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ARTICLE

The Articulation of Obligations Erga Omnes and Erga Omnes Partes by the International Court of Justice: Coherence or Confusion?

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Abstract

Which international obligations are characterised as obligations owed erga omnes or erga omnes partes is today a crucial question for the enforcement of international law, particularly through adjudication before the International Court of Justice (ICJ). The ICJ, however, has not given sufficiently clear indication as to how it understands and identifies obligations erga omnes and erga omnes partes. This lack of clarity and consistency permits varied approaches to the articulation of such obligations, ultimately leaving uncertain the enforceability, through adjudication and otherwise, of a wide variety of obligations.

Keywords: public international law; obligations erga omnes; obligations erga omnes partes; peremptory norms; jus cogens; locus standi; community interest; International Court of Justice

1. Introduction

Today, a variety of international obligations are declared with conviction to be obligations owed erga omnes or erga omnes partes.[1] Yet there remains surprisingly

[1] See, e.g. M Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 2000) 135–62; G Gaja, 'The Protection of General Interests in the International Community' (2011) 364 RdC 171–81; M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 IRRC 401, 424; M Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations *Erga Omnes* and *Erga Omnes Partes*' (2018) 23 JC&SL 383, 391–99; E de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments Since *Barcelona Traction*' (2013) 38 SAYIL 1, 3–4; E Cimiotta, 'The Relevance of *Erga Omnes* Obligations in Prosecuting International Crimes' (2016) 76 ZaöRV 687, 692–93; N Craik, T Davenport and R Mackenzie, *Liability for Environmental Harm to the Global Commons* (CUP 2023) 166–68; E Fasia, 'No Provision Left Behind – Law of the Sea Convention's Dispute Settlement System and Obligations *Erga Omnes*' (2021) 20 LPICT 519, 528–33; C Rose, 'Enforcing the "Community Interest" in Combating Transnational Crimes: The Potential for Public Interest Litigation' (2022) 69 NILR 57; R O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (2008) 53 ICLQ 189, 190, 192.

little agreement as to what actually justifies such characterisation. Since the celebrated dictum of the International Court of Justice (ICJ or Court) in the *Barcelona Traction* case, obligations erga omnes are routinely described as obligations owed by a State to 'the international community as a whole' and in whose performance 'all States can be held to have a legal interest'.[2] Indeed, this dictum provided the foundation for the articulation by the International Law Commission (ILC) of the consequences that follow, in the law of State responsibility, breaches of obligations owed to 'the international community as a whole' or to 'a group of States … and established for the protection of a collective interest of the group'.[3] The ILC, however, steered clear of defining these obligations and different views as to the nature of obligations erga omnes and, at times, obligations erga omnes partes, were expressed by its various Special Rapporteurs.[4] As such, the articulation of obligations erga omnes and erga omnes partes was effectively left to contemporary practice, in particular, the practice of the ICJ. In the decade following the adoption of the ILC's 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), this practice was sparse and, as a result, academic scholarship 'express[ed] widely diverging views'.[5]

Since the *Belgium v Senegal* decision of 2012, the ICJ has consistently reasoned, across several decisions, orders and advisory opinions, that the common interest of States in compliance with certain obligations supports their characterisation as obligations erga omnes or erga omnes partes.[6] In the Court's view of obligations erga omnes partes, '[t]hat common interest implies that the obligations in question are owed by any State party to all the other States parties' and 'each State party has an interest in compliance with them in any given case'.[7] It is the common interest in compliance with obligations erga omnes partes, if not also obligations erga omnes,[8] that entitles a State other than an injured State to institute contentious proceedings alleging their breach.[9]

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[2] *Barcelona Traction, Light and Power Co, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 (*Barcelona Traction*) 32.

[3] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', UNYBILC, vol II (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (ARSIWA) art 48(1). See also Institut de Droit International, 'Resolution on Obligations *Erga Omnes* in International Law' (27 August 2005) art 1.

[4] ILC, 'Second Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur' (1970) UN Doc A/CN.4/233, 178; ILC, 'Fourth Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1992) UN Doc A/CN.4/444 (Arangio-Ruiz's Fourth Report) 44; ILC, 'Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility), by Mr. Willem Riphagen, Special Rapporteur' (1980) UN Doc A/CN.4/330 (Riphagen's First Report) 120; ILC, 'Second Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (1999) UN Doc A/CN.4/498, 27.

[5] CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 119.

[6] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422 (*Belgium v Senegal*).

[7] ibid 449.

[8] P Urs, 'Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice' (2021) 34 LJIL 505, 518.

[9] *Belgium v Senegal* (n 6) 450. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Rep 477 (*The Gambia v Myanmar*) 516; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v Syrian Arab Republic)* (Provisional Measures)

A closer examination of the ICJ's jurisprudence reveals, however, that the Court's articulation of obligations erga omnes and erga omnes partes is not so straightforward. In reality, the Court is frequently persuaded by considerations beyond simply the existence of a common interest in compliance with relevant obligations to justify their characterisation as obligations erga omnes or erga omnes partes. The first is the Court's assertion, since its *Barcelona Traction* dictum, that 'the importance of the rights involved' supports the conclusion that 'all States can be held to have a legal interest in the[] protection' of obligations erga omnes.[10] The implication is that although a variety of multilateral obligations[11] reflect States' common interests, only those that protect important rights qualify as obligations erga omnes or even obligations erga omnes partes. This characterisation stands in stark contrast with a second suggestion, based, inter alia, on a different reading of the same dictum,[12] that it is instead all multilateral obligations unamenable to bilateral performance between pairs of States that constitute obligations erga omnes or erga omnes partes.[13] On two occasions, the Court seemed to rely on the non-synallagmatic nature of certain treaty obligations and suggested a gap-filling logic to support the standing of States Parties other than injured States Parties for the enforcement of such obligations, which it described as obligations erga omnes partes. Were the enforcement of these obligations to require a 'special interest' over and above the common interest, 'in many cases no State would be in the position to make such a claim'.[14] It remains open to question whether the fact of a 'victimless' breach[15] may justify the characterisation of an obligation as one owed erga omnes or erga omnes partes. With insufficient consistency from the Court as to its articulation of obligations erga omnes and erga omnes partes, any of these considerations, or a combination of them, could justifiably be deployed—by the Court, the parties appearing before it or commentators—to affirm or deny the character of an obligation as an obligation owed erga omnes or erga omnes partes.[16]

[2023] ICJ Rep 587 (*Canada and the Netherlands v Syria*) 602–03; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v Israel*) (Provisional Measures) [2024] ICJ Rep 3 (*South Africa v Israel*) 16–17.

[10] *Barcelona Traction* (n 2) 32. See also Tams (n 5) 136; S Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in E Benvenisti and G Nolte (eds), *Community Interests Across International Law* (OUP 2018) 36, 38–39.

[11] The term 'multilateral obligations' refers to 'obligations owed not individually to a particular State but to a collective, a group of States, or even to the international community as a whole': ILC, 'Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (2000) UN Doc A/CN.4/507, 34 (Crawford's Third Report). See also J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 331, 344, 346.

[12] Tams (n 5) 129–30.

[13] ibid; N Nedeski, *Shared Obligations in International Law* (CUP 2022) 88.

[14] *Belgium v Senegal* (n 6) 450. See also *The Gambia v Myanmar* (n 9) 516.

[15] Crawford's Third Report (n 11) 100.

[16] *The Gambia v Myanmar* (n 9) 536 (Dissenting Opinion of Judge Xue); *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) [2024] ICJ General List No 186 (*Palestine*) 13 (Declaration of Judge Tladi); Y Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law' (2021) 68 NILR 1, 8.

This article provides an account of the ICJ's articulation of obligations erga omnes and erga omnes partes to date, with a view to demonstrating the inconsistencies and insufficiencies in the Court's approach to this exercise. It begins by identifying the discrete justifications given by the Court for its articulation of obligations erga omnes and erga omnes partes. Next, the article examines the implications of each justification for how narrowly or widely the respective classes of obligations erga omnes and erga omnes partes are construed. In particular, the article considers the grounds on which the diversity of obligations contained in multilateral treaties could be characterised as obligations erga omnes partes—a question the Court is yet to settle, and which is only beginning to be considered by it and by commentators in light of its recent practice.

The article contributes, in the first place, to the scholarship on the articulation, rather than the enforcement, of obligations erga omnes and erga omnes partes.[17] One influential study recognises two broad approaches to the nature of obligations erga omnes based, respectively, on the importance of the rights corresponding to relevant obligations and their non-synallagmatic nature.[18] Others suggest descriptive features with which to identify obligations erga omnes and erga omnes partes.[19] Much of this work was undertaken before or during the 2000s, when the ICJ's jurisprudence on the subject was limited and 'inconclusive'.[20] At the time, the ILC and commentators recognised that any definitive account of the character of obligations erga omnes and erga omnes partes was necessarily left to future practice. By the ILC Special Rapporteur James Crawford's own admission, the *Barcelona Traction* dictum was 'only the beginning of the story'[21] and 'Article 48 of the ILC Articles was established more on *a priori* grounds than on the basis of established practice'.[22] As such, the debate on the articulation of obligations erga omnes 'carried on almost entirely in the abstract'[23] and

[17] A de Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer Law 1996); C Annacker, 'The Legal Régime of *Erga Omnes* Obligations in International Law' (1994) 46 ÖZöRV 131; Tams (n 5) ch 4; Ragazzi (n 1) chs 4–9; Tanaka (n 16) 3–11; P d'Argent, 'Les Obligations Internationales' (2019) 417 RdC 21, ch II. On the nature of multilateral obligations generally, see F Coulée, 'Droit des Traités et Non-Réciprocité: Recherche sur l'Obligation *Intégrale* en Droit International Public' (PhD Thesis, Université Pantheon-Assas, Paris II, 1999); É Wyler, 'Quelques réflexions sur la typologie des obligations en droit international, avec reference particulière au droit des traités et au droit de la responsabilité' (2019) 65 AFDI 25; Nedeski (n 13) chs 3–4; S Thin, *Beyond Bilateralism: A Theory of State Responsibility for Breaches of Non-Bilateral Obligations* (Edward Elgar 2024) 52–67.

[18] Tams (n 5) ch 4.

[19] Ragazzi (n 1) chs 4–9.

[20] Tams (n 5) 117. As de Hoogh concluded in 1996: '[d]ue to the differing character of the examples given by the Court', 'one cannot determine any criterion on which to base the *erga omnes* character of an obligation'. See de Hoogh (n 17) 55.

[21] Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 425.

[22] ibid 450.

[23] J Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in U Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 224. See also P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 422; d'Argent (n 17) 65; M Kawano, 'Standing of a State in the Contentious Proceedings of the International Court of Justice' (2012) 55 JapYBIL 208, 215; S Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 EJIL 387, 408.

largely excluded the consideration of obligations erga omnes partes, whose recognition by the ICJ is more recent.[24] By clarifying the manner of the Court's articulation of obligations erga omnes and erga omnes partes, the article also assists the practice and scholarship on the enforcement of such obligations, including the invocation of State responsibility for their breach,[25] the amenability of breaches of such obligations to adjudication[26] and the entitlement of States other than injured States to resort to unilateral countermeasures in the event of a breach.[27] How the Court characterises obligations erga omnes and erga omnes partes may also influence its answers to procedural questions before it, such as the permissibility of intervention by a State professing an 'interest of a legal nature which may be affected by the decision' in a contentious case.[28]

Section 2 scrutinises the practice of the ICJ to date to ascertain the manner of the Court's articulation of obligations erga omnes and erga omnes partes and to reveal, where relevant, inconsistencies and insufficiencies in the justifications used to support its characterisation of obligations erga omnes and erga omnes partes. Section 3 identifies the implications of the Court's various approaches for the breadth of the respective classes of obligations erga omnes and erga omnes partes and, in particular,

[24] Tams, writing in 2005, was not convinced that 'anything approaching a coherent legal regime of obligations *erga omnes partes* has already emerged': Tams (n 5) 128. On more recent developments, see M Andenas and T Weatherall, 'II. International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012' (2013) 62 ICLQ 753; Rose (n 1) 59–60, 71–72.

[25] See, e.g. DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1989) 59 BYIL 151; J Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law' (1994) 248 RdC; AL Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127; PM Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' (2002) 13 EJIL 1053; M Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility' (2002) 13 EJIL 1099.

[26] See, e.g. Gaja (n 1); de Wet (n 1) 9–19; M Benzing, 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 LPICT 369; Tanaka (n 16); Urs (n 8); T Ruys, 'Legal Standing and Public Interest Litigation – Are All *Erga Omnes* Breaches Equal?' (2021) 20 ChineseJIL 457; MI Papa, 'Litigating Collective Obligations before the International Court of Justice: Progress, Challenges and Prospects' (2024) 23 LPICT 36; D Tamada, 'Settlement of Disputes Before the ICJ: The Case of Public Interest Litigation' in J Gomula, S Wittich and M Stemeseder (eds), *Research Handbook on International Procedural Law* (Edward Elgar 2024) 330; A Hachem, O Hathaway and J Cole, 'A New Tool for Enforcing Human Rights: *Erga Omnes Partes* Standing' (2024) 62 ColumbiaJTransnatlL 259. See also P Wintour, 'Taliban to be Taken to International Court over Gender Discrimination' *The Guardian* (25 September 2024) <https://www.theguardian.com/world/2024/sep/25/taliban-to-be-taken-to-international-court-over-gender-discrimination>.

[27] See, e.g. A Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2010); M Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017).

[28] Statute of the International Court of Justice (adopted 24 October 1945) art 62. McGarry, for example, deploys a gap-filling rationale to argue that the invocation of responsibility for breaches of obligations erga omnes or erga omnes partes by States other than injured States is meant to 'resolve a *horror vacui*' in the law of State responsibility, but that such a purpose 'is not furthered by adding more States to ongoing proceedings through any form of intervention': see B McGarry, 'Decoding Nicaragua's Historic Request to Intervene in South Africa v Israel' (*EJIL:Talk!*, 21 February 2024) <https://www.ejiltalk.org/decoding-nicaraguas-historic-request-to-intervene-in-south-africa-v-israel/>.

the characterisation of obligations contained in multilateral treaties as obligations erga omnes partes.

2. The articulation of obligations erga omnes and erga omnes partes in the practice of the ICJ

The case law of the ICJ to date offers some indications as to the understanding of the Court, and at times its individual judges, of the character of obligations erga omnes and erga omnes partes. The essence of the Court's jurisprudence is that obligations erga omnes are obligations owed to 'the international community as a whole'[29] and obligations erga omnes partes are obligations under multilateral treaties 'owed by any State party to all the other States parties'.[30] Beyond this, the practice to date sheds limited light on how the Court actually characterises an obligation as an obligation owed erga omnes or erga omnes partes. Indeed, the relevant practice suggests more than one approach to the identification of such obligations.

This section outlines three approaches to the articulation of obligations erga omnes, obligations erga omnes partes, or both, seen across the ICJ's decisions, orders and advisory opinions. First, both obligations erga omnes and obligations erga omnes partes are consistently described by the Court as obligations in whose performance all the committing States share a common interest (Section 2.1). The sufficiency of this requirement, however, is doubtful. When it comes to multilateral treaties, it is unclear whether the common interest of the States Parties in compliance with the treaty, inferred from the treaty's object and purpose, may justifiably be used to characterise any or all of the obligations contained therein as obligations erga omnes partes. Second, the ICJ has, since the *Barcelona Traction* case, indicated more than once that the common interest in compliance with both obligations erga omnes and erga omnes partes is grounded in, or qualified by, 'the importance of the rights involved' (Section 2.2).[31] This rationale is cause for confusion as it elides the character of obligations erga omnes and erga omnes partes on the one hand, and peremptory norms of international law on the other, both as a matter of identification and also when determining the consequences for third States of breaches of obligations declared by the Court to be obligations erga omnes or erga omnes partes.[32] Third, the ICJ has twice implicitly supported its characterisation of multilateral treaty obligations as obligations erga omnes partes based on their non-synallagmatic nature by concluding that, in the absence of such a characterisation, 'in many cases no State would be in the position to make … a claim' (Section 2.3).[33] In the context of obligations erga omnes, however, only individual judges have advanced this view. Which of the three approaches, or combination of them, is decisive in the characterisation of an obligation owed erga

[29] *Barcelona Traction* (n 2) 32. See also ARSIWA (n 3) art 48(1)(b).

[30] *Belgium v Senegal* (n 6) 449. See also *The Gambia v Myanmar* (n 9) 515–16; ARSIWA (n 3) art 48(1)(a). There is no reason to exclude the possibility that obligations erga omnes partes may also arise under customary international law.

[31] *Barcelona Traction* (n 2) 32.

[32] The article addresses peremptory norms to the extent of their elision with obligations erga omnes.

[33] *Belgium v Senegal* (n 6) 450. See also *The Gambia v Myanmar* (n 9) 516.

omnes or erga omnes partes, and whether different approaches might be warranted for the characterisation of obligations erga omnes and erga omnes partes, respectively, is open to question.

2.1. The common interest in compliance with relevant obligations

Even before it introduced the language of obligations erga omnes and erga omnes partes, the ICJ recognised that the international community as a whole, or a group of States, could share a common legal interest in compliance with certain obligations.[34] While omitting the terminology of obligations erga omnes and erga omnes partes, the Court in the *South West Africa* cases recognised that the legal interest shared by a group of States may underlie certain obligations so as to entitle each State to seek their enforcement through adjudication. Affirming its jurisdiction in the cases brought by Ethiopia and Liberia, the Court recognised that the then Member States of the League of Nations enjoyed '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] For Judge Jessup, such legal interests existed in particular in respect of 'general humanitarian causes'.[36] Even judges who subsequently supported the dismissal of the cases owing to the lack of a legal interest on the part of the applicant States affirmed the existence, in general terms, of obligations of this character. Judges Spender and Fitzmaurice agreed that States Parties to a treaty may 'have a legal interest in its due observance, even though the alleged breach of it has not, or not yet, affected them directly'.[37] Like Judge Jessup, Judge Bustamante took note of the 'human rights objectives' of the mandate,[38] which in his view implied that:

> all the States Members would have the same legal interest as the League in the dispute, and would be affected to the same extent by violations of the agreements, one or more of those States having the right to appear before the Court to defend the common cause.[39]

While ultimately dismissing the cases, the Court did not exclude in principle that the Member States of the League of Nations could have shared a legal interest in South Africa's fulfilment of its obligations. It was the view of the Court, however, that 'such rights or interests, in order to exist, must be clearly vested in those who claim them … and that in the present case, none were ever vested in individual members of the League'.[40] In contrast, several dissenting judges emphasised the existence of 'general

[34] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (*Reservations*) 23. See also *SS Wimbledon (United Kingdom and Ors v Germany)* (Merits) [1923] PCIJ Rep Series A No 1, 20.

[35] *South West Africa (Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) [1962] ICJ Rep 319, 343.

[36] ibid 425 (Separate Opinion of Judge Jessup). See further ibid 428 (Separate Opinion of Judge Jessup); ibid 447–48 (Separate Opinion of Judge Mbanefo).

[37] ibid 548 (Joint Dissenting Opinion of Judges Spender and Fitzmaurice).

[38] ibid 361 (Separate Opinion of Judge Bustamante).

[39] ibid 361–62 (Separate Opinion of Judge Bustamante).

[40] *South West Africa (Ethiopia v South Africa; Liberia v South Africa*) (Second Phase) [1966] ICJ Rep 6 (*South West Africa* 1966) 33. For a critique, see Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 409–10.

interests' under international law as it stood at the time[41] and under the mandate specifically.[42]

Shortly afterwards, the Court in its *Barcelona Traction* dictum introduced the terminology of 'obligations *erga omnes*', describing these as 'obligations of a State towards the international community as a whole' and as obligations which are '[b]y their very nature … the concern of all States'.[43] This language was subsequently recalled in *The Wall*,[44] *Chagos Archipelago*[45] and *Palestine* advisory opinions.[46] The ICJ also relied on the *Barcelona Traction* dictum to affirm the existence of a common interest in compliance with certain multilateral treaty obligations, which it described as 'obligations *erga omnes partes*', in the cases in which it endorsed the standing of States Parties other than injured States Parties to institute contentious proceedings pertaining to alleged breaches of such obligations. In doing so, the Court retreated from its earlier view in *South West Africa* that any entitlement to standing based on a common interest in compliance with relevant multilateral treaty obligations must be made explicit.[47]

In the *Belgium v Senegal* case, the Court used the object and purpose of the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), articulated in the treaty's preamble, to demonstrate that States Parties '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'.[48] Where an alleged offender is present in the territory of a given State, this includes a common interest in compliance by that State with the obligations to conduct a preliminary inquiry into the facts and to prosecute the case.[49] Accordingly, the Court concluded that these and any other obligations erga omnes partes contained in the Torture Convention are owed 'by any State party to all the other States parties' and 'each State party has an interest in compliance with them in any given case'.[50] This reasoning supported the Court's affirmation of Belgium's standing to bring the case.[51]

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[41] *South West Africa* 1966 (n 40) 242 (Dissenting Opinion of Judge Koretsky); *South West Africa* 1966 (n 40) 252 (Dissenting Opinion of Judge Tanaka); *South West Africa* 1966 (n 40) 374, 387–88 (Dissenting Opinion of Judge Jessup); *South West Africa* 1966 (n 40) 478 (Dissenting Opinion of Judge Forster); *South West Africa* 1966 (n 40) 502–04 (Dissenting Opinion of Judge Mbanefo).

[42] ibid 247 (Dissenting Opinion of Judge Koretsky); ibid 232 (Dissenting Opinion of Judge Koo); ibid 479 (Dissenting Opinion of Judge Forster); ibid 501 (Dissenting Opinion of Judge Mbanefo); ibid 463 (Dissenting Opinion of Judge Padilla Nervo).

[43] *Barcelona Traction* (n 2) 32. See also ARSIWA (n 3) art 48(1); Section 2.2.

[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*The Wall*) 199.

[45] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1964* (Advisory Opinion) [2019] ICJ Rep 95 (*Chagos Archipelago*) 139.

[46] *Palestine* (n 16) 74.

[47] *The Gambia v Myanmar* (n 9) 544 (Declaration of Judge ad hoc Kreß). See also Crawford's Third Report (n 11) 31, 35; Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 450; ILC, 'Third Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles), by Mr. Willem Riphagen, Special Rapporteur' (1982) UN Doc A/CN.4/354, 30.

[48] *Belgium v Senegal* (n 6) 449.

[49] ibid. See also ibid 587 (Declaration of Judge Donoghue).

[50] ibid 449.

[51] ibid 450.

In contrast, for the dissenting Judge Xue, the States Parties 'in no way intended to create obligations *erga omnes partes*' under relevant treaty provisions.[52] Nor was Judge ad hoc Sur convinced by the characterisation of relevant obligations as obligations erga omnes partes, which he did not consider had been 'justif[ied] in any way'.[53] The majority failed, in his view, to draw the necessary distinction between those treaty obligations 'which have an *erga omnes* character and those which do not'.[54] He opined that multilateral treaties, such as the Torture Convention, cannot, 'by their nature' alone, create obligations erga omnes partes.[55] Regrettably, for Judge ad hoc Sur, 'the object and purpose of the Convention, as determined by the Court, … superseded and removed all other considerations',[56] including scrutiny of the obligations in question.[57]

The ICJ used the same approach to affirm The Gambia's standing in *The Gambia v Myanmar*, pointing to the common interest of States Parties to the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)—well established since its *Reservations* advisory opinion[58]—'to ensure the prevention, suppression and punishment of genocide'.[59] The Court echoed the language used in *Belgium v Senegal* to conclude that the 'common interest in compliance implie[d] that the obligations in question are owed by any State party to all the other States parties'; 'they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case'.[60] The reference to 'the obligations in question' was presumably to at least some, if not all, of the obligations alleged by The Gambia to have been breached by Myanmar.[61] Judge ad hoc Kreß sought to clarify that, in his view, the common interest of States Parties in compliance did not necessarily mean that 'each and every obligation contained therein necessarily constitutes an obligation *erga omnes partes*'.[62] He drew what he considered to be the relevant distinction between obligations 'central to the fulfilment of the common interest underlying the Genocide Convention', which he would characterise as obligations erga omnes partes, and those 'markedly peripheral' to such an objective.[63] It

[52] ibid 576 (Dissenting Opinion of Judge Xue).
[53] ibid 611 (Dissenting Opinion of Judge ad hoc Sur).
[54] ibid 614 (Dissenting Opinion of Judge ad hoc Sur).
[55] ibid.
[56] ibid 616 (Dissenting Opinion of Judge ad hoc Sur).
[57] ibid 615–16 (Dissenting Opinion of Judge ad hoc Sur).
[58] *Reservations* (n 34) 23.
[59] *The Gambia v Myanmar* (n 9) 515. See also *The Gambia v Myanmar* (Provisional Measures) [2020] ICJ Rep 3, 17 (*The Gambia v Myanmar* 2020).
[60] *The Gambia v Myanmar* (n 9) 515–16.
[61] See Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) arts I, III–VI. See also *The Gambia v Myanmar* 2020 (n 59) 17; X Mao, 'Public Interest Litigation before the International Court of Justice: Comment on *The Gambia v. Myanmar* Case' (2022) 21 ChineseJIL 589, 594–96. The Court recently referred to 'the *erga omnes partes* character of certain obligations under the [International Convention on the Elimination of All Forms of Racial Discrimination]'. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Judgment) [2024] ICJ General List No 181, para 41.
[62] *The Gambia v Myanmar* (n 9) 545 (Declaration of Judge ad hoc Kreß).
[63] ibid.

was not necessary, in the opinion of the Judge ad hoc, for the Court to have 'elaborate[d] in more detail on what it takes for an obligation, enshrined in a convention, to "transcend the sphere of bilateral relations of the States parties" so as to acquire an *erga omnes partes* character'.[64] As in *Belgium v Senegal*, Judge Xue objected that 'the notions of obligations *erga omnes* or *erga omnes partes* were not established in general international law' at the time of the drafting of the Genocide Convention and that their enforcement by States Parties other than an injured State Party could not have been intended by the drafters.[65] She was also concerned, more generally, that 'such common interest', and thus obligations erga omnes partes, 'could equally be identified in many other conventions relating, for example, to human rights, disarmament and [the] environment'.[66]

The common interest in compliance with the obligations erga omnes partes contained in the Torture Convention and Genocide Convention, respectively, was affirmed in the ICJ's orders indicating provisional measures in *Canada and the Netherlands v Syria*[67] and *South Africa v Israel*.[68] As before, in neither instance did the Court specify whether such a characterisation applied to all the obligations arising under the relevant treaty and, if not, to which obligations such a characterisation did apply. Judge Xue, consistently with her earlier position, did not consider that the 'common interest' of States Parties to the Torture Convention gave the applicant States in *Canada and the Netherlands v Syria* the entitlement to institute the proceedings.[69] In contrast, in *South Africa v Israel*, the same judge considered that when it came to 'a protected group such as the Palestinian people, it is least controversial that the international community has a common interest in its protection'.[70] In her view, 'this is the very type of case where the Court should recognize the legal standing of a State party to the Genocide Convention to institute proceedings on the basis of *erga omnes partes*'.[71]

2.2. The importance of the rights underlying relevant obligations

In the *Barcelona Traction* case, the ICJ did not stop at describing obligations erga omnes as obligations 'towards the international community as a whole', which are 'the concern of all States'.[72] The Court explained further that it was '[i]n view of the importance of the rights involved' that 'all States can be held to have a legal interest in their protection'.[73] It gave as examples obligations 'deriv[ing] … from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights

[64] ibid.

[65] ibid 525 (Dissenting Opinion of Judge Xue). Interestingly, Judge Xue distinguished the case from the *South West Africa* cases, which she described as a '*sui generis*' context in which the Member States of the League of Nations had a legal interest in compliance. See ibid 531–33 (Dissenting Opinion of Judge Xue).

[66] ibid 536 (Dissenting Opinion of Judge Xue).

[67] *Canada and the Netherlands v Syria* (n 9) 602–03.

[68] *South Africa v Israel* (n 9) 16–17.

[69] *Canada and the Netherlands v Syria* (n 9) 616 (Declaration of Judge Xue).

[70] *South Africa v Israel* (n 9) 34 (Declaration of Judge Xue).

[71] ibid.

[72] *Barcelona Traction* (n 2) 32.

[73] ibid.

of the human person, including protection from slavery and racial discrimination'.[74] While some 'corresponding rights of protection' had, in the Court's view, 'entered into the body of general international law', 'others [we]re conferred by international instruments of a universal or quasi-universal character'.[75] Notably, the Court avoided any reference to peremptory norms of international law, whose inclusion in the Vienna Convention on the Law of Treaties was, at the time, new and somewhat controversial.[76] That the Court characterised obligations erga omnes by reference to the importance of the rights underlying them was also the understanding within the ILC.[77]

What may well have been a passing remark the Court saw fit to make in the aftermath of the *South West Africa* cases has since become an integral part of its articulation of obligations erga omnes and erga omnes partes.[78] The reference to 'the importance of the rights involved' to describe obligations erga omnes was recalled over 30 years later in the advisory opinion in *The Wall*, on which basis the Court concluded that the obligations erga omnes breached by Israel included the obligation 'to respect the right of the Palestinian people to self-determination' and 'certain … obligations under international humanitarian law'.[79] The Court further justified its characterisation of relevant obligations under international humanitarian law as obligations erga omnes on the basis that they are 'so fundamental to the respect of the human person' and 'constitute intransgressible principles of international customary law', a description it had previously given to such obligations in the *Nuclear Weapons* advisory opinion,[80] and which it repeated in its recent *Palestine* advisory opinion.[81] Judge Higgins, while sceptical of the majority's characterisation of these obligations as obligations erga omnes,[82] nevertheless agreed that 'there are certain rights in which, by reason of their importance, "all states have a legal interest in their protection"'.[83]

Subsequent cases in which the common interest in compliance with obligations erga omnes or erga omnes partes was invoked also referred to the importance of

[74] ibid.

[75] ibid.

[76] See ibid 312, 325 (Separate Opinion of Judge Ammoun); Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 409–10. The ICJ's mention of peremptory norms came later: see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Judgment) [2006] ICJ Rep 6, 32.

[77] ILC, 'Fifth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Continued)' (1976) UN Doc A/CN.4/291, 29, referring to the importance of the obligations themselves.

[78] The *Barcelona Traction* dictum is widely viewed as an apology for the Court's 1966 decision in the *South West Africa* cases: Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 410.

[79] *The Wall* (n 44) 199.

[80] ibid; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons*) 257. Particular reference was made to common art 1 of the four Geneva Conventions of 1949, which the Court did not expressly characterise as encompassing an obligation erga omnes or erga omnes partes. The reference in the following sentence and paragraph to 'the character and the importance of the rights and obligations involved' suggests such a characterisation. *The Wall* (n 44) 200. See also ibid 217 (Separate Opinion of Judge Higgins).

[81] *Palestine* (n 16) 31.

[82] *The Wall* (n 44) 217 (Separate Opinion of Judge Higgins).

[83] ibid 216 (Separate Opinion of Judge Higgins).

the rights corresponding to relevant obligations to do so, even where the treaties in question did not actually confer any such rights on individuals or groups.[84] The *Belgium v Senegal* decision described the legal interest of States Parties to the Torture Convention in 'the protection of the rights involved', citing the *Barcelona Traction* dictum on the point.[85] This language was recalled again vis-à-vis the Torture Convention in the order indicating provisional measures in the ongoing case of *Canada and the Netherlands v Syria*.[86] The *Palestine* advisory opinion, like *The Wall* advisory opinion, repeated the *Barcelona Traction* reference to 'the importance of the rights involved'[87] and concluded that the obligations erga omnes violated by Israel included:

> the obligation to respect the right of the Palestinian people to self-determination and the obligation arising from the prohibition of the use of force to acquire territory as well as certain of its obligations under international humanitarian law and international human rights law.[88]

For the Court, 'a great many of the rules' of the Geneva Convention relative to the Protection of Civilian Persons in Times of War in particular are 'so fundamental to the respect of the human person, and elementary considerations of humanity', that they 'constitute intransgressible principles of international customary international law' and 'incorporate obligations which are essentially of an *erga omnes* character'.[89]

In some cases, individual judges described obligations erga omnes or obligations erga omnes partes as obligations protecting important values rather than, or alongside, important rights. In her declaration appended to the *Chagos Archipelago* advisory opinion, Judge Xue emphasised 'the paramount importance of the principle of self-determination', which was 'reflected in its *erga omnes* character'.[90] For Judge Robinson, writing in the same context, the examples of obligations erga omnes given by the Court in its *Barcelona Traction* dictum '[i]ndicate[d] that the essence of obligations *erga omnes* is that they protect the fundamental values of the international community, such as those relating to respect for the inherent dignity and worth of the human

[84] The Genocide Convention makes no provision for rights on the part of 'national, ethnical, racial or religious' groups: Genocide Convention (n 61) art II. Similarly, the Torture Convention does not espouse any right to be protected from acts of torture; it imposes obligations on States Parties to ensure that individuals alleging that they have been subjected to torture have a right to complain and that victims of torture have a right of redress. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention) arts 13–14. See also d'Argent (n 17) 71–73; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 NordicJIL 211, 235. But see PYS Chow, 'On Obligations *Erga Omnes Partes*' (2021) 52 GeoJIntlL 469, 482.

[85] *Belgium v Senegal* (n 6) 449.

[86] *Canada and the Netherlands v Syria* (n 9) 603.

[87] *Palestine* (n 16) 74.

[88] ibid.

[89] ibid 31. See also *Nuclear Weapons* (n 80) 257; *The Wall* (n 44) 199. In *The Wall* and *Palestine* advisory opinions, the Court did not actually declare the treaty-based rules to be obligations erga omnes partes. See Tams (n 5) 123.

[90] *Chagos Archipelago* (n 45) 146 (Declaration of Judge Xue).

person, the prohibition of aggression and genocide'.[91] Similarly, in *The Gambia v Myanmar*, Judge ad hoc Kreß considered that the erga omnes partes character of relevant obligations in the Genocide Convention was justified not merely by 'the shared interest that all States parties have in the preservation of the legal régime established by a multilateral treaty'.[92] It was also relevant that 'the Genocide Convention serves a much more pronounced common interest in that it recognizes and protects a fundamentally important common value'.[93]

The *Barcelona Traction* reference to 'the importance of the rights involved' is the root of some unfortunate terminological and conceptual confusion in subsequent jurisprudence.[94] The Court has referred, on more than one occasion, to 'rights *erga omnes*' either in the place of, or alongside, 'obligations *erga omnes*'.[95] The term 'rights *erga omnes*' was usually taken to refer to the interests of individuals or groups who were the beneficiaries of relevant obligations. In the *East Timor* case, Portugal argued, inter alia, that the rights allegedly breached by Australia were 'rights *erga omnes*', suggesting that this entitled it to require Australia 'to respect them' regardless of whether Indonesia had 'conducted itself in a similarly unlawful manner'.[96] The Court used the same language when it confirmed that the right of peoples to self-determination, rather than any obligation arising out of it, 'has an *erga omnes* character'.[97] Compounding the confusion, the Court referred, in the same figurative breath, to the irrelevance of 'the nature of the obligations invoked' when it affirmed the applicability to the case of the 'indispensable third party' rule.[98] The language of 'rights *erga omnes*' was recalled again in *The Wall* advisory opinion,[99] with the majority referring further, and in looser terms still, to 'the character and the importance of the rights and obligations involved'.[100] The Court subsequently reverted to the language of 'obligations *erga omnes*' to describe the obligation to respect the right of peoples to self-determination in the *Chagos Archipelago* advisory opinion.[101] Only one judge in that case referred, as the Court had previously done, to the '*erga omnes* character' of the 'right of peoples to

[91] ibid 311 (Separate Opinion of Judge Robinson). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595 (*Bosnia-Herzegovina v Yugoslavia*) 647 (Separate Opinion of Judge Weeramantry).

[92] *The Gambia v Myanmar* (n 9) 545 (Declaration of Judge ad hoc Kreß).

[93] ibid 545–46 (Declaration of Judge ad hoc Kreß).

[94] *Barcelona Traction* (n 2) 32.

[95] Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 412 ('as if the general notion of a legal right is explicated by the addition of Latin words'). For a different view, see Tanaka (n 16) 7–8.

[96] *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102.

[97] ibid. See also ibid 129 (Separate Opinion of Judge Ranjeva) ('an absolute right *erga omnes*'); ibid 142 (Separate Opinion of Judge Weeramantry) ('the *erga omnes* nature of these rights'); ibid 265–66 (Dissenting Opinion of Judge Skubiszewski).

[98] ibid 102.

[99] *The Wall* (n 44) 172. See also *The Wall* (n 44) 259 (Separate Opinion of Judge Elaraby) ('the exercise … of an *erga omnes* right').

[100] ibid 200. See also *Bosnia-Herzegovina v Yugoslavia* (n 91) 616 ('rights and obligations *erga omnes*').

[101] *Chagos Archipelago* (n 45) 139. See also C Eggett and S Thin, 'Clarification and Conflation: Obligations *Erga Omnes* in the Chagos Advisory Opinion' (*EJIL:Talk!*, 21 May 2019) <https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/>.

self-determination'.[102] Like the *Chagos Archipelago* advisory opinion, the more recent *Palestine* advisory opinion preferred the language of 'obligations *erga omnes*' to that of 'rights *erga omnes*'.[103] As before, this did not dissuade individual judges from referring to 'rights and obligations *erga omnes*'[104] and from characterising the right to self-determination as a 'right *erga omnes*'.[105]

Beyond the various inconsistent references to 'obligations' and 'rights' erga omnes, the importance of the rights underlying obligations owed erga omnes and erga omnes partes was also used by the ICJ to suggest that the breach of obligations erga omnes and erga omnes partes triggers obligations for States other than injured States. In *The Wall* advisory opinion, the Court, following its characterisation of relevant obligations as obligations erga omnes, referred to 'the character and the importance of the rights and obligations involved' to conclude that all States were under an obligation 'not to recognize the illegal situation resulting from the construction of the wall', 'not to render aid or assistance in maintaining the situation' and 'to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end'.[106] In the *Chagos Archipelago* advisory opinion, the Court concluded, on the back of its characterisation of the obligation to respect the right to self-determination as an obligation erga omnes, that 'all Member States must co-operate with the United Nations' to give effect to 'the modalities required to ensure the completion of the decolonization of Mauritius'.[107] The same approach was taken in the *Palestine* advisory opinion, wherein the Court concluded, again 'in view of the character and importance of the rights and obligations involved', that all States are obliged 'not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory', 'not to render aid or assistance in maintaining the situation' and 'to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end'.[108] Going beyond its previous jurisprudence, the Court also declared that, 'in view of the serious breaches of obligations *erga omnes*', '[t]he duty of non-recognition … applies to international organizations, including the United Nations'.[109] In yet another departure from its case law, elsewhere the *Palestine* advisory opinion declared that 'in cases of foreign occupation … the right to self-determination constitutes a peremptory norm of international law'.[110] Given the Court's references to both obligations erga omnes and

[102] *Chagos Archipelago* (n 45) 341 (Declaration of Judge Iwasawa).

[103] *Palestine* (n 16) 65.

[104] ibid 1 (Declaration of Judge Brant).

[105] ibid 33 (Dissenting Opinion of Judge Sebutinde).

[106] *The Wall* (n 44) 200. See also Institut de Droit International (n 3) art 5.

[107] *Chagos Archipelago* (n 45) 139. But see D Tladi, *The International Law Commission's Draft Conclusions on Peremptory Norms* (OUP 2024) 236.

[108] *Palestine* (n 16) 76. But see E Carli, 'Obligations Erga Omnes, Norms of Jus Cogens and Legal Consequences for "Other States" in the ICJ Palestine Advisory Opinion' (*EJIL:Talk!*, 26 August 2024) <https://www.ejiltalk.org/obligations-erga-omnes-norms-of-jus-cogens-and-legal-consequences-for-other-states-in-the-icj-palestine-advisory-opinion/>.

[109] *Palestine* (n 16) 76.

[110] ibid 66.

peremptory norms, Judge Cleveland sought to make clear that it was the erga omnes nature of the obligations breached, rather than any peremptory status, that gave rise to obligations on the part of other States and the UN.[111] In her view, this is both 'consistent with the Court's prior case law' and the 'correct' approach.[112]

In contrast, other judges writing separately in the advisory opinions took the Court's various references to 'the character and the importance of the rights and obligations involved' as references to their peremptory status.[113] Some judges also took issue, in principled terms, with what they saw as the Court's reliance on the character of the obligations breached as obligations erga omnes or erga omnes partes to support the existence of obligations for other States and, as per the *Palestine* advisory opinion, international organisations. Judge Higgins, in her separate opinion in *The Wall*, objected to the majority's invocation of the *Barcelona Traction* dictum 'for more than it can bear', explaining that the concept of obligations erga omnes discussed therein had 'nothing to do with imposing substantive obligations on third parties to a case'.[114] The articulation of obligations erga omnes in the *Barcelona Traction* case had, in her view, been 'directed to a very specific issue of jurisdictional *locus standi*'.[115] Judge Kooijmans hinted at the same concern.[116] For Judge Cançado Trindade, writing separately in the *Chagos Archipelago* advisory opinion, the Court should not have referred 'only to obligations *erga omnes* without focusing and elaborating on *jus cogens* wherefrom they ensue'.[117] It was necessary, in his view, to 'elaborate [the Court's] reasoning on *jus cogens* (not only obligations *erga omnes*) and its legal consequences'.[118] Judges Sebutinde and Robinson, each writing separately to the same opinion, were more explicit in drawing the link between the serious breach of a peremptory norm of international law, rather than the breach of an obligation erga omnes or erga omnes partes, and relevant consequences for other States.[119]

Most recently, in the context of the *Palestine* advisory opinion, Judge Gómez Robledo, recalling Article 41 ARSIWA, regretted that the Court did not 'directly establish[] the link between the finding that the right to self-determination has the status of a peremptory norm and the consequences of its violation'.[120] The 'hierarchically higher' status of the right to self-determination was not, in his view,

[111] ibid 7 (Separate Opinion of Judge Cleveland).

[112] ibid.

[113] *Chagos Archipelago* (n 45) 289 (Separate Opinion of Judge Sebutinde); *Palestine* (n 16) 8 (Separate Opinion of Judge Gómez Robledo).

[114] *The Wall* (n 44) 216 (Separate Opinion of Judge Higgins). See further *The Wall* (n 44) 216–17 (Separate Opinion of Judge Higgins); Crawford (n 23) 234. For Crawford, *The Wall* (n 44) 'can be read as an elliptical reference to the peremptory character of the norms in question rather than their *erga omnes* character': see Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 475.

[115] *The Wall* (n 44) 216 (Separate Opinion of Judge Higgins).

[116] ibid 231 (Separate Opinion of Judge Kooijmans).

[117] *Chagos Archipelago* (n 45) 219 (Separate Opinion of Judge Cançado Trindade).

[118] ibid.

[119] ibid 284, 289, 291 (Separate Opinion of Judge Sebutinde); ibid 326 (Separate Opinion of Judge Robinson). Both judges cited ARSIWA (n 3) art 41 for these consequences, which they considered reflected the position under customary international law. But see ibid 293 (Separate Opinion of Judge Sebutinde).

[120] *Palestine* (n 16) 8 (Separate Opinion of Judge Gómez Robledo).

founded in the fact that the right gave rise to obligations erga omnes.[121] Likewise, Judge Tladi, who had been the ILC's Special Rapporteur on peremptory norms, lamented that the Court did not 'pronounce itself clearly on the peremptory status of norms that are widely accepted as having that character' and instead invoked 'the related but distinct concept of *erga omnes*'.[122] The Court's resort to obligations erga omnes gave Judge Tladi 'cause for pause', since 'this language might suggest that the obligations for third States … flow not from the peremptory status of the right of self-determination but rather from the *erga omnes* character of the obligations breached'.[123] For Judge Tladi, the majority's approach was 'based on a complete miscomprehension of the relationship between peremptory norms and *erga omnes* obligations' and was contrary to the views of States, the ILC and the scholarship.[124] In his view, '[t]he *erga omnes* character of an obligation', which entitles States other than injured States to invoke responsibility for a breach, is 'a consequence of the nature of the norm from which the obligation arises'.[125] It 'does not itself create obligation [sic] on third States'.[126] Were this the case, breaches of obligations erga omnes and erga omnes partes concerning common spaces, in addition to those with 'primarily humanitarian objectives', could give rise to 'the threefold duties of non-recognition, non-assistance and co-operation' on the part of other States.[127]

2.3. The gap in the enforcement by injured States of relevant obligations

The *Barcelona Traction* dictum relied explicitly on 'the importance of the rights involved' to conclude that 'all States can be held to have a legal interest in the[] protection' of obligations erga omnes.[128] Yet the same dictum could also be taken to reflect a different characterisation of obligations erga omnes, based on the structure of their performance. This latter characterisation is supported by the Court's drawing of 'an essential distinction' between obligations in the field of diplomatic protection and obligations erga omnes.[129] While obligations relating to diplomatic protection give rise to bilateral obligations between States, obligations erga omnes are non-synallagmatic or 'non-bilateralisable'.[130] When it comes to the latter, the conduct in performance of the obligation towards one State also fulfils the obligation towards all the others.[131] Conversely, the breach of the obligation towards one State necessarily involves the

[121] ibid 9 (Separate Opinion of Judge Gómez Robledo).
[122] ibid 7 (Declaration of Judge Tladi).
[123] ibid 11 (Declaration of Judge Tladi). See also ibid 8–9 (Declaration of Judge Tladi).
[124] ibid 12 (Declaration of Judge Tladi). See further ibid 11–14 (Declaration of Judge Tladi).
[125] ibid 12 (Declaration of Judge Tladi).
[126] ibid.
[127] ibid 13 (Declaration of Judge Tladi).
[128] *Barcelona Traction* (n 2) 32.
[129] Tams (n 5) 129.
[130] K Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 NILR 273, 281; Annacker (n 17) 135–36; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 RdC 370; R Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) 65 BYIL 383, 386–87; Tams (n 5) 129–35; J Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907, 908; Thin (n 17) 52–58.
[131] Arangio-Ruiz's Fourth Report (n 4) 62; Coulée (n 17) 25; Annacker (n 17) 149; d'Argent (n 17) 85.

breach of the obligation towards all the others.[132] ILC members like Special Rapporteur Arangio-Ruiz specifically endorsed this articulation of obligations erga omnes rather than the assessment of 'the importance of the rights involved':[133]

> the concept of *erga omnes* obligation is not characterized by the importance of the interest protected by the norm (as is typical of *jus cogens*) but rather by the 'legal indivisibility' of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others.[134]

Like his predecessor, Special Rapporteur Crawford was reluctant to describe obligations erga omnes as 'necessarily imperative or of fundamental importance to the international community'.[135]

Whatever the judges of the ICJ may have intended in drawing a line between obligations in the field of diplomatic protection and obligations erga omnes, and whatever the view preferred within the ILC, many of the obligations recognised by the Court to be obligations erga omnes in the *Barcelona Traction* dictum, such as the prohibition of aggression,[136] are 'perfectly bilateralisable'.[137] Nor does the subsequent jurisprudence clearly support an understanding of obligations erga omnes or erga omnes partes based on their non-synallagmatic nature. The Court has done no more than indicate, in relation to obligations erga omnes partes, that relevant obligations are owed 'by any State party to all the other States parties'.[138] Only Judge Tladi, writing separately in the *Palestine* advisory opinion, additionally described obligations erga omnes as encompassing both obligations with underlying humanitarian objectives and '[o]bligations arising from customary international law norms concerning common spaces',[139] in the latter case '*because of their very character as not being capable of being owed bilaterally*'.[140]

Notwithstanding the absence of any formal endorsement by the ICJ of the non-synallagmatic nature of obligations erga omnes and erga omnes partes, or the 'structural approach' to articulating such obligations,[141] the Court has acknowledged more than once that the structure of performance of certain obligations is such that their breach will not necessarily injure another State, precluding, in turn, the

[132] In the context of the Vienna Convention on the Law of Treaties (opened for signature 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 60(2)(c), see B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties' (1970) 20 ÖZöRV 5, 75.

[133] *Barcelona Traction* (n 2) 32.

[134] Arangio-Ruiz's Fourth Report (n 4) 34; see ibid 45.

[135] ILC, 'First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (1989) UN Doc A/CN.4/490, 69; see also 76–77; Crawford's Third Report (n 11) 34.

[136] de Hoogh (n 17) 54; Tams (n 5) 134; Arangio-Ruiz's Fourth Report (n 4) 45 n 306.

[137] Tams (n 5) 134. See further 130–36.

[138] *Belgium v Senegal* (n 6) 449. See also *The Gambia v Myanmar* (n 9) 515–16; *South Africa v Israel* (n 9) 16–17; *Canada and the Netherlands v Syria* (n 9) 603. But see the reference by Judge ad hoc Kreß to 'the structure of the legal relationship' that obligations establish. *The Gambia v Myanmar* (n 9) 543 (Declaration of Judge ad hoc Kreß) 543.

[139] *Palestine* (n 16) 13 (Declaration of Judge Tladi).

[140] ibid (emphasis in original).

[141] Tams (n 5) 130.

enforcement of such obligations by an injured State. Since the *South West Africa* cases, this fact has been used by the Court to categorise certain obligations as obligations erga omnes partes or to support the standing of States other than injured States to invoke responsibility in the event of the breach of relevant obligations. Setting aside the views expressed by some judges, this approach was not taken by the Court in relation to obligations erga omnes.

When dismissing the *South West Africa* cases, the Court engaged with, but ultimately rejected, the argument that if the Member States of the League of Nations were not entitled individually to seek the performance of South Africa's mandate for South West Africa, there would be 'no entity' entitled to do so.[142] For the majority, it was impermissible to remedy this reality by 'postulat[ing] the existence of … rights' in order to avoid a gap in the enforceability of South Africa's obligations.[143] The Court declined the task of 'filling in the gaps' since, in its view, '[r]ights cannot be presumed to exist merely because it might seem desirable that they should'.[144] Support for the argument was nevertheless seen in the dissenting opinion of Judge Koo, who endorsed the entitlement of Member States of the League of Nations 'to invoke, in the last resort, judicial protection of the sacred trust'.[145] Similarly, Judge Mbafeno regretted that '[t]he Court's interpretation of the Mandate, pursued to its logical conclusion, le[ft] the Mandatory without any enforceable obligations' in relation to the provisions in question.[146]

Expressing similar dissatisfaction with gaps in the enforcement of obligations under international humanitarian law and international human rights law, Judge Simma, writing separately in the *DRC v Uganda* case, considered that Uganda in principle enjoyed standing in respect of its counterclaim alleging violations by the Democratic Republic of the Congo of obligations vis-à-vis non-Ugandan nationals. He described various obligations contained in the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Torture Convention[147] as 'instances *par excellence* of obligations that are owed to a group of States … and are established for the protection of a collective interest of the States parties'.[148] In Judge Simma's view, 'at least the core of the obligations deriving from international humanitarian law and human rights law are valid *erga omnes*'.[149] Writing in his academic capacity, he explained that 'the very raison d'être of at least certain

[142] *South West Africa* 1966 (n 40) 36.

[143] ibid.

[144] ibid 48.

[145] ibid 219 (Dissenting Opinion of Judge Koo).

[146] ibid 491 (Dissenting Opinion of Judge Mbafeno). See also R Higgins, 'The International Court and South West Africa: The Implications of the Judgment' (1966) 42 IntlAff 573, 583–85.

[147] The obligations he described as obligations erga omnes partes included the Torture Convention (n 84) art 16(1), at issue in *Canada and the Netherlands v Syria* (Application Instituting the Proceedings) General List No 188 (8 June 2023) para 59(c) <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-app-01-00-en.pdf>.

[148] *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, 348 (Separate Opinion of Judge Simma).

[149] ibid 349 (Separate Opinion of Judge Simma).

obligations *erga omnes*',[150] whose breach does not necessarily give rise to injury, implies that States other than injured States must be entitled to invoke the responsibility of the wrongdoing State, 'so as to make the most important community interests enforceable'.[151]

In the apparent reversal of its position in *South West Africa*, the Court, on two subsequent occasions, invoked the necessity of ensuring the enforceability of obligations erga omnes partes in multilateral treaties to support its endorsement of the standing of States Parties in the event of a breach and in the absence of injury. In *Belgium v Senegal*, the Court explained that, were a special interest required for the purpose of 'mak[ing] a claim concerning the cessation of an alleged breach' of the obligations erga omnes partes contained in the Torture Convention, 'in many cases no State would be in the position to make such a claim'.[152] Accordingly, 'any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* … and to bring that failure to an end'.[153] Judge Donoghue, in her declaration, agreed that 'the obligations at issue could be entirely hollow unless they are obligations *erga omnes partes*'.[154] Conversely, Judge Xue was sceptical of the need to permit States Parties to the Torture Convention other than those with a special interest in compliance to institute contentious proceedings before the Court. In her view, the compliance mechanisms set out in the Torture Convention are meant precisely to address the enforcement of treaty obligations.[155] More recently, Judge Xue also expressed concern that such a 'policing role' for States Parties to the Torture Convention would be exercised in a 'selective and biased manner'.[156]

The same gap-filling logic was used by the majority in *The Gambia v Myanmar* to reject Myanmar's argument that only a State Party with a special interest in compliance was entitled to bring a case against it under the Genocide Convention. In language similar to that used in *Belgium v Senegal*, the Court declared that:

> Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim.[157]

The Court pointed to the fact that 'victims of genocide are often nationals of the State allegedly in breach of its obligations *erga omnes partes*', hinting that, in the event of such a breach, no other State Party would be injured and in a position to institute

[150] Simma (n 130) 296.

[151] ibid 297. See also de Hoogh (n 17) 42.

[152] *Belgium v Senegal* (n 6) 450. For Chow, the Court recognised the obligations' 'non-bilateral' nature: Chow (n 84) 497.

[153] *Belgium v Senegal* (n 6) 450.

[154] ibid 587 (Declaration of Judge Donoghue).

[155] See Torture Convention (n 84) arts 17–21. *Belgium v Senegal* (n 6) 576–77 (Dissenting Opinion of Judge Xue). See also *Bosnia-Herzegovina v Yugoslavia* (n 91) 626 (Declaration of Judge Oda).

[156] *Canada and the Netherlands v Syria* (n 9) 617 (Declaration of Judge Xue).

[157] *The Gambia v Myanmar* (n 9) 516.

proceedings.[158] At the same time, the Court seemed to indicate that, were another State to have been specially affected by Myanmar's alleged breach, this would 'not preclude The Gambia's standing'.[159] Judge ad hoc Kreß, writing separately, considered that 'it would have been wrong had the Court … left the fundamental community interest at issue … without the judicial protection which is due to it under the applicable law'.[160] Considering the insufficiency of the enforcement of certain obligations erga omnes or erga omnes partes by a State with a special interest in compliance, the Judge ad hoc proposed the division of obligations erga omnes and erga omnes partes into two subsets. The first subset encompassed obligations in respect of which 'the collective interest at stake is mediated through the special legal interest of at least one State'.[161] That is, for obligations such as the prohibition of the use of force (presumably taken to be an obligation owed erga omnes or erga omnes partes), 'the collective interest comes into play through the violation of the special legal interest of at least one direct victim State'.[162] The second subset included obligations, such as the prohibition of genocide, in respect of which 'the collective interest … is not mediated through the special legal interest of any State'.[163] In the event of the breach of such an obligation, Judge ad hoc Kreß explained that 'no State is in a position to dispose of the relevant collective interest completely'.[164] He did not specify, however, whether acts of genocide attributable to one State and directed at a group comprising the nationals of another State would, like the prohibition of the use of force, be obligations in respect of which 'the collective interest comes into play through the violation of the special legal interest of at least one direct victim State'.[165] Judge Xue, for her part, considered that the permissibility of reservations to the Genocide Convention, including to exclude the application of the treaty's compromissory clause,[166] 'could also lead to many situations where no State party would be in a position to make a claim before the Court against another State party who has made a reservation to the jurisdiction of the Court'.[167] Such reservations did not, in her view, 'prejudice[] the common interest of the States parties to the Convention'; they only 'exclude[d] a particular method of settling a dispute' arising under the Convention.[168]

Notably, the gap-filling logic proposed by the Court in *Belgium v Senegal* and *The Gambia v Myanmar* was not seen in the *Australia v Japan* case, brought by

[158] ibid 516–17. Commentators read the case as 'gap-filling' vis-à-vis the enforcement of relevant obligations: Hachem, Hathaway and Cole (n 26) 286, 330.

[159] *The Gambia v Myanmar* (n 9) 517. See also Hachem, Hathaway and Cole (n 26) 297.

[160] *The Gambia v Myanmar* (n 9) 556 (Declaration of Judge ad hoc Kreß).

[161] ibid 554 (Declaration of Judge ad hoc Kreß).

[162] ibid 553 (Declaration of Judge ad hoc Kreß). Judge ad hoc Kreß raised, but did not address, the question whether such a State 'might be in a position to dispose of the relevant common interest completely': ibid 554. See also Crawford's Third Report (n 11) 36. For a similar discussion of the prohibition of aggression, see n 136.

[163] *The Gambia v Myanmar* (n 9) 554 (Declaration of Judge ad hoc Kreß).

[164] ibid.

[165] ibid 553 (Declaration of Judge ad hoc Kreß). On the 'bilateralisable' nature of the prohibition of genocide, see Tams (n 5) 134.

[166] Genocide Convention (n 61) art IX.

[167] *The Gambia v Myanmar* (n 9) 531 (Dissenting Opinion of Judge Xue).

[168] ibid.

Australia with a view to 'uphold[ing] its collective interest' in Japan's compliance with its obligations under the International Convention for the Regulation of Whaling and decided by the Court not long after *Belgium v Senegal*.[169] Barring a clarification sought during oral proceedings, the question of Australia's standing to bring the case was not raised.

3. The implications of the ICJ's approaches to the articulation of obligations erga omnes and erga omnes partes

The ICJ has consistently relied on the common interest of the international community as a whole or a group of States in the performance of relevant obligations to affirm their status as obligations erga omnes and erga omnes partes, respectively.[170] In the fulfilment of this requirement, the Court has emphasised 'the importance of the rights involved', although it is not always clear whose rights—those of other States, individuals or groups—are weighed in the assessment.[171] In *Belgium v Senegal* and *The Gambia v Myanmar*, the Court alluded further to the gap that would be left in the enforcement of obligations whose breach does not necessarily cause injury to support their characterisation as obligations erga omnes partes.[172] The Court did not make clear, however, whether this rationale alone could suffice to justify such a characterisation, and in no case was it required to clarify whether the logic applied equally to obligations erga omnes. These various indications suggest that obligations erga omnes and erga omnes partes continue to 'defy clear-cut classifications'.[173]

The following discussion considers the implications of the Court's articulation of obligations erga omnes and erga omnes partes for the identification of such obligations going forward. First, the case law to date leaves unclear how extensive the Court understands the classes of obligations erga omnes and erga omnes partes to be. As such, the various justifications offered by the Court to support its characterisation of obligations as obligations erga omnes or erga omnes partes could be invoked more widely or more restrictively than may be anticipated (Section 3.1). Second, the Court's reliance on the common interest of States Parties in compliance with multilateral treaties is no indication of which of the obligations contained therein are obligations erga omnes partes. Unless the Court considers every obligation contained in such treaties to be owed erga omnes partes, additional qualification of treaty obligations is needed to support such a characterisation (Section 3.2).

3.1. Implications for the breadth of the classes of obligations erga omnes and erga omnes partes

Besides demonstrating a common interest in compliance with obligations erga omnes and erga omnes partes—an easily satisfied requirement,[174] consistently affirmed by the

[169] *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening)* (ICJ, Verbatim Record CR 2013/18, 9 July 2013) 28.

[170] See Section 2.1.

[171] *Barcelona Traction* (n 2) 32. See Section 2.2.

[172] See Section 2.3.

[173] Tams (n 5) 136.

[174] Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 449.

ICJ[175]—the use of two further grounds for characterising obligations as obligations erga omnes or erga omnes partes, namely the assessment of 'the importance of the rights involved'[176] and the absence of injury in the event of a breach, indicates that, in the view of the Court:

> the rules which impose obligations *erga omnes* perform not only the function of protecting absolute and 'supreme' values of the international community … but also the wider role of making it possible, through the collective action of states, to protect goods and values that might otherwise be ineligible for protection.'[177]

Beyond the assessment of the common interest, which of these two approaches is used to affirm an obligation's status as erga omnes or erga omnes partes, or their application cumulatively to this end, determines how narrowly or widely the classes of obligations erga omnes and erga omnes partes are construed. Different approaches to obligations erga omnes and obligations erga omnes partes might also be suggested. One commentator, for example, proposes to define obligations erga omnes by reference to the importance of the rights involved and obligations erga omnes partes by their non-synallagmatic nature. On this view, obligations erga omnes 'exist as such *because* of the community interest in their fulfilment—by reason of the "importance of the rights involved"'.[178] In contrast, obligations erga omnes partes are obligations 'of such a structure that their breach would not result in an injured State'.[179] To be sure, the *Barcelona Traction* dictum, in its reliance on 'the importance of the rights involved', referred only to obligations erga omnes and not obligations erga omnes partes.[180] Yet the reference in substance included obligations 'conferred by international instruments of a universal or quasi-universal character'.[181] The Court's description of obligations erga omnes partes in contemporary practice, moreover, suggests the relevance in that context too of 'the importance of the rights involved'.[182] Conversely, the Court's reliance on the non-synallagmatic nature of certain obligations has to date been limited to its articulation of obligations erga omnes partes,[183] but there is no clear reason to apply the logic only to obligations owed to a group of States and not to all States. As such, the following discussion considers the implications of each approach for the characterisation of both obligations erga omnes and obligations erga omnes partes.

3.1.1. The importance of the rights underlying relevant obligations

The *Barcelona Traction* dictum, endorsed in subsequent jurisprudence,[184] suggested the consideration of 'the importance of the rights involved' in respect of relevant

[175] See Section 2.1.

[176] *Barcelona Traction* (n 2) 32.

[177] P Picone, 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes*' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 411, 415.

[178] Thin (n 17) 120 (emphasis in original).

[179] ibid 119. For Thin, obligations erga omnes partes are 'often evidence of a common or collective interest' but their character is 'not dependent on this interest': ibid 120.

[180] *Barcelona Traction* (n 2) 32.

[181] ibid. See also Tams (n 5) 122.

[182] *Barcelona Traction* (n 2) 32; see Section 2.2.

[183] See Section 2.3.

[184] See Section 2.2.

obligations to conclude that 'all States can be held to have a legal interest in their protection'.[185] Accordingly, obligations 'deriv[ing] … from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination',[186] obligations arising from the right of peoples to self-determination,[187] obligations relating to the prohibition of torture[188] and certain obligations under international humanitarian law are considered by the Court to be owed erga omnes or erga omnes partes, as the case may be.[189]

Consistently with this rationale, peremptory norms of international law are widely considered to give rise to obligations erga omnes.[190] Accordingly, it might be suggested that the ICJ's repeated reference to 'the importance of the rights' underlying relevant obligations is simply a reference to the peremptory status of the norms from which such obligations derive.[191] As one commentator observes, obligations erga omnes and peremptory norms 'pertain to the same overarching idea—namely, the protection of (particularly important) community interests'.[192] Indeed, the 'essential characteristics'[193] of peremptory norms are that they 'reflect and protect fundamental values of the international community'.[194] Yet nowhere does the Court or even the ILC suggest that obligations erga omnes are restricted to obligations arising from peremptory norms.[195] For its part, the Court has avoided making any reference whatsoever to peremptory norms when identifying obligations erga omnes and certainly not when identifying obligations erga omnes partes. It was perhaps for this reason that Special Rapporteur Crawford, writing on the *Barcelona Traction* dictum in his academic capacity, regretted that 'the Court added to the armoury of multilateralism but in a confusing way, since all the examples it gave of "obligations … towards the international community as a whole" could equally have been taken as examples of peremptory norms'.[196] In short, any assessment by

[185] *Barcelona Traction* (n 2) 32. See also Tams (n 5) 136; Katselli Proukaki (n 27) 50.

[186] *Barcelona Traction* (n 2) 32. This includes the prohibition of the use of force to acquire territory: *Palestine* (n 16) 74.

[187] *The Wall* (n 44) 199; *Palestine* (n 16) 74.

[188] *Belgium v Senegal* (n 6) 449.

[189] *The Wall* (n 44) 199; *Palestine* (n 16) 74.

[190] ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries' (2022) UN Doc A/77/10 (Draft Conclusions with Commentaries) conclusion 17(1). The list of peremptory norms includes, in the view of the ILC, the prohibition of crimes against humanity: annex, para (c). See also Tams (n 5) 148–51. Peremptory norms give rise to obligations erga omnes rather than obligations erga omnes partes.

[191] The peremptory status of a norm is assessed, inter alia, by reference to the 'fundamental values of the international community' it protects: Draft Conclusions with Commentaries (n 190) conclusion 2.

[192] Thin (n 17) 65. See also Ragazzi (n 1) 189; U Linderfalk, 'International Legal Hierarchy Revisited – The Status of Obligations *Erga Omnes*' (2011) 80 NordicJIL 1, 5–6.

[193] Draft Conclusions with Commentaries (n 190) 150.

[194] ibid conclusion 2. See also A Haque, 'Peremptory Norms and Fundamental Values' (Social Science Research Network, 16 August 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192022>.

[195] See Tams (n 5) 151–56.

[196] Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 410. See also ARSIWA (n 3) 112–13; Picone (n 177) 414–15.

the Court of 'the importance of the rights' underlying relevant obligations to support their characterisation as obligations erga omnes or erga omnes partes cannot be taken to require the assessment of the peremptory nature of the norms from which such obligations arise.[197]

If the peremptory status of a norm is not the basis for concluding that an obligation is owed erga omnes, the assessment of 'the importance of the rights involved' to identify an obligation erga omnes or erga omnes partes must be carried out by reference to some other benchmark of importance.[198] Any such assessment of importance is likely to create further confusion between peremptory norms of international law, on the one hand, and obligations erga omnes and erga omnes partes, on the other.[199] Such an assessment is also necessarily subjective[200] and calls for the difficult drawing of lines between obligations in such regimes as international human rights law[201] and international humanitarian law.[202] The task is made more difficult still by the lack of clarity in the Court's practice as to whose rights—those of other States or the individual or group beneficiaries of the obligations—are weighed in the assessment, particularly where no such rights are vested under customary or conventional international law.[203] It was perhaps some or all of these considerations that prompted one ILC report to caution that obligations erga omnes are 'not necessarily distinguished by the importance of their substance'.[204]

3.1.2. The gap in the enforcement by injured States of relevant obligations

Aside from the requirement of the importance of the rights underlying relevant obligations is the Court's suggestion in *Belgium v Senegal* and *The Gambia v Myanmar* that, but for their characterisation as obligations erga omnes partes, certain obligations would be unenforceable, since 'no State would be in the position to make … a claim'.[205] That breaches of certain obligations erga omnes and erga omnes partes, or certain kinds

[197] *Barcelona Traction* (n 2) 32.

[198] ibid.

[199] On the other causes for such confusion, see Section 2.2.

[200] See Tams (n 5) 133, 136, 139–41, 151; Linderfalk (n 192) 8–10, 19–22; Katselli Proukaki (n 27) 50; Fasia (n 1) 527; M McCreath, 'Community Interests and the Protection of the Marine Environment within National Jurisdiction' (2021) 70 ICLQ 569, 579.

[201] The *Barcelona Traction* reference to 'basic' human rights seems to support such an assessment: *Barcelona Traction* (n 2) 32. On the complexity of this proposition, see Y Dinstein, 'The *Erga Omnes* Applicability of Human Rights' (1992) 30 Third States and Sanctions in International Law 16, 17–18. Others reject such a division of human rights: Institut de Droit International, 'Resolution on the Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States' (13 September 1989) art 1; AA Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (3rd edn, Brill 2020) 322.

[202] See, e.g. Longobardo (n 1) 391–99; MM Bradley, '*Jus Cogens*' Preferred Sister: Obligations *Erga Omnes* and the International Court of Justice – Fifty Years after the *Barcelona Traction* Case' in D Tladi (ed), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations* (Brill 2021) 193, 216–21. But see Cançado Trindade, 'Conceptual Constructions: *Jus Cogens* and Obligations *Erga Omnes*' (n 201).

[203] See n 84.

[204] See ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/CN.4/L.682, para 389. See also para 380.

[205] *Belgium v Senegal* (n 6) 450. See also *The Gambia v Myanmar* (n 9) 516.

of breaches of obligations erga omnes and erga omnes partes, do not give rise to injury was also recognised by the ILC.[206] The commentary to the ARSIWA notes that, '[i]n case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach'.[207] Although preferring a wider definition of injury than that ultimately adopted by the ILC, Special Rapporteur Arangio-Ruiz expressly endorsed a gap-filling logic when arguing that 'once redress' for the breach of an obligation erga omnes 'has been obtained for all … through the action of one or more of the injured parties, any further measures would serve no legitimate purpose'.[208]

In *Belgium v Senegal* and *The Gambia v Myanmar*, the Court effectively limited its application of this logic to obligations it recognised as obligations erga omnes partes based on the common interest of States Parties in compliance with the relevant treaty[209] and, in *Belgium v Senegal*, the importance of the rights underlying the relevant obligations.[210] The fact of a 'victimless' breach[211] could—taken together with the existence of a common interest in compliance—support the characterisation of an obligation as one owed erga omnes or erga omnes partes, entitling States other than injured States to standing in the event of a breach. Unless qualified by an additional assessment of the importance of underlying rights, this gap-filling rationale would include as obligations erga omnes and erga omnes partes a much wider range of obligations than those identified by the Court to date, entitling States other than injured States to standing in the event of a breach.[212]

The obligations characterised as obligations erga omnes or erga omnes partes on this basis would encompass two subsets. First, as Judge Tladi suggested,[213] it would include obligations whose breach is unlikely to ever injure another State, such as obligations for the preservation of shared resources or areas beyond national jurisdictions. At the ILC, Special Rapporteur Crawford gave as examples of such obligations 'certain obligations *erga omnes* in the environmental field, e.g. those involving injury to the "global commons"'.[214] So too did Special Rapporteur Arangio-Ruiz describe obligations 'related to environmental protection in outer space or in any area where contamination or pollution would affect the whole planet' as obligations erga omnes.[215] The ILC, in its later work on peremptory norms, affirmed that 'certain rules relating to common

[206] Crawford's Third Report (n 11) 36; Arangio-Ruiz's Fourth Report (n 4) 45; Riphagen's First Report (n 4) 127.

[207] ARSIWA (n 3) 127.

[208] Arangio-Ruiz's Fourth Report (n 4) 49.

[209] *Belgium v Senegal* (n 6) 449; *The Gambia v Myanmar* (n 9) 515.

[210] *Belgium v Senegal* (n 6) 449.

[211] Crawford's Third Report (n 11) 100.

[212] If 'obligations *erga omnes* were solely characterised by their non-reciprocal (or non-bilateralisable/integral) structure, the concept would be considerably broader than its supporters acknowledge': Tams (n 5) 131. Alternatively, or in addition, the Court might seek pragmatic means, such as the use of jurisdictional requirements or procedural rules, to constrain such consequences.

[213] *Palestine* (n 16) 13 (Declaration of Judge Tladi).

[214] Crawford's Third Report (n 11) 100.

[215] Arangio-Ruiz's Fourth Report (n 4) 45.

spaces … may produce *erga omnes* obligations'.[216] Many commentators agree that breaches of obligations for 'the protection of the environment of an area which is not subject to the sovereignty of any State', such as the high seas, the Area[217] or the atmosphere, are unlikely to cause injury.[218] Consistently with the Court's practice to date, the common interest in compliance with such obligations, combined with the need to fill a gap in their enforcement, could support their characterisation as obligations erga omnes or erga omnes partes, as the case may be.

Second, the use of a gap-filling logic includes obligations whose breach would, in some instances, injure one or more States, but in others will not do so.[219] This somewhat pragmatic articulation of obligations erga omnes and erga omnes partes ties the character of the obligation to the character of the breach.[220] Commentators explain, for example, that a State may be responsible for genocidal acts against members of a group comprising the nationals of another State or against members of a group within a State's own population.[221] In the latter case, the breach of the obligation would preclude injury to any other State. Beyond human rights obligations, such an approach would support the characterisation of a variety of obligations in 'treaties involving undertakings to conform to certain standards and conditions',[222] such as obligations for the protection of the environment within a State's jurisdiction,[223] as obligations erga omnes partes.[224]

3.2. Implications for the identification of obligations erga omnes partes in multilateral treaties

The various points of jurisprudential inconsistency notwithstanding, the ICJ has been consistent in its articulation of obligations erga omnes and erga omnes partes by

[216] Draft Conclusions with Commentaries (n 190) 66. See also *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10, 59.

[217] The Area comprises 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction': United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art 1(1).

[218] Gaja (n 1) 178. See also Picone (n 177) 415; d'Argent (n 17) 86–87; PM Dupuy, 'L'Unité de l'Ordre Juridique International' (2000) 297 RdC 140; C Chinkin, 'Alternative Dispute Resolution under International Law' in M Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1998) 124, 130; J Mossop, 'Dispute Settlement in Areas beyond National Jurisdiction' in V De Lucia, A Oude Elferink and LN Nguyen (eds), *International Law and Marine Areas beyond National Jurisdiction* (Brill 2022) 392, 400–01; Craik, Davenport and Mackenzie (n 1) 166–68. Conversely, such obligations could be characterised as interdependent obligations whose breach injures all the committing States. See P Urs, 'The Elusiveness of "Interdependent Obligations" and the Invocation of Responsibility for their Breach' BYIL (forthcoming) <https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/brae006/7901233> subsection III.B.ii.

[219] Annacker (n 17) 150.

[220] Ragazzi (n 1) 202; Tams (n 5) 137.

[221] Tams (n 5) 134–35.

[222] ILC, 'Second Report on the Law of Treaties by Mr GG Fitzmaurice, Special Rapporteur', UNYBILC, vol II (1957) UN Doc A/CN.4/107, 31 (Fitzmaurice's Second Report).

[223] Picone (n 177) 415; Thin (n 17) 55–57.

[224] Fitzmaurice's Second Report (n 222).

reference to the common interest of 'the international community as a whole'[225] or a group of States,[226] as the case may be, in compliance with relevant obligations.[227] When it comes specifically to the obligations erga omnes partes contained in multilateral treaties, the Court has not, since the *South West Africa* cases, required the express articulation of such a legal interest. Instead, the common interest of the States Parties in the performance of relevant obligations was inferred by the Court from its assessment of the object and purpose of the treaty at issue.[228]

The sufficiency of characterising treaty obligations as obligations erga omnes partes by reference to the common interest of States Parties, as reflected in the object and purpose of a treaty, is doubtful.[229] First, there is a risk of any and every multilateral treaty being characterised as one established for the protection of the common interest of its States Parties and therefore as a treaty encompassing obligations erga omnes partes. As one commentator rightly asks: '[w]hich international obligations are not in some sense "established for the protection of a collective interest"?'[230] Moreover, the practice leaves unclear whether, in the case of a multilateral treaty whose object and purpose is said to reflect the common interest of its States Parties, all the obligations contained therein are necessarily obligations erga omnes partes, the breach of which entails all relevant consequences in the law of State responsibility, entitles States Parties to have standing before the Court even in the absence of injury on their part and implies further consequences for the Court's procedure.[231] Judges ad hoc Sur and Kreß, writing separately in different cases, were both of the view that not every obligation contained in a multilateral treaty reflecting the common interest of its States Parties is necessarily an obligation erga omnes partes.[232] For Judge ad hoc Sur, dissenting in *Belgium v Senegal*, the 'nature' of a multilateral treaty like the Torture Convention is insufficient in itself to justify the characterisation of the obligations contained therein as obligations erga omnes partes.[233] Nor should the consideration of the object and purpose of the treaty supersede other relevant considerations, in particular, the interpretation of the obligations allegedly breached.[234] In *The Gambia v Myanmar*, Judge ad hoc Kreß qualified the majority's reliance on the object and purpose of the Genocide Convention to characterise relevant obligations as obligations

[225] *Barcelona Traction* (n 2) 32.

[226] *Belgium v Senegal* (n 6) 449; *The Gambia v Myanmar* (n 9) 515–16.

[227] See Section 2.1.

[228] *Belgium v Senegal* (n 6) 449; *The Gambia v Myanmar* (n 9) 515; *Canada and the Netherlands v Syria* (n 9) 602–03; *South Africa v Israel* (n 9) 16.

[229] For other suggested indicators of the common interest, see Rose (n 1) 75.

[230] Crawford, 'Multilateral Rights and Obligations in International Law' (n 11) 449. For the range of obligations erga omnes partes suggested by Special Rapporteur Crawford in the ILC, see Crawford's Third Report (n 11) 35. See also ILC, 'Third Report on State Responsibility, by Mr Arangio-Ruiz, Special Rapporteur' (1991) UN Doc A/CN.4/440 27; Arangio-Ruiz's Fourth Report (n 4) 80; Mao (n 61) 596–97; Chow (n 84) 497; Rose (n 1) 75.

[231] A treaty may confer standing on States Parties to seek the enforcement of obligations therein irrespective of their characterisation as obligations erga omnes partes: Tams (n 5) 124.

[232] *Belgium v Senegal* (n 6) 614 (Dissenting Opinion of Judge ad hoc Sur); *The Gambia v Myanmar* (n 9) 545 (Declaration of Judge ad hoc Kreß).

[233] *Belgium v Senegal* (n 6) 614 (Dissenting Opinion of Judge ad hoc Sur).

[234] ibid 615–16 (Dissenting Opinion of Judge ad hoc Sur).

erga omnes partes, suggesting that only obligations 'central to the fulfilment of the common interest' underlying the Convention, and not those 'markedly peripheral' to such an objective, could be described as such.[235] Commentators agree that not every obligation in a multilateral treaty reflecting the common interest of its States Parties is an obligation erga omnes partes.[236]

The existence of a common interest among the States Parties to a multilateral treaty is indeed of little assistance in assessing whether a particular obligation contained in such a treaty is an obligation erga omnes partes.[237] With insufficient guidance from the Court, however, it remains unclear how to undertake such an assessment. One approach is to argue, by analogy, that only obligations qualitatively comparable to those already characterised by the Court as obligations erga omnes partes are obligations erga omnes partes. In *Belgium v Senegal*, these were the obligation of a State Party to 'immediately make a preliminary inquiry into the facts' when 'a person alleged to have committed' relevant offences is in its territory[238] and, where the State does not extradite him or her, the obligation to prosecute[239] such a person.[240] For Judge ad hoc Kreß, if not also the majority in the decision on preliminary objections in *The Gambia v Myanmar*, 'the obligations said by The Gambia to have been violated by Myanmar' under the Genocide Convention are also obligations erga omnes partes.[241] This includes the obligation to prevent and punish the crime of genocide, the prohibition of relevant acts of genocide, the obligation to punish acts of genocide, the obligation to enact relevant legislation under municipal law and the obligation to prosecute persons 'charged with genocide' before a competent tribunal.[242] Some commentators include, by extension, comparable obligations relating to 'core offenses' under other multilateral treaties.[243]

While pragmatic, such an approach risks being overly restrictive in light of the limited case law on the point and, in any event, 'the demarcation of conventional obligations that are *erga omnes* from those that are not … requires a principled distinction'.[244] Reflecting the incoherence in the Court's articulation of obligations erga omnes and erga omnes partes, scholarly suggestions as to how to assess whether an obligation contained in a multilateral treaty is an obligation erga omnes partes either call for the weighing of the importance of an obligation for the fulfilment of the object and purpose of the treaty or rely on the non-synallagmatic nature of the obligation.[245] Representing the first approach are those who, like Judge ad

[235] *The Gambia v Myanmar* (n 9) 545 (Declaration of Judge ad hoc Kreß).

[236] See, e.g. G Gaja, 'The Concept of an Injured State' in J Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) 941, 943; Kawano (n 23) 232; Chow (n 84) 496; Mao (n 61) 594; Hachem, Hathaway and Cole (n 26) 297.

[237] Kawano (n 23) 232; Papa (n 26) 57; Mao (n 61) 596. Various obligations reflect common interests: see Thin (n 17) 52–58.

[238] Torture Convention (n 84) art 6(2).

[239] ibid art 7(1).

[240] *Belgium v Senegal* (n 6) 462–63.

[241] *The Gambia v Myanmar* (n 9) 545 (Declaration of Judge ad hoc Kreß).

[242] See Genocide Convention (n 61) arts I, III–VI.

[243] Hachem, Hathaway and Cole (n 26) 298–99, 302, 305; see also Wintour (n 26).

[244] Andenas and Weatherall (n 24) 763.

[245] See Sections 2.2. and 2.3.

hoc Kreß,[246] ask whether relevant obligations 'are essential to fulfilling the aim of the treaty'.[247] These commentators propose an assessment of whether the provision in question is 'relevant' to the common interest reflected in the treaty,[248] variously describing obligations erga omnes partes as 'obligations that would defeat the "object and purpose" of the treaty',[249] obligations which 'go to the fundamental purpose of the treaty'[250] and obligations 'incorporated to achieve th[e] common interest' underlying the treaty.[251] In line with this approach, commentators conclude, for example, that 'reporting obligations' contained in relevant treaties do not qualify as obligations erga omnes partes.[252] Committed to the second approach are those who, like Judge Tladi,[253] consider the non-synallagmatic structure of performance of obligations relevant to their characterisation as obligations erga omnes partes.[254] Even commentators who, in principle, support the identification of obligations erga omnes partes by reference to their centrality to the object and purpose of the treaty recognise, against the backdrop of the Court's recent practice, some place for a gap-filling rationale vis-à-vis non-synallagmatic obligations. The admission is made in particular in the context of multilateral human rights treaties, which impose obligations on States Parties in respect of conduct within their own jurisdictions and whose breach is unlikely, in many instances, to cause injury to any other State Party.[255]

Without sufficient clarity from the Court, some commentators employ a combination of rationales to justify the erga omnes partes status of obligations.[256] Others introduce policy considerations to rule out the characterisation of certain obligations, such as procedural obligations,[257] as obligations erga omnes partes because doing so would be 'unimaginable'[258] or have 'far-reaching effects'[259] in terms of the breadth of the entitlement to standing on the part of non-injured States Parties.

In the end, it is insufficient to characterise obligations erga omnes partes by reference to the common interest of States Parties to a multilateral treaty, but how to do so remains unclear. On the one hand, identifying obligations erga omnes partes by

[246] *The Gambia v Myanmar* (n 9) 545 (Declaration of Judge ad hoc Kreß).
[247] Chow (n 84) 496.
[248] Hachem, Hathaway and Cole (n 26) 297. Hachem, Hathaway and Cole suggest the criterion of 'relevance' based on the Court's conclusion in *Belgium v Senegal* that '[t]he common interest in compliance with the *relevant obligations* under 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': *Belgium v Senegal* (n 6) 450 (emphasis added); Hachem, Hathaway and Cole (n 26) 297–98. See also *The Gambia v Myanmar* (n 9) 516. The Court's reference to 'relevant obligations' was more likely a reference to the obligations at issue rather than any criterion of relevance.
[249] Hachem, Hathaway and Cole (n 26) 299.
[250] ibid 299–300.
[251] ibid 300.
[252] ibid 298.
[253] *Palestine* (n 16) 13 (Declaration of Judge Tladi).
[254] See, e.g. Kawano (n 23) 232; Papa (n 26) 57; Pauwelyn (n 130) 929; O'Keefe (n 1) 190.
[255] See references to this logic in Hachem, Hathaway and Cole (n 26) 300–04, 309–10.
[256] See, e.g. Chow (n 84) 493; Longobardo (n 1) 391, 393.
[257] Mao (n 61) 596.
[258] Chow (n 84) 497, referring to Torture Convention (n 84) arts 10–11, 15.
[259] Mao (n 61) 595, referring to Genocide Convention (n 61) art V.

assessing the importance of the obligation to the fulfilment of the object and purpose of a multilateral treaty leaves room for judgment, which might be exercised by the Court to circumscribe what would otherwise constitute an unwieldy set of obligations erga omnes partes contained in relevant treaties. On the other hand, it cannot be denied that the performance of certain multilateral treaty obligations is owed collectively by each State Party to all the others, rather than to each of them bilaterally. The need to ensure the enforceability of such obligations supports their characterisation as obligations erga omnes partes. It remains for the Court to determine the implications of this reality, both in the context of multilateral treaties and for the characterisation of obligations erga omnes.

4. Conclusion

Characterising an obligation as an obligation erga omnes or erga omnes partes is essential to assessing the permissibility of a State's invocation of responsibility for its breach by another State in the absence of injury, including through the institution of contentious proceedings before the ICJ. Such a characterisation may also have implications for the Court's procedure. In practice, the Court has consistently identified obligations erga omnes and erga omnes partes by reference to the common interest in their performance, while at times making additional reference to the importance of the rights underlying them and, to a lesser extent, their non-synallagmatic nature, which in some contexts implies no injury to another State. Such an incoherent approach is unsatisfactory. The existence of a common interest in compliance is not always sufficient to characterise an obligation as one owed erga omnes or erga omnes partes, in particular when assessed by reference to the object and purpose of a multilateral treaty. The inconsistent resort to additional justifications, moreover, introduces uncertainty as to how narrowly or widely the Court construes obligations erga omnes and erga omnes partes. Without clarity as to which justification, or combination of justifications, supports the character of an obligation as 'erga omnes' or 'erga omnes partes', the Court retains wide discretion in the identification of such obligations and the question of their enforcement remains unsettled.

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