Constitution of the ILO provide that disputes as between States must be resolved through the internal mechanisms of the ILO before they may be referred to the ICJ. *See* Constitution of the ILO arts. 26–29, 31, Oct. 9, 1946, 62 Stat. 3485. The difference between admissibility and jurisdiction is addressed below. *See infra* notes 149–152.

117. Jure Vidmar, *Protecting the Community Interest in a State Centric Legal System: The UN Charter and Certain Norms of ‘Special Standing’*, in *THE COMMON INTEREST IN INTERNATIONAL LAW* 109, 113 (Wolfgang Benedek, Koen De Feyter, Matthias C. Kettmann & Christina Voigt eds., 2014).

118. Bearing in mind also that compromissory clauses primarily provide for jurisdiction and not necessarily legal standing.

partes, given that most, if not all, human rights treaties provide for some obligations that are unable to be applied bilaterally or are “non-synallagmatic”?¹¹⁹ Moreover, are all substantive provisions within that treaty obligations *erga omnes partes*? For instance, it has been argued that since human rights treaties are not concluded on the basis of reciprocity, they are a “series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.”¹²⁰ If this characterization is accurate, then *prima facie* all obligations pertaining to human rights treaties are *erga omnes partes* in nature.¹²¹ Yet, would it not be strange for all states to have standing over any violation of human rights treaty obligations, regardless of the significance of the treaty provision and the gravity of the breach?¹²² If they do not, however, then how do we differentiate between obligations that are *erga omnes partes* and those that are not? As will be discussed in the next section, the ICJ case *Belgium v. Senegal* provided some insight in relation to these questions.

V. THE RECEPTION OF OBLIGATIONS *ERGA OMNES PARTES* BY THE ICJ

The notion of obligations *erga omnes partes* was first expressly endorsed by the ICJ in the case *Belgium v. Senegal*.¹²³ In this case, victims

119. See Comm. on the Elimination of Racial Discrimination, Inter-State Communication Submitted by the State of Palestine Against Israel, ¶ 3.33, U.N. Doc. CERD/C/100/5 (Dec. 12, 2019) (“The Committee notes that the jurisprudence of the European and Inter-American systems of protection of human rights, as well as the General Comment of the Human Rights Committee, shows that the objective or non-synallagmatic nature of the substantive obligations contained in the European and American Convention of Human Rights has as a result, that any State party may trigger the collective enforcement machinery created by the respective treaty, independently from the existence of correlative obligations between the concerned parties.”).

120. Jean S. Pictet, *Commentary on First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, in THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1952).

121. See Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Erika De Wet, *The International Constitutional Order*, 55 INT’L & COMP. L.Q. 51, 55 (2006).

122. See *Barcelona Traction*, *supra* note 5, ¶ 91. The ICJ, in relation to the right to have access to justice, observed that “the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe.” In other words, the corresponding duty to protect the right to access to justice does not qualify as an obligation *erga omnes*. See Manfred Lachs, *The Development and General Trends of International Law in Our Time*, 169 RECUEIL DES COURS 9 (1980); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 58 (2d ed. 1979) (“The ordinary violation of law or treaty is not yet a ‘crime’ against the society to be vindicated by the society.”).

123. *Belgium v. Senegal*, *supra* note 13; cf. MARTIN DAWIDOWICZ, *THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW* 42–43 (2017) (observing that the admissibility of Australia in Whaling in

of Chadian nationality instituted proceedings in the Belgian courts to prosecute Hissan Habré, the former president of Chad, who was alleged to have committed gross human rights violations.¹²⁴ After the government was overthrown, Habré took refuge in Senegal.¹²⁵ Subsequent prosecutions of Habré in the Senegalese courts failed, because Senegalese law did not provide for the power to exercise universal jurisdiction.¹²⁶ After Senegal's rejection of multiple requests made by Belgium for the extradition of Habré, Belgium brought a case against Senegal before the ICJ asking the Court to order Senegal to commence investigations against Habré for his crimes, on the basis that they were both parties to the United Nations Convention against Torture ("UNCAT").¹²⁷ At issue was whether Belgium's status as a party to the UNCAT was sufficient in itself to justify legal standing before the ICJ in the absence of a special interest.¹²⁸ The majority in the judgment concluded in the affirmative on the basis that the object and purpose of the Convention requires state parties to the UNCAT to comply with certain, core obligations.¹²⁹ In turn, all state parties have a common interest to ensure these common interests are complied with:

As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world." The States parties to the

Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. 226 (Mar. 31), was implicitly based on the idea of obligations *erga omnes partes*. Note that various ICJ judges made observations effectively recognizing that obligations pertaining to human rights treaties may be owed to all States parties. Judge Simma observed in relation to the Geneva Convention that "regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right—indeed the duty—to raise the violations of international humanitarian law [before the International Court of Justice]." See *Armed Activities on Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Judgment, 2005 I.C.J. 168, 347, ¶ 34 (Dec. 19) (separate opinion by Simma, J.). Judge Oda in *Bosnian Genocide* observed in relation to the obligation to prevent and punish acts of genocide under Article 1 of the Genocide Convention that "these legal obligations are borne in a general manner *erga omnes* by the Contracting Parties in their relations with all the other Contracting Parties to the Convention—or, even, with the international community as a whole—but are *not* obligations in relation to any specific and particular signatory Contracting Party," although he further commented that States are entitled to resolve disputes through other organs of the U.N. but not by invoking the responsibility of States before the ICJ. See *Bosnian Genocide*, *supra* note 68.

124. *Belgium v. Senegal*, *supra* note 13, ¶ 19.

125. *Id.* ¶ 16.

126. *Id.* ¶ 18.

127. *Id.* ¶ 65.

128. *Id.* ¶ 69.

129. *Id.* ¶ 68.

ON OBLIGATIONS ERGA OMNES PARTES

Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred.

All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. *That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.* All the States parties “have a legal interest” in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33).

These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in the others’ compliance in any given case.¹³⁰

The ICJ then drew parallels between the UNCAT and the Genocide Convention and concluded that they are similar in nature; for example, for both Conventions, state parties do not have an “interest of their own; they merely have . . . a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention.”¹³¹ The ICJ further concluded:

The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may

130. *Id.* ¶ 68.

131. *Id.* (citing Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28)).

invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.¹³²

The majority in *Belgium v. Senegal* thus made important observations. First, in order to identify obligations *erga omnes partes*, one must seek to ascertain (i) the object and purpose of the Convention and therefore the community interest that the treaty seeks to secure.¹³³ Then, one must further understand (ii) the design of the Convention, in particular how it purports, through articulating various rights and obligations, to give effect to the Convention's purpose, so as to (iii) determine whether the obligation at issue was incorporated to fulfil this purpose.¹³⁴ In this case, the ICJ decided that the "obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution" are essential to fulfilling the aim of the treaty and therefore all states parties ought to have a legal interest in others' compliance with the obligation.¹³⁵

The above remarks are essential, as they suggest that not all obligations pertaining to the UNCAT are obligations *erga omnes partes*.¹³⁶ The

132. *Belgium v. Senegal*, *supra* note 13, ¶ 69.

133. *Id.*

134. *Id.*

135. *Id.* The majority judgment was criticized by Judge Xue and Judge ad hoc Sur. First, both judges found that the ICJ's reliance on an obiter dictum from *Barcelona Traction* was misguided. Furthermore, Judge Xue thought that the dictum referred to the nature of substantive obligations (being owed to all); the ICJ had not commented on the procedural aspects of such obligations (including those relating to standing). She observed that the ICJ in *Barcelona Traction* had not intended to change the status of law at that time, namely the fact that *actio popularis* does not exist in international law. Second, both judges found the ICJ's conclusion on admissibility inconsistent with the law on state responsibility. In particular, Judge Xue observed that it is one thing to find that a state has an interest in compliance with certain treaty obligations, but another to say that a state has standing; only the "injury" of a state within the meaning of Article 42 of the ARSIWA gives rise to standing. Judge ad hoc Sur observed that the majority had relied on a concept borrowed from the ARSIWA that was *lex ferenda*. See *id.* (dissenting opinion by Xue, J.); *id.* (dissenting opinion by Sur, J.) The tension between the dictums of the *1966 South West Africa* case and *Barcelona Traction* on *actio popularis* and obligations *erga omnes* was addressed in Sections II and III above. The development of Articles 42 and 48 of the ARSIWA as well as its recognition by international tribunals was also addressed in Section IV. This Article disagrees with the conclusions of both judges on these points, for there is, to say the very least, an emerging recognition of obligations *erga omnes partes*—one that is, in fact, consistent with earlier authorities of international courts and tribunals.

136. See also *Belgium v. Senegal*, *supra* note 13 (declaration by Donoghue, J. ¶ 12).

UNCAT contains a wide list of provisions in relation to the prevention and prohibition of torture, including Articles 10 and 11 on the obligation to ensure that education and information regarding the prohibition of torture are fully integrated into the training of law enforcement officers, and the obligation to keep a systemic review of interrogation rules.¹³⁷ Article 15 of the UNCAT further provides for the exclusion of statements extracted by torture from legal proceedings.¹³⁸ It would indeed be unimaginable that third-party states should have standing against a state in an international forum should the latter allegedly have failed to fulfil these provisions.

The conceptual link between the object and purpose of a treaty and its underlying common interests gives rise to further implications: since obligations *erga omnes partes* are those that are integral to the object and purpose of the treaty, it is likely that they are also obligations that cannot be subject to reservations, as provided by Article 19(c) of the VCLT.¹³⁹ Moreover, states parties will not be able to contract out of such obligations as amongst themselves.¹⁴⁰ Article 41 of the VCLT provides that:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if . . . (b) the modification in question is not prohibited by the treaty and . . . (ii) [if the modification] does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.¹⁴¹

This is consistent with the idea that obligations *erga omnes partes* are non-bilateral obligations “owed by any State party to all the other States parties to the Convention.”¹⁴²

Interestingly, since all multilateral treaties have an object and purpose, the practical application of obligations *erga omnes partes* may extend beyond human rights treaties and beyond treaties that are non-reciprocal in character. For instance, they may even apply to free trade

137. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 10, 11, Dec. 10, 1984, 1465 U.N.T.S. 85.

138. *Id.* art. 15.

139. VCLT, *supra* note 74, art. 19(c).

140. *Id.* art. 41.

141. *Id.*

142. *Belgium v. Senegal*, *supra* note 13, ¶ 68.

agreements.¹⁴³ In fact, following from the above analysis, a breach of obligations *erga omnes partes* is conceptually no different from a “material breach” envisaged under Article 60 of the VCLT.¹⁴⁴ Article 60(3) of the VCLT provides that a material breach of a treaty “consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”¹⁴⁵ By affording third-party standing in the event of such a breach, the very concept of obligations *erga omnes partes* supplements the VCLT regarding the consequences for material breach,¹⁴⁶ by providing a third state with the legal remedy to make a claim for the cessation of the alleged breach, where judicial settlement is envisaged.¹⁴⁷

A. *Standing, Admissibility, and Jurisdiction*

Nevertheless, it is important to clarify that the practical application of obligations *erga omnes partes* relates solely to standing¹⁴⁸—which, in

143. See, e.g., Chios Carmody, *WTO Obligations as Collective*, 17 EUR. J. INT’L L. 419 (2006); Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT’L L. 907 (2003).

144. Marco Longobardo, *The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes*, 23 J. CONFLICT & SEC. L. 383, 397 (2018).

145. VCLT, *supra* note 74, art. 60(3).

146. VCLT, *supra* note 74, art. 60(2), provides that: “A material breach of a multilateral treaty by one of the parties entitles: (a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties; (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.” Article 60(5) provides that: “Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”

147. Where judicial settlement is not expressly provided, a breach of an obligation *erga omnes partes* may provide the legal basis for countermeasures as envisaged by the ARSIWA. See ARSIWA, *supra* note 79, art. 54.

148. Both obligations *erga omnes* and *erga omnes partes* relate strictly to legal standing. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 63, ¶¶ 37, 213 (separate opinion by Higgins, J.); see also the series of cases in note 122 below. In her dissenting opinion in *Belgium v. Senegal*, *supra* note 13, Judge Xue argued that the UNCAT had

turn, is an aspect of admissibility.¹⁴⁹ Furthermore, obligations *erga omnes partes* do not relate to jurisdiction.¹⁵⁰ In order to bring a claim against a

put in place a treaty body to monitor states' compliance with the convention, and that it further provided for an inter-State complaints procedure, both of which served to safeguard the common interests of all contracting parties in compliance with treaty obligations. She thus argued that the concern of the majority that the obligation would not be enforceable "should a special interest be required" was therefore unfounded. She added that the Convention allowed state parties to make a reservation on the jurisdiction of the ICJ, which suggested that the Convention did not intend to create obligations *erga omnes partes*. It is submitted that Judge Xue conflated the relationship amongst standing, admissibility, and jurisdiction. The question of obligations *erga omnes partes* relates strictly to standing, which in turn depends on the nature of the obligation itself (whether it is owed to one or owed to all). It does not relate to the other aspects of admissibility (such as the non-existence of a dispute, or the failure to exhaust local remedies), nor to the issue of jurisdiction. Judge Xue's focus on the mechanisms in place for fulfilling the objects and purpose of the treaty to rebut the argument that state parties intended to create obligations *erga omnes partes* was therefore misplaced. If anything, the very inclusion of these mechanisms strengthens the argument that the obligations are not of a reciprocal nature—hence the need for collective enforcement. That the compromissory clause of the ICJ may be the subject of reservation is a matter of jurisdiction and does not alter the *erga omnes partes* nature of the obligations involved, as the latter relates to standing and not jurisdiction. States may freely agree to one form of dispute settlement or another; this does not alter the nature of the treaty obligation. Meanwhile, Judge Xue's skepticism of the admissibility of the claim only makes sense if she was suggesting that the creation of such enforcement mechanisms (such as inter-state communications) implies that the state parties to the treaty do not intend disputes arising to be eligible for judicial settlement (which is an aspect of admissibility), or do not intend the ICJ to have jurisdiction over disputes arising from the UNCAT. Nevertheless, both interpretations must be considered incorrect in light of Article 30 of the UNCAT, which expressly provides for the ICJ as a forum of dispute resolution.

149. *See* *Abaclat and Others v. Arg. Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Georges Abi-Saab, ¶¶ 18, 126 (Aug. 4, 2011) (“[J]urisdiction is first and foremost a power, the legal power to exercise the judicial or arbitral function. Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence.” “Generically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.” While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment.)

150. The difference between standing and jurisdiction has been acknowledged in a series of ICJ cases. In *Armed Activities on Territory of Congo*, (New Application: 2002) (*Dem. Rep. Congo v. Rwanda*), Judgment, 2006 I.C.J. 6, ¶ 64 (Feb. 3), the Democratic Republic of the Congo alleged that Rwanda had violated the Genocide Convention. Rwanda, however, made a reservation to Article IX of the Convention (i.e. the compromissory clause). The ICJ took the view that “the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the ICJ jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction.” This distinction—between standing and jurisdiction—was maintained in the Application of

defendant state on the ground of a breach of an obligation *erga omnes partes*, not only must the court have jurisdiction to adjudicate the dispute, but all other aspects of admissibility must also be met.¹⁵¹ In fact, once it is clarified that the *erga omnes partes* nature of an obligation does not replace the need for a claimant state to prove other aspects of admissibility, one can readily perceive that the effect of obligations *erga omnes partes* is not as drastic as may first appear.

B. *Obligations Erga Omnes Partes and Provisional Measures*

The above is largely confirmed in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Provisional Measures) in relation to the Genocide Convention.¹⁵² In finding that The Gambia had *prima facie* standing to submit a dispute with Myanmar on the basis of the alleged violations of obligations under the Genocide Convention, the majority declared that:

In 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. That common interest implies

Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 147 (Feb. 26), when the ICJ explained that its jurisdiction over obligations pertaining to the Genocide Convention under Article IX cannot be extended to other obligations that do not amount to genocide: “[t]hat is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.” In *East Timor*, *supra* note 3, after affirming the *erga omnes* character of the right to self-determination, the ICJ remarked that “the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligation invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.”

151. Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 412, ¶ 120 (Nov. 18) (listing examples of objections to admissibility as “failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim”); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 29 (Nov. 6) (“Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the application State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of merits.”); *see also* *Belgium v. Senegal*, *supra* note 13 (declaration of Donoghue, J. ¶¶ 14–16).

152. *See The Gambia v. Myanmar*, *supra* note 20, at 7.

that the obligations in question are owed by any State party to all the other States parties to the Convention.

In its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court observed that the relevant provisions in the Convention against Torture were “similar” to those in the Genocide Convention. The Court held that these provisions generated “obligations [that] 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” (Judgment, I.C.J. Reports 2012 (II), p. 449, para. 68). It follows 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.¹⁵³

The common interest in the Genocide Convention is evident and the subject matter of the case—the prohibition of genocide—clearly falls within the object and purpose of the treaty.

The case, however, gave rise to some unique issues. According to the 2018 Report published by the United Nations Human Rights Council’s Independent Fact-Finding Mission on Myanmar, as a result of the violent conflict, nearly 725,000 Rohingya fled to Bangladesh.¹⁵⁴ Myanmar argued that, in this case, Bangladesh was specifically affected and therefore, even if The Gambia had a legal interest in the case, its standing against Myanmar was subsidiary to the standing of Bangladesh.¹⁵⁵ The ICJ seemingly dodged Myanmar’s question: if a specifically affected state can be identified, is the right of a third state to invoke responsibility under *erga omnes partes* subsidiary to that of the specifically affected state? Therefore, does a third state only have standing when the specially affected state has waived its right to invoke responsibility against the violating State? As addressed in Section IV above, it is likely that, if the party that is not directly injured merely seeks to see the breached obligation complied with and does not seek reparations on behalf of the injured state, there ought not to be an issue of subsidiarity.¹⁵⁶

153. *Id.* ¶ 41.

154. *See id.* ¶ 71.

155. *Id.* ¶ 39.

156. *See supra* text accompanying notes 86–89.

Another point the ICJ failed to address is whether there are formal admissibility requirements that must be met before a third state can invoke the responsibility of another on the basis of *erga omnes partes*. For example, must the third state first appeal to the alleged state to put the breach to a stop? Must the third state first notify the alleged state of its intention to pursue the claim before an international court? Or should the state have exhausted local remedies, similar to those envisaged under Articles 43, 44, and 45 of the ARSIWA?¹⁵⁷ Though these procedural requirements do not affect the *erga omnes partes* nature of convention obligations, there is seemingly no good reason to think they need not be complied with in establishing admissibility. Perhaps another matter requiring clarification is whether the standard of review for admissibility at the stage of a request for provisional measures is lower than if the same issue is to be considered at the preliminary objections stage; in the former phase, a state is only required to satisfy the ICJ that the dispute is *prima facie* admissible.¹⁵⁸

Nonetheless, the ICJ's endorsement of the concept of obligations *erga omnes partes* is absolutely vital to defending the common values and interests established by a multilateral treaty, where these values and interests are at "real and imminent risk of irreparable prejudice."¹⁵⁹ The significance is profound, as this endorsement acknowledges that the object and purpose of a multilateral treaty may be frustrated by a breach on the part of any one state,¹⁶⁰ and when that happens, judicial recourse should be available to all states that are party to the respective treaties to demand the violation to stop. This is also important for protecting the treaty's integrity, as it is conceivable that if one state can breach the object and purpose of a treaty without being held accountable, other states may follow suit, entailing the complete breakdown of

157. ARSIWA, *supra* note 79, art. 48(3) ("The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.").

158. *See* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, 1996 I.C.J. 13 (Mar. 15).

159. The criterion that there must be "a real and imminent risk that irreparable prejudice will be caused to the rights [of the applicant State]" is a requirement for the indication of provisional measures. Application of International Convention for Suppression of Financing of Terrorism and of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, 2017 I.C.J. 104, ¶ 89 (Apr. 19).

160. The most obvious example would be when a State engages in activity that may cause serious damage to the environment in contravention of an environmental agreement. Other examples may involve the conducting of exploitative fisheries and whaling practices, the destruction of cultural heritage, or the conducting of nuclear tests, in contravention of multilateral treaties adopted to regulate these activities.

the regulatory regime that the multilateral treaty intended to establish. Having access to provisional measures in such situations exemplifies the very rationale of these measures, i.e. to preserve the rights of all treaty parties;¹⁶¹ this would not be possible if a special interest was required. Moreover, if such provisional measures are respected by all states involved, they may disincentivize the use of third-party counter-measures, and may, in turn, contribute to strengthening the use of the ICJ as a forum for dispute resolution and thus the rule of law at the international level.

VI. CONCLUSIONS

This Article has outlined the development of obligations *erga omnes partes*. It began by cautioning against overreliance on the 1966 judgment in *South West Africa* denying third-party standing, and illustrated the seismic change in the perception of international obligations (influenced largely by mutual commitments undertaken by states toward protecting human rights) that led to the ICJ's observation in *Barcelona Traction* that there may be obligations owed to the international community as a whole. The Article then appraised the ILC's effort to articulate state responsibility on the basis of "common interests" and traced how the ILC's proposals were adopted in the jurisprudence of regional courts and international tribunals.

Importantly, as this Article argues, the subsequent endorsement of obligations *erga omnes partes* by the ICJ provides valuable guidance on how to identify those treaty obligations where the standing of third-party states is not expressly provided for. In such cases, whether an obligation is deemed *erga omnes partes* depends on whether the obligation is essential to the fulfilment of the treaty's object and purpose.¹⁶² Through this ruling, the ICJ's approach potentially expanded the application of the concept, implying that the concept of obligations *erga omnes partes* may be applied outside of human rights conventions. In such a way, the notion of obligations *erga omnes partes* essentially asserts that "even in the absence of an express clause recognizing standing, all States can institute proceedings if they seek to defend a small range of obligations protecting fundamental community values [forming the *raison d'être* of a treaty]."¹⁶³ Viewed in this light, a breach of *erga omnes*

161. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979 I.C.J. 7, ¶ 44 (Dec. 15).

162. See *supra* notes 133–35.

163. Christian J. Tams, *Individual States as Guardians of Community Interests*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 379, 386 (Ulrich

partes is no different from a “material breach” under the VCLT: its practical effect is that it provides the claimant state with an additional judicial remedy to demand the cessation of the breach.¹⁶⁴

Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer & Christoph Vedder eds., 2011).

164. *Cf.* VCLT, *supra* note 74, art. 60(2).