Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice

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A number of states have in recent years sought to invoke the responsibility of other states for breaches of their international obligations *erga omnes*. Their contention is that these obligations are not owed to them bilaterally but in the collective interest, whether as states parties to multilateral treaties or as members of the international community as a whole. This growing interest in the invocation of responsibility for breaches of obligations *erga omnes* is discussed primarily in relation to the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. The Articles being a statement of principle, and indeed, a progressive development of the law on the issue, attention must also be paid to the decisions and dicta of the International Court of Justice. Of particular interest, and the focus of this article, is the question of a state's standing to institute proceedings before the Court to invoke responsibility for the breach of an obligation *erga omnes* even in the absence of any injury on its part. The most recent manifestation of this position is The Gambia's institution in 2019 of proceedings against Myanmar, solely on the basis that all states parties to the Genocide Convention have a legal interest in compliance with the obligations therein. By scrutinising the practice of the Court to date, the article examines the limits and consequences of a more expansive right of standing for states seeking to enforce obligations *erga omnes* at the Court.

Keywords: obligations *erga omnes*, standing, *locus standi*, consent, International Court of Justice

1. Introduction

As early as 1951, the International Court of Justice (ICJ, the Court) recognised that certain multilateral obligations in international law are such that the states bound by them 'do not have any interests of their own; they merely have, one and all, a common interest'.[1] The articulation of these common or collective interests may take the form of a multilateral treaty,[2] which confers on states parties the right to invoke the responsibility of a breaching state.[3] Equally, a collective

[1] *Reservations to the Convention on Genocide*, Advisory Opinion, [1951] ICJ Rep. 15, 23 (hereafter '*Reservations*').

[2] The term 'multilateral' does not itself describe obligations that are owed in the collective interest. Certain obligations are only multilateral to the extent that 'they bind more than two states'; these are bilateral obligations in multilateral form. C. Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', (1999) 10 *EJIL* 353, 354. See also J. Crawford, *Chance, Order, Change* (2014), 307; C.J. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005), 45.

[3] Multilateral treaties that expressly confer a right of standing upon states parties are not therefore addressed. For an overview, see Tams (2005), ibid., at 71–6; E. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', (2002) 96 *AJIL* 798, 805–6; J. Crawford, *State Responsibility*: *The General Part* (2013), 390.

interest in compliance with certain international obligations may be said to exist, whether under treaty law or customary international law, irrespective of their articulation as such. The growing recognition of this latter category of obligations *erga omnes*,[4] as they have been described by the ICJ, raises questions about the consequences of their inclusion in what remains in many respects an essentially bilateral international legal order. To begin with, it is necessary to determine 'the precise identity of the *omnes* to whom the obligations are owed',[5] including by distinguishing states' interest in compliance with obligations *erga omnes* from their overarching interest in compliance with international law generally.[6] Having identified the recipients of the category of obligations *erga omnes*, the closely related question arises whether the breach by a state of such an obligation entitles a state to which the obligation is owed to invoke, individually, the responsibility of the breaching state, thereby 'vindicat[ing] its interest as a member of the international community'.[7]

The enforcement of obligations *erga omnes* requires a reappraisal of the means by which, and conditions under which, the responsibility of a breaching state might be invoked. Among the various routes available to a state seeking to invoke responsibility for a breach of international law are resort to countermeasures and the adjudication of the dispute.[8] In both cases, what is necessary

[4] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep. 3, 32, para. 33 (hereafter '*Barcelona Traction*'). See also Art. 1(a)–(b), Obligations Erga Omnes in International Law, Institut de Droit Internationale (2005). The term is not used to describe obligations arising under a multilateral treaty which 'expressly provides for standing in the public interest'. C.J. Tams and A. Tzanakopoulos, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development', (2010) 23 *LJIL* 781, 794.

[5] P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 *AJIL* 413, 432. It is sometimes suggested that obligations *erga omnes* are not owed to states individually but to the international community as a whole. The position must be rejected, particularly in a discussion of standing before the ICJ, since 'it is nonsensical if the "party" to which the obligation is owed is a collective one without the capacity to act'. Crawford (2014), *supra* note 2, para. 340. See also Weil, ibid., at 432; Tams (2005), *supra* note 2, at 174–5.

[6] Weil, ibid., at 431; B. Simma, 'From Bilateralism to Community Interest in International Law', (1994) 250 *Collected Courses of the Hague Academy of International Law* 224, 295; Crawford, *Chance, Order, Change*, *supra* note 2, para. 310; Tams (2005), *supra* note 2, at 29.

[7] Crawford (2014), *supra* note 2, para. 339.

[8] For a comparative overview of adjudication and political means of dispute settlement, see S. Scott, 'Litigation versus Dispute Resolution through Political Processes', in N. Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (2014), 24. The focus of the article being the adjudication of disputes before the ICJ, adjudication before other courts and the use of treaty mechanisms and diplomatic channels are not addressed, although any of these may contribute to the satisfaction of the requirement of a 'dispute' between the parties at the ICJ. ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), 117 (hereafter 'Commentary'). The question of the interaction between countermeasures and adjudication also arises. As reflected in Article 52(3)(a) of the ARSIWA, countermeasures are excluded if the dispute is pending adjudication. See also J.D.

is that the state seeking to invoke responsibility for the breach, as well as remedies, has 'a specific right to do so'.[9] Such a right may derive, for example, from the terms of a multilateral treaty or from the fact that the state has been demonstrably injured by the breach. Broadly construed, standing or *locus standi* is thus 'the requirement that a State seeking to enforce the law establishes a sufficient link between itself and the legal rule that forms the subject matter of the enforcement action'.[10] When standing is addressed, as it is here, in relation to a state's entitlement to bring a dispute before the ICJ, the relevant question is whether such a link may exist even in the absence of a right of standing conferred under a multilateral treaty or as a result of injury. Is there, in other words, a right of standing that derives exclusively from the collective nature of certain obligations? If so, what are the implications of its inclusion for the adjudication of disputes before the Court?

The debates that have taken place have tended to address the significant contribution of the International Law Commission (ILC) in its 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA, the Articles). It had perhaps been anticipated that the Articles would 'provide the grain of sand around which the pearl of international law would develop', including through the practice of the Court.[11] Indeed, recent years have seen greater attention being paid to the ICJ's recognition of *locus standi* to litigate in the collective interest, but discussion of the various consequences of conferring standing upon states for the enforcement of obligations *erga omnes* in the collective interest remains limited by comparison.[12]

Against this backdrop, the article scrutinises the practice of the ICJ to date not only to address the overarching question of the permissibility of a right of standing to invoke responsibility for the

Bederman, 'Counterintuiting Countermeasures', (2002) 96 *AJIL* 817, 826; J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 *AJIL* 874, 883–4.

[9] Commentary, ibid., at 117. In other words, '[f]or a state to enjoy a right implies its possession of legal standing to claim performance of the corresponding obligation'. Weil, *supra* note 5, at 431.

[10] Tams (2005), *supra* note 2, at 26. On standing before the ICJ generally, see G. Gaja, 'Standing: International Court of Justice (ICJ)', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2018).

[11] D.D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', (2002) 96 *AJIL* 857, 866. See also Crawford (2013), *supra* note 3, at 390.

[12] M. Kawano, 'Standing of a State in the Contentious Proceedings of the International Court of Justice', (2012) 55 *Japanese Yearbook of International Law* 208, 235.

breach of obligations *erga omnes*, but also to identify the practical limits and consequences of a right of standing to enforce obligations *erga omnes* at the Court. On this basis, the article first identifies the limits of the Court's own recognition of a right of standing vis-à-vis obligations *erga omnes*. Secondly, it highlights the practical limits even of a broad right of standing to enforce obligations *erga omnes* owing to the requirement, in various manifestations, of state consent to the exercise of the jurisdiction of the Court. Thirdly, it addresses the consequences of a right of standing for states acting in the collective interest where an injured state may be able itself to institute the proceedings. Finally, is considers whether the conferral of standing in the collective interest permits the intervention in the proceedings of other states to which the obligation *erga omnes* is owed. The focus of the article being the substantive positions that the Court has taken on these issues, the article does not advance a position as to the weight to be assigned to the practice of the Court in the development of international law generally.[13] Suffice it to say that the decisions of the Court play an important role in the development of the concept of obligations *erga omnes* the Court itself took the initiative to formulate. A final caveat as to the proceedings in the dispute between The Gambia and Myanmar, in which the question of standing may be raised again as a preliminary objection, is necessary, limiting the discussion of that case to the Court's order for provisional measures, issued in 2020.

2. A right of standing for the enforcement of obligations *erga omnes*

2.1. The Articles on the Responsibility of States for Internationally Wrongful Acts

Before assessing the practice of the ICJ, it is necessary to briefly address the contribution of the ILC through its 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.

[13] On this subject, see F. Berman, 'The International Court of Justice as an "Agent" of Legal Development?', in C.J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013), 7; A. Pellet, 'Shaping the Future of International Law: The Role of the World Court in Law-Making', in M.H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (2011), 1065.

The Articles – some of which codify existing rules of international law, others of which seek progressively to develop the law – not only reflect the views of the ICJ in its case law prior to 2001 but also serve as a benchmark against which to assess subsequent decisions of the Court.[14] While the Articles are framed in terms of the invocation of the responsibility of a state for the breach of its primary obligations, the issue bears on the question of a state's right of standing to institute proceedings before the Court in respect of such a breach.

The Articles are tailored to address a variety of primary obligations, which 'may be owed to another State, to several States, or to the international community as a whole'.[15] Within which of these categories a particular obligation falls, and whether it gives rise to a right *erga omnes* to invoke responsibility for its breach, depends on the interpretation of the relevant rule.[16] Discarding an earlier preference for a broad definition of 'injury', which would have provided a unified basis for the invocation of responsibility, the question of a state's right to invoke the responsibility of a breaching state eventually took the form of Articles 42 and 48 of the ARSIWA.[17] Article 42[18]

[14] See e.g. G. Gaja, 'Interpreting Articles Adopted by the International Law Commission', (2015) 85 *BYIL* 10; Crawford (2013), *supra* note 3, Chapter 11. The General Assembly's adoption of the Articles by resolution stopped short, on the recommendation of the ILC, of convening 'an international conference of plenipotentiaries to examine the draft articles … with a view to concluding a convention on the topic'. Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), paras. 72–3. For some, the level of abstraction at which the Articles are pitched makes them influential, even if 'as a statement of principle … than as a legally binding treaty instrument'. Bederman, *supra* note 8, at 828–9. As Caron warned, however, the Articles are not themselves a source of law, and their contribution – notwithstanding their articulation in statutory form, perhaps in anticipation of their adoption as such – must not be overstated. Caron, *supra* note 11, at 867. See also F. Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments', (2018) 21 *Max Planck Yearbook of United Nations Law* 83.

[15] Art. 33(1), Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (hereafter 'ARSIWA'). As one commentator remarks, this taxonomy was 'innovative, if perhaps controversial'. Brown Weiss, *supra* note 3, at 801.

[16] Commentary, *supra* note 8, at 118; Dominicé, *supra* note 2, at 357.

[17] The inclusion of these provisions followed a debate about whether the breach of all obligations should trigger the application of the same regime of responsibility irrespective of both the content of the obligation and the nature of the internationally wrongful act. Fifth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 1976, YILC Vol. II (Part One), 24, para. 72. It had been suggested by Special Rapporteur Roberto Ago that a distinct regime of responsibility must apply to an elevated category of 'international crimes', that is, 'a breach by a State of an obligation whose respect is of fundamental importance to the international community as a whole'. Ibid., at 26, para. 80. This approach was captured in Draft Article 19 of the 1996 draft, with the corresponding Draft Article 40 defining an injured state to include, in the case of an international crime as defined under Article 19, 'all other States'.

[18] Article 42 is modelled on Article 60 of the Vienna Convention on the Law of Treaties 1969 (hereafter 'VCLT'), but its scope is restricted neither to material breaches nor treaties and, crucially for the enforcement of obligations *erga omnes*, the remedies available to an injured state thereunder are not limited to the termination or suspension of the operation of the treaty. Commentary, *supra* note 8, at 117.

defines an 'injured state' as a state to which the obligation breached is owed, either individually, in accordance with Article 42(a), or as part of a group of states or of 'the international community as a whole', in accordance with Article 42(b), which entitles the state to invoke the responsibility of the breaching state if the breach 'specially affects' it[19] or 'is of such a character as radically to change the position of all the other States to which the obligation is owed'.[20] Critically, an injured state is entitled not only to invoke the responsibility of another state for its breach of a primary obligation but also to resort to a variety of countermeasures.[21]

Complementing Article 42, Article 48 permits 'any State other than an injured State' to invoke the responsibility of a breaching state if one of two conditions specified under Article 48(1) is met:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.[22]

While a state acting under Article 48(1)(a) does so 'in its capacity as a member of a group of States to which the obligation is owed', addressing the breach of obligations *erga omnes partes*,[23] a state acting under Article 48(1)(b) does so 'as a member of the international community as a whole', addressing the breach of obligations *erga omnes*.[24] Conceptually, there is no distinction between the two categories.[25] Article 48 being complementary to Article 42, the Commission did not rule out

[19] See Art. 42(b)(i), ARSIWA, reflecting Art. 60(2)(b), VCLT. The state 'must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed'. Commentary, *supra* note 8, at 119.
[20] See Art. 42(b)(ii), ARSIWA, reflecting Art. 60(2)(c), VCLT. This clause addresses the category of integral or inter-dependent obligations, the breach of which 'affect[s] *per se* every other State to which the obligation is owed' such that 'they must all be considered as individually entitled to react to [the] breach'. Commentary, *supra* note 8, at 119. Put differently, Article 42(b)(ii) addresses a treaty 'where each party's performance is effectively conditioned upon and requires the performance of each of the others'. Commentary, *supra* note 8, at 119.
[21] See Chapter II, Part 3, ARSIWA.
[22] Unlike the ICJ, the Articles do not use the term 'legal interest' to describe the entitlement to invoke responsibility under Article 48, since this would have blurred the distinction between Article 42 and Article 48. Commentary, *supra* note 8, at 126.
[23] What is required is that 'the arrangement' 'foster[s] a common interest, over and above any interests of the States concerned individually'. Commentary, *supra* note 8, at 126.
[24] Commentary, *supra* note 8, at 127.
[25] Obligations *erga omnes partes* are different from obligations *erga omnes* only to the extent that the former constitute a subset of states to which the relevant obligations are owed, while the latter are obligations owed to the international community as a whole. See also Commentary, *supra* note 8, at 127.

the possibility of an injured state invoking responsibility for the breach of an obligation *erga omnes* or *erga omnes partes*.[26] The inclusion of Article 48 – a progressive development of the law[27] – was intended mainly to address those obligations in respect of which there may be no injured state to invoke responsibility for a breach. For the Commission, it was 'highly desirable' that states other than an injured state be entitled to take some more limited measures in order 'to protect the community or collective interest at stake'.[28] Accordingly, Article 48 stipulates that a state is entitled to seek cessation of the breach and perhaps also assurances and guarantees of non-repetition, under Article 48(2)(a), but also reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached', under Article 48(2)(b).[29] The effectiveness of Article 48 in filling this gap of enforceability is, however, limited by the decoupling of the entitlement to invoke responsibility, on the one hand, and the availability of countermeasures, on the other. Under international law as it then stood, and as reflected in the Articles, only injured states are entitled to resort to countermeasures. This limitation vis-à-vis states acting under Article 48 is anticipated by Article 54, the savings clause permitting states other than injured states to take 'lawful measures', whatever they may be,[30] to 'ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'. Absent a rule of international law permitting the use of countermeasures by states under Article 48, '[t]he pragmatic compromise – and, indeed, the only possible political solution – was to defer debate to another day'.[31]

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[26] Commentary, *supra* note 8, at 127.
[27] Crawford (2013), *supra* note 3, at 551.
[28] Commentary, *supra* note 8, at 127.
[29] International obligations being increasingly 'unilateral or vertical', the selection of remedies in Article 48(2) may be explained by the fact that '[b]reach of these duties is unlikely to injure another state directly or give rise to a classic claim for reparations'. The emphasis on cessation may similarly be explained by the fact that states have an interest in continued compliance with these obligations. D. Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', (2002) 96 *AJIL* 833, 834.
[30] The Commission noted that '[p]ractice on this subject is limited and rather embryonic'. Commentary, *supra* note 8, at 137. On the objection of some states, the provision was 'reduced … from a substantive article to a savings clause'. Crawford (2002), *supra* note 8, at 875.
[31] Bederman, *supra* note 8, at 828. To whatever extent subsequent state practice supports the use of countermeasures for the enforcement of obligations *erga omnes*, it may bear on the permissibility of recourse to the ICJ. For an account of this practice, see M. Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', (2016) 29 *QIL Zoom-In* 3; C. Hillgruber, 'The Right of Third States to Take Countermeasures', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006), 265 at 283–7.

The Commission having restricted the scope of the ARSIWA to secondary obligations, the Articles do not themselves identify the primary obligations that may qualify as obligations *erga omnes* or *erga omnes partes* for the purpose of Articles 48. That task is effectively left to the ICJ, which had already offered some illustrations before 2001. In subsequent practice, the Court has also engaged with the question of the invocation of responsibility for the breach of obligations *erga omnes*, including through the conferral of *locus standi*, even if it has not addressed Article 48 by name.

2.2. ***The practice of the International Court of Justice***

The decision of the Permanent Court of International Justice (PCIJ) in *SS Wimbledon* in 1923 was the first articulation of the expansive position later expressed in Article 48(1)(a) of the ARSIWA.[32] In that case, the United Kingdom, France, Italy and Japan had complained of a breach by Germany of its obligations under the plurilateral Treaty of Versailles when it denied access to the SS Wimbledon – a vessel registered to the UK and chartered by a French company – to the Kiel Canal. On the question of each state's standing to institute the proceedings, the Court succinctly observed that Italy and Japan also 'had a clear interest in the execution of the provisions relating to the Kiel Canal' since they 'possess[ed] fleets and merchant vessels flying their respective flags'.[33] Notwithstanding the absence on their respective parts of 'any pecuniary interest' in the matter, the Court endorsed an expansive reading of the jurisdiction clause in Article 368(1) of the Treaty, which conferred on 'any Interested Power' a right to institute proceedings before the PCIJ.[34]

In contrast to the PCIJ, the ICJ in the earliest proceedings in which the question of standing to bring a dispute in respect of collective interests was at issue, namely the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (hereafter '*South West Africa*'), wavered. Following the institution by Ethiopia and Liberia of proceedings against South Africa in respect of the latter's

[32] Commentary, *supra* note 8, at footnote 724.
[33] *SS Wimbledon*, PCIJ Rep. Series A No 1, 15 at 20.
[34] Ibid.

alleged violation of its mandate for South West Africa under the League of Nations, it fell to the Court to address the question of Ethiopia and Liberia's 'legal right or interest regarding the subject matter of their claim'.[35] In its initial decision of 1962, the Court endorsed the applicants' standing to bring the dispute as member states of the League of Nations with 'a legal right or interest' in South Africa's compliance with its obligations, 'both towards the inhabitants of the Mandated Territory, and towards the League of Nations and its Members'.[36] Conversely, based on its subsequent assessment of the Covenant of the League of Nations and the instrument of mandate for South West Africa, the Court found in its final decision of 1966 that South Africa's obligations in respect of the mandate had been owed to the League of Nations as a whole and not to its member states individually.[37] It relied *inter alia* on a restrictive reading of the jurisdiction clause specified in Article 7(2) of the instrument of mandate, which in its view did not confer upon member states a substantive right to invoke the responsibility of the mandatory.[38] Accordingly, neither the Covenant nor the mandate instrument conferred on the former member states of the League of Nations a right of recourse to the ICJ.[39] The Court did not, however, exclude in principle the existence under international law of a right of standing, absent injury, where 'such rights or interests' are 'clearly vested in those who claim them, by some text or instrument, or rule of law'.[40]

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[35] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of 18 July 1966, [1966] ICJ Rep. 6, 18, para. 4 (hereafter '*South West Africa*').

[36] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Rep. 319, 343.

[37] It was perhaps relevant that the Covenant of the League of Nations, unlike the Treaty of Versailles, did not establish an objective legal regime. C. Fernández de Casadevante Romani, 'Objective Regime', (2010) *Max Planck Encyclopedia of Public International Law*, paras. 6–7.

[38] For the Court, '[j]urisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal'. *South West Africa*, *supra* note 35, at 39, para. 65. The same issue had previously been raised by the parties in *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, wherein the jurisdiction clause in Article 19 of the trusteeship agreement for the Cameroons had been in question. The Court did not, however, address the issue. *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment of 2 December 1963, [1963] ICJ Rep. 15, 35.

[39] *South West Africa*, *supra* note 35, at 25, para. 24. For an alternative explanation for the Court's decision, see V. Kattan, '"There was an elephant in the courtroom": Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the *South West Africa Cases* (1960–1966) after Half a Century', (2018) 31 *LJIL* 147; I. Venzke, 'Public Interests in the International Court of Justice – A Comparison between *Nuclear Arms Race* (2016) and *South West Africa* (1966)', (2017) 111 *AJIL Unbound* 68, 69–70.

[40] *South West Africa*, *supra* note 35, at 32, para. 44. That is, 'to generate legal rights and obligations, [the interest] must be given juridical expression and be clothed in legal form'. *South West Africa*, *supra* note 35, at 34, para. 51.

At the same time, it rejected in broader terms resort by states to an '*actio popularis*', which it considered '[wa]s not known to international law' at the time.[41]

What followed the ICJ's 1966 decision in the *South West Africa* cases was the apparent reversal by the Court of the restrictive position it ultimately took on the issue of standing. The Court's dictum in its *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* (hereafter '*Barcelona Traction*') decision of 1970, which is widely considered to be reflected in Article 48(1)(b) of the ARSIWA,[42] is as follows:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[43] Some of the corresponding rights of protection have entered into the body of general international law …; others are conferred by international instruments of a universal or quasi-universal character.[44]

Going beyond the treaty-based disputes that had previously been at issue in *SS Wimbledon* and the *South West Africa* cases, in which contexts it was primarily the interpretation of relevant jurisdiction clauses that had been at issue, the Court recognised a category of 'obligations *erga omnes*' under

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[41] *South West Africa*, *supra* note 35, at 47, para. 88.
[42] Commentary, *supra* note 8, at 127. The Court's reference at paragraph 34 to 'instruments of a … quasi-universal character' suggest that its statements also address the content of Article 48(1)(a), that is, obligations *erga omnes partes*.
[43] But see *Barcelona Traction*, *supra* note 4, at 47, para. 91. Whether the Court's subsequent statement at paragraph 91 serves to exclude the broad right of standing previously expressed is subject to debate. Interpretations which retain the effectiveness of the dictum at paragraphs 33 and 34 are preferred. Simma (1994), *supra* note 6, at 296; but see Dominicé, *supra* note 2, at 362. For an extensive discussion, see J. Crawford, 'Multilateral Rights and Obligations in International Law', (2006) 319 *Collected Courses of the Hague Academy of International Law* 329, at 424–5; Tams, (2005), *supra* note 2, at 176–9.
[44] *Barcelona Traction*, *supra* note 4, at 32, paras. 33–4.

both treaty law and general international law,[45] even if it did not elaborate upon the legal basis for their existence[46] and notwithstanding the fact that the violation of obligations *erga omnes* had not even been at issue in *Barcelona Traction*.[47]

A series of subsequent disputes provided the Court with the opportunity to elaborate upon the arguably broad concept it had introduced in *Barcelona Traction*. This is not to say that the Court always took the opportunity to do so. In *Nuclear Tests (Australia* v. *France)*, for instance, the majority did not address the question of Australia's standing to bring a dispute in respect of France's future compliance with what Australia characterised as the *erga omnes* prohibition of atmospheric nuclear tests under customary international law since, in the view of the Court, France had in fact undertaken an obligation not to conduct further tests. Judge ad hoc Barwick was alone in endorsing, if only in principle, a right of standing in respect of obligations *erga omnes* that confer upon individual states, such as Australia, a corresponding right to compliance.[48] Conversely, Judge de Castro rejected the contention, including on the basis that the dictum in *Barcelona Traction* should be taken '*cum grano salis*'.[49] So also, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (hereafter '*Bosnian Genocide*'), only Judge Oda obliquely addressed the issue of standing, asserting that the *erga omnes partes* nature of the obligations under the Genocide Convention did not mean that responsibility for a breach could be invoked 'in inter-State relations', including by instituting proceedings at the ICJ.[50] In his view,

[45] Tams (2005), *supra* note 2, at 123.
[46] Tams and Tzanakopoulos, *supra* note 4, at 796–7.
[47] The value of the Court's dictum is thus subject to debate. It is often suggested that its statements were an attempt to correct its heavily criticised approach in *South West Africa*, and consequently an exercise in judicial activism. See F. Zarbayev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis', (2012) 3 *JIDS* 247, 276–7. It may also be that the Court was setting the stage for subsequent developments. N. Ridi, '"Mirages of an Intellectual Dreamland"? *Ratio*, *Obiter* and the Textualization of International Precedent', (2019) 10 *JIDS* 361, 381–2.
[48] *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 391, 437 (Judge Barwick, Dissenting Opinion). Based on his reading of the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, Tams goes further in concluding that 'the majority of judges expressing a view was prepared to take the *Barcelona Traction* dictum at face value'. Tams (2005), *supra* note 2, at 180–2.
[49] *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 372, 387 (Judge de Castro, Dissenting Opinion) (hereafter 'de Castro Dissent').
[50] *Application of the Convention on the Prevention and Punishment of the Crimes of Genocide*, Judgment of 11 July 1996, [1996] ICJ Rep. 625, 626, para. 4 (Judge Oda, Declaration) (hereafter 'Oda Declaration').

the alleged breach by a state party of an obligation *erga omnes partes* does not automatically give rise to a dispute as to the 'interpretation, application or fulfilment' of the treaty with another state party.[51] The latter must demonstrate the resultant infringement of its rights for a dispute to exist.[52] For Judge Oda, this was doubtful, since the obligations *erga omnes* enumerated in the Genocide Convention were owed principally to individuals and groups. Their breach was thus better addressed by means other than adjudication.[53]

Similarly, when in 1995 Portugal invoked Australia's optional clause declaration under Article 36(2) of the Statute of the International Court of Justice to bring a case against Australia pertaining *inter alia* to the violation of the right of the people of Timor-Leste to self-determination – arguably an obligation *erga omnes* – it fell to the Court to determine whether Portugal enjoyed standing to initiate the proceedings. The Court in *East Timor (Portugal* v. *Australia)* (hereafter '*East Timor*') did not address Australia's argument that Portugal did not have 'a sufficient interest of its own to institute the proceedings' and thus lacked *locus standi*.[54] Instead, the decision turned on whether the Court could adjudicate the dispute without the participation of Indonesia, which had not consented to the exercise of the Court's jurisdiction but whose rights and obligations were, in Australia's view, at issue. While endorsing the *erga omnes* nature of the obligation to respect the right of self-determination,[55] the Court rejected Portugal's contention that its characterisation as such meant that the indispensable third party rule, which called for Indonesia's participation, could be discarded.[56] As the Court explained, 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things'.[57] A different conclusion as to the interaction of obligations *erga omnes* with the requirement of consent to jurisdiction was reached by Judge Weeramantry, who

[51] Art. IX, Convention on the Prevention and Punishment of the Crime of Genocide 1948.
[52] Oda Declaration, *supra* note 50, at 626, para. 3.
[53] Oda Declaration, *supra* note 50, at 626, paras. 4, 6.
[54] *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, 99, para. 20 (hereafter '*East Timor*').
[55] *East Timor*, ibid., at 102, para. 29.
[56] *East Timor*, ibid., at 105, para. 35.
[57] *East Timor*, ibid., at 102, para. 29.

dissented on the basis that 'the practical operation' of obligations *erga omnes* would be limited by the requirement of consent such that the former would be 'substantially deprived of its effectiveness'.[58] The Court having affirmed the requirement of consent to jurisdiction, the decision lent no further clarity as to whether, conditional upon Indonesia's consent, the violation of an obligation *erga omnes* alone would confer a right of standing on Portugal or on any other state.[59]

The clearest affirmation to date of a right of standing in respect of violations of at least obligations *erga omnes partes* came in the Court's 2012 decision in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (hereafter '*Obligation to Extradite*').[60] The relevant question in that case was whether Belgium could bring a dispute against Senegal, first, for alleged violations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter 'Torture Convention'), and secondly, under customary international law, including in respect of the obligation to prosecute crimes against humanity, genocide, and war crimes.[61] When it came to Senegal's alleged violations of the Torture Convention, Belgium argued not only that it enjoyed *locus standi* as a state party to the treaty but also that it had a special interest in the matter.[62] The Court, however, focused its attention exclusively on the former submission. Relying on the object and purpose of the Convention, it agreed that all states parties, including Belgium, had a

[58] *Case Concerning East Timor*, Judgment of 30 June 1995, [1995] ICJ Rep. 139, 172 (Judge Weeramantry, Dissenting Opinion) (hereafter 'Weeramantry Dissent'). See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 88, 117–19 (Judge Weeramantry, Separate Opinion) (hereafter 'Weeramantry Separate Opinion').

[59] J.A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', (1994) 248 *Collected Courses of the Hague Academy of International Law* 350, 429; Simma (1994), *supra* note 6, at 297. For Tams, 'by subjecting the enforcement of obligations *erga omnes* to the Monetary Gold test [the Court] did not prejudice the question of standing'. Tams (2005), *supra* note 2, at 184.

[60] Judgment of 20 July 2012, [2012] ICJ Rep. 422 (hereafter '*Obligation to Extradite*'). For Crawford, the decision is 'firmly in line with' Article 48 of the ARSIWA. Crawford (2013), *supra* note 3, at 370. See also B. Simma, 'The ICJ and Human Rights', in C.J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013), 301 at 314.

[61] *Obligation to Extradite*, ibid., at 444, para. 53.

[62] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Memorial of Belgium of 1 July 2010, 79–80, paras. 5.14–.18.

legal interest in compliance with what it described as the obligations *erga omnes partes* articulated therein.[63] Accordingly,

> [t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* … and to bring that failure to an end.[64]

It was thus not necessary, in the opinion of the Court, to determine whether Belgium also had a special interest in the matter.[65] Judge Xue and Judge ad hoc Sur, dissenting, questioned the majority's reliance on the notion of obligations *erga omnes* to establish Belgium's standing, an approach which Judge Xue considered to be 'abrupt and unpersuasive'[66] and which, in Judge ad hoc Sur's opinion, 'ha[d] been produced like a rabbit from a magician's hat'.[67] Sceptical of the weight assigned to the dictum in *Barcelona Traction*, Judge Xue asserted that the mere identification of a category of collective interests in that case did not necessarily confer a right of standing on states individually to invoke responsibility for their breach.[68] She drew the same distinction when it came to the majority's characterisation of relevant treaty rules as obligations *erga omnes partes*:

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[63] *Obligation to Extradite*, *supra* note 60, at 449, para. 68. Judge ad hoc Sur questioned whether all the obligations arising under the Convention necessarily derive from the prohibition of torture, thereby rendering them obligations *erga omnes partes*. *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. 605, 613–5, paras. 27–30, 34 (Judge ad hoc Sur, Dissenting Opinion) (hereafter 'Sur Dissent'). See also *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. 571, 575, para. 17 (Judge Xue, Dissenting Opinion) (hereafter 'Xue Dissent').
[64] *Obligation to Extradite*, *supra* note 60, at 450, para. 69.
[65] *Obligation to Extradite*, *supra* note 60, at 450, para. 70.
[66] Xue Dissent, *supra* note 63, at 574, para. 14.
[67] Xue Dissent, *supra* note 63, at 618, para. 44.
[68] Xue Dissent, *supra* note 63, at 574–5, paras. 15–6. Judge ad hoc Sur also questioned the Court's implicit reliance on the ARISWA on this question. Sur Dissent, *supra* note 63, at 614–5, paras. 30–1.

> [I]t is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court.[69]

Judge Xue also rejected the majority's suggestion that the concept of obligations *erga omnes* was necessary in cases in which 'no State would be in the position to make … a claim'.[70] For her, the non-adjudicatory accountability mechanisms specified in the Convention, including the role of the Committee against Torture, 'are designed exactly to serve the common interest of the States parties in the compliance with the obligations under the Convention'.[71] In the same vein, and relying once again on the text of the treaty, both dissenting judges claimed that since states parties could make reservations to exclude the jurisdiction of the ICJ in respect of their treaty obligations, there could be no generalised right of standing for each of them to invoke, in the collective interest, responsibility for the breach of those obligations.[72] Accordingly, 'the parties do not form a single homogeneous group which assumes the same obligations and can claim the same rights'.[73] When it came to Senegal's obligations under customary international law, the Court – while conceding that the international arrest warrant issued by Belgium did refer to violations of customary international law by Hissène Habré – found that a dispute with Senegal did not exist in respect of those obligations. Belgium had neither 'stated [n]or implied that Senegal had an obligation under [customary] international law to exercise its jurisdiction over those crimes if it did not extradite'.[74] Reminiscent of its earlier decision in *East Timor*, the Court did not ultimately pronounce on whether Belgium would have enjoyed a right of standing in respect of obligations *erga omnes* arising under customary international law.

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[69] Xue Dissent, *supra* note 63, at 575, para. 17.
[70] *Obligation to Extradite*, *supra* note 60, at 450, para. 69.
[71] Xue Dissent, *supra* note 63, at 576, para. 19.
[72] Xue Dissent, *supra* note 63, at 577, paras. 22–3; Sur Dissent, *supra* note 63, at 616–7, para. 39.
[73] Sur Dissent, *supra* note 63, at 616, para. 36.
[74] *Obligation to Extradite*, *supra* note 60, at 444–5, para. 54. As noted by Judge ad hoc Sur, limited explanation was offered in support of the majority's view on the issue. Sur Dissent, *supra* note 63, at 610, para. 17.

Of more recent vintage is the 2014 *Whaling in the Antarctic (Australia* v. *Japan: New Zealand Intervening*)[75] (hereafter '*Whaling*') decision in which the respondent state, Japan, did not challenge Australia's standing to bring the dispute. The absence of any discussion on the point is striking since Australia was alleging violations by Japan of the International Convention for the Regulation of Whaling and other relevant treaty obligations without any suggestion of injury on its part.[76] Given the proximity of the proceedings to the Court's earlier decision in *Obligation to Extradite*, Japan's contestation of the jurisdiction of the Court,[77] and the parties' reliance on the object and purpose of the Convention to support competing interpretations on the merits,[78] the Court's decision not to determine whether the Convention established obligations *erga omnes partes* in order to establish standing – as it had previously done in *Obligation to Extradite* – is unexpected, if not anomalous. Presumably, the Court effectively accepted the position that Australia had purported to act in the collective interest[79] and on that basis engaged Japan's responsibility for the breach of obligations *erga omnes partes*.[80]

Another recent case of a state seeking to initiate ICJ proceedings in the collective interest was the Marshall Islands' institution of proceedings against a number of states in respect of their alleged violations of the integral obligation, arising variously under treaty law and customary international

[75] Judgment of 31 March 2014, [2014] ICJ Rep. 226 (hereafter '*Whaling*').
[76] *Whaling in the Antarctic (Australia v. Japan; New Zealand Intervening)*, Australia's Application Instituting Proceedings, 31 May 2010, para. 2. In response to a question from Judge Bhandari, Australia clarified during the oral proceedings that it was seeking 'to uphold its collective interest, an interest it shares with all other parties'. Verbatim Record CR 2013/18, 9 July 2013, 28, para. 19.
[77] See *Whaling*, *supra* note 75, at 242–3, paras. 32–3.
[78] See *Whaling*, *supra* note 75, at 251–2, paras. 56–8.
[79] P. Urs, 'Guest Post: Are States Injured by Whaling in the Antarctic?', *Opinio Juris*, 14 August 2014, available at opiniojuris.org/2014/08/14/guest-post-states-injured-whaling-antarctic/; M. Fitzmaurice, *Whaling and International Law* (2015), 109–10. This is also how the Japanese Foreign Ministry subsequently understood the decision. Cf. Fitzmaurice (2015), ibid., at 114.
[80] For an explanation of the dynamics of the case, see C.J. Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment', in M. Fitzmaurice and D. Tamada (eds.), *Whaling in the Antarctic: The Significance and the Implications of the ICJ Judgment* (2016), 193 at 206–9. Australia's approach was 'unusual in light of the fact that, in earlier instances of public interest litigation, claimant States had usually opted for a different, "dualistic", approach that emphasised the right to vindicate general interests but also stressed the claimant State's special position'. Tams (2016), ibid., at 204. See also T. Stephens, 'Law of the Sea Symposium: A Comment on Natalie Klein's Post', *Opinio Juris*, 27 May 2013, available at opiniojuris.org/2013/05/27/law-of-the-sea-symposium/; Crawford (2013), *supra* note 3, at 373.

law, to negotiate a move towards nuclear non-proliferation. Contrary to its *Whaling* decision, the three decisions of 2016, issued on the basis of the option clause declarations of the UK, India and Pakistan respectively (hereafter '*Marshall Islands*'),[81] acknowledged the existence of a collective interest in nuclear non-proliferation but found, as Judge Oda had in *Bosnian Genocide*, the absence of a dispute between the parties necessary for the exercise of the Court's jurisdiction.[82] As such, the question of standing did not arise.[83] Judge Crawford, in dissent, challenged what he considered to be the majority's excessively formalistic approach. In his view, the adjudication of a multilateral dispute of this kind, while 'ultimately be[ing] fitted within the bilateral mode of dispute settlement', does not require that the 'underlying relations' between the parties be 'bilateral *ab initio*'.[84] Judge Tomka qualified Judge Crawford's position by suggesting that the dispute would have in any event been rendered inadmissible due to the absence from the proceedings of the other nuclear weapons states with which the UK, India and Pakistan respectively were obliged to negotiate, suggesting ultimately that another forum might have been more appropriate.[85]

Most recently, The Gambia in its institution in 2019 of proceedings against Myanmar in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* (hereafter '*Rohingya Genocide*') did so explicitly on the basis of 'the *erga omnes* and *erga omnes partes*

[81] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, [2016] ICJ Rep. 833 (hereafter '*Marshall Islands*'); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment of 5 October 2016, [2016] ICJ Rep. 255; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Judgment of 5 October 2016, [2016] ICJ Rep. 552.
[82] *Marshall Islands*, ibid., at 854, para. 52.
[83] For the argument that the Court might have been better off dismissing the cases for inadmissibility, see V.-J. Proulx, 'The *Marshall Islands* Judgment and Multilateral Disputes at the World Court: Whither Access to International Justice?', (2017) 111 *AJIL Unbound* 96.
[84] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, [2016] ICJ Rep. 1093, para. 21 (Judge Crawford, Dissenting Opinion). See also F. Paddeu, 'Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory', (2017) 76(1) *Cambridge Law Journal* 1, 2–3.
[85] This did not, however, make all nuclear weapons states indispensable third parties. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, [2016] ICJ Rep. 885 (Judge Tomka, Separate Opinion).

character of the obligations that are owed under the Genocide Convention'.[86] Accordingly, The Gambia sought

> to establish Myanmar's responsibility for violations of the Genocide Convention, to hold it fully accountable under international law for its genocidal acts against the Rohingya group, and to have recourse to th[e] Court to ensure the fullest possible protection for those who remain at grave risk from future acts of genocide.[87]

While in the *Whaling* and *Marshall Islands* cases it would have proved necessary for the Court – had it addressed the issue of standing – to establish the existence of a collective interest in compliance, The Gambia's right of standing was relatively secure. The Court had already affirmed, on more than one occasion, the *erga omnes partes* nature of the obligations arising out of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter 'Genocide Convention').[88] In *Barcelona Traction*, it had offered as an example of obligations *erga omnes* the obligations arising out of the prohibition of genocide under international law.[89] So also, in *Obligation to Extradite*, the Court's conclusion as to the right of standing vis-à-vis obligations *erga omnes partes* under the Torture Convention had been based in part on the treaty's similarity, in its view, with the Genocide Convention.[90] If this were not enough, both decisions referred back to the 1951 advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in which the Court, speaking of the Genocide Convention, remarked:

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[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, The Gambia's Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019, para. 15. This was a rare instance (in addition to the *Whaling* case) of a state bringing a dispute to the Court in the collective interest without also suggesting that it was specially affected.
[87] Ibid.
[88] See e.g. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595, 615, para. 31.
[89] *Barcelona Traction*, *supra* note 4, at 32, para. 34.
[90] *Obligation to Extradite*, *supra* note 60, at 449, para. 68.

> In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.[91]

These decisions together provided the basis for the Court's affirmation of The Gambia's standing on the ground that 'any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party'.[92] Accordingly, the Court rejected various arguments presented by Myanmar. It had been Myanmar's contention that, although it had consented to the jurisdiction of the Court by its acceptance of the compromissory clause in Article IX of the Genocide Convention, it had made a reservation to exclude the application of Article VIII of the Convention, which in its view was the provision that actually permitted the Court to render a decision as an organ competent to take appropriate 'action' thereunder. Proceeding with the dispute would thus vitiate the requirement of Myanmar's consent to what it considered ultimately to be the application of Article VIII.[93] The Court also rejected Myanmar's argument that *locus standi* was conferred only on specially affected states, such as Bangladesh, and that permitting the institution by The Gambia of the proceedings 'would represent a major inroad into fundamental principles concerning the consensual nature of the Court's jurisdiction'.[94] If only specially affected states were entitled to standing before the Court, and it was only Bangladesh that was, in Myanmar's view, entitled to initiated the proceedings, the Court would have been unable to exercise its jurisdiction owing to Bangladesh's reservation to Article IX of the Convention, which effectively made the Court's jurisdiction conditional upon Myanmar's consent.[95] Judge Xue, consistently with her dissent in *Obligation to Extradite*, challenged the majority's reasoning on the question of standing. She sought once again to separate the collective interest of states parties

[91] *Reservations*, *supra* note 1, at 23. See also *Reservations to the Convention on Genocide*, Advisory Opinion, [1951] ICJ Rep. 49, 51 (Judge Alvarez, Dissenting Opinion) (hereafter 'Alvarez Dissent').
[92] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, Order for Provisional Measures of 23 January 2020, para. 41 (not yet published) (hereafter '*Rohingya Genocide*').
[93] *Rohingya Genocide*, ibid., para. 35.
[94] Verbatim Record CR 2019/19, 11 December 2019, 53, para. 56 (hereafter 'Verbatim Record I').
[95] Ibid., at 53, paras. 55–6.

under the treaty, on the one hand, and the standing to institute proceedings before the Court, on the other. In her view,

> [t]he *raison d'être* of the Genocide Convention … does not, in and by itself, afford each State party a jurisdictional basis and the legal standing before the Court. Otherwise, it cannot be explained why reservation to the jurisdiction of the Court under Article IX of the Convention is permitted under international law. Those States which have made a reservation to Article IX are equally committed to the *raison d'être* of the Genocide Convention. The fact that recourse to the Court cannot be used either by or against them in no way means that they do not share the common interest in the accomplishment of the high purposes of the Convention.[96]

On the question of enforcement, Judge Xue, like Judges Oda and Tomka, emphasised the existence of alternative mechanisms for addressing breaches of the Genocide Convention, including through the architecture of the United Nations (UN).[97]

In sum, the ICJ has in several of its decisions affirmed the existence of the category of obligations *erga omnes* it had proposed in *Barcelona Traction*. In doing so, the Court has shed light on what these collective obligations may be, in particular by reference to the object and purpose of multilateral treaties, such as the Genocide Convention, as well as in respect of relevant rules of customary international law, as with the right of self-determination. The Court has also recognised a right of standing to enforce obligation *erga omnes*, even if its conferral of *locus standi* has in practice been limited to obligations *erga omnes partes* arising under the multilateral treaties which have been the subject of the cases before it. When it has come, however, to addressing the consequences of its

[96] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, Order for Provisional Measures of 23 January 2020, para. 6 (Judge Xue, Separate Opinion) (not yet published) (hereafter 'Xue Separate Opinion').
[97] Xue Separate Opinion, ibid., para. 7. See also M. Ruffert, 'Special Jurisdiction of the ICJ in the Case of Infringement of Fundamental Rules of the International Legal Order?', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006), 295 at 307.

conferral of a right of standing to invoke responsibility for the breach of obligations *erga omnes*, the Court's engagement with relevant issues has been somewhat more limited.

3. Identifying the limits and consequences of the right of standing for the enforcement of obligations *erga omnes*

Generally speaking, 'it is common for broad principles enunciated in early cases', such as the notion of obligations *erga omnes*, 'to be subject to narrowing and refinement by later courts'.[98] Even beyond the question of standing, the *Marshall Islands* cases illustrate the difficulties that arise in the adjudication of disputes bilaterally where obligations *erga omnes* are owed multilaterally.[99] In the decisions discussed above, the ICJ has not yet had the opportunity to engage in such a process in depth, at least not in respect of the right of standing to invoke responsibility for the breach of obligations *erga omnes*. In fact, the conferral by the Court of a generalised right of standing to enforce obligations in the collective interest raises a number of difficulties in its operation within the existing architecture of international law. Principal among these is the tension between the effectiveness of obligations *erga omnes*, which is dependent on the ability to invoke the responsibility of the breaching state, including through the adjudication of the dispute, and the consent-based, bilateral system of international dispute resolution that characterises proceedings at the Court. With a view to identifying the practical limits of an otherwise wide right of standing to enforce obligations *erga omnes*, and to temper the expectations that are likely to be placed upon this category of obligations, the following discussion draws from the practice of the Court to identify some of the constraints that might qualify the wide right of standing which the Court has now undoubtedly recognised. First, it identifies the limits of the Court's own recognition of *locus standi* vis-à-vis obligations *erga omnes*. Secondly, it qualifies states' resort to the contentious jurisdiction of the Court based on the requirement of the breaching state's consent to jurisdiction. Thirdly, it

[98] Crawford (2013), *supra* note 3, at 378.
[99] See Paddeu (2017), *supra* note 84.

considers the availability of *locus standi* for a state acting in the collective interest where an injured state may be able itself to institute proceedings. Finally, it considers the implications of this right of standing for states wishing to intervene in the proceedings. On this basis, and in anticipation of the Court's future treatment of these issues, the article offers some tentative conclusions as to the scope of the right of standing to invoke responsibility for the breach of obligations *erga omnes*.

3.1. Obligations erga omnes *arising under customary international law*

It is often suggested that the Court's dictum in *Barcelona Traction* was the starting point for the recognition and enforcement of community interests in international law.[100] On an expansive reading of that decision, the Court was responsible for not only creating the category of obligations *erga omnes* but also 'describ[ing] specific features of the secondary rules governing the invocation of responsibility for violations of obligations called "*erga omnes*"'.[101] Even those, like Judges de Castro, Oda, and Xue, who question the weight that has since been assigned to the Court's statements in *Barcelona Traction*, can no longer rely on a more restrictive reading to exclude *locus standi* vis-à-vis breaches of obligations *erga omnes*. Their position, articulated in Judge de Castro's statement in *Nuclear Tests*, below, has been clearly rejected in the subsequent practice of the Court:

> I am unable to believe that by virtue of this dictum the Court would regard as admissible, for example, a claim by State A against State B that B was not applying 'principles and rules concerning the basic rights of the human person' … with regard to the subjects of State B or even State C.[102]

Any remaining doubt as to the connection between the recognition of obligations *erga omnes*, on the one hand, and *locus standi*, on the other, has been dispelled by the more recent jurisprudence of

[100] For Simma, 'the *Barcelona Traction* dictum can be regarded as providing an exception to the general bilateralist rule in the case of severe violations of the most important community interests'. Simma (1994), *supra* note 6, at 295.
[101] Tams (2005), *supra* note 2, at 102. This is indeed the better view. If obligations *erga omnes* did not give rise to a right of standing, the concept would be 'of rhetorical value only'. Tams (2005), *supra* note 2, at 158. In support, see C. Tomuschat, 'Obligations Arising for States Without or Against their Will' (1993) 241 *Collected Courses of the Hague Academy of International Law* 203, 365; Frowein, *supra* note 59, at 427; Crawford (2006), *supra* note 43, at 425. For a detailed discussion, see Tams (2005), *supra* note 2, at 162–80.
[102] de Castro Dissent, *supra* note 49, at 387. See also Brown Weiss, *supra* note 3, at 801.

the Court in *Obligation to Extradite* and *Rohingya Genocide*.[103] The same position was effectively taken in the *Whaling* case,[104] with one commentator observing that the decision 'could be seen as a sequel to' the decision in *Obligation to Extradite*.[105]

Even so, the contribution of the Court's practice on the point is not unqualified. While *Barcelona Traction* clearly identified obligations *erga omnes* as existing under both multilateral treaties and general international law, giving rise in principle to *locus standi* in respect of both treaty law and customary international law, the Court did not 'announc[e] a new rule as much as a category, a general idea, an alternative way of establishing legal relations in international law'.[106] Viewed in this light, the subsequent practice of the Court, which has so far recognised a right of standing in respect only of breaches of obligations *erga omnes partes* under multilateral treaties, cannot necessarily be taken to represent the endorsement of a broader right of standing also in respect of obligations *erga omnes* under customary international law.[107] While there is no qualitative distinction between obligations *erga omnes* and *erga omnes partes*, nor between states' interests in compliance with collective obligations under treaty law and customary international law respectively, the Court has simply not been required, in its decisions to date, to address the issue of standing by reference to customary international law. This has been the case even in disputes in which the Court acknowledged the existence of obligations *erga omnes* under customary international law, such as in *East Timor*, *Obligation to Extradite* and *Marshall Islands*.[108] To the extent that the Court might address the breach of obligations *erga omnes* arising under customary international law in the future, its

[103] See Kawano, *supra* note 12, at 230; M. Andenas and T. Weatherall, '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, 765–6.
[104] *Supra* note 79.
[105] Tams (2016), *supra* note 80, at 210.
[106] Crawford (2006), *supra* note 43, at 423.
[107] But see Andenas and Weatherall, *supra* note 103, at 764.
[108] On *Rohingya Genocide*, see J. Heieck, 'Rohingya Symposium: Judicial Intervention and the Duty to Prevent Genocide in the Rohingya Genocide Case – The Role of Obligatio Erga Omnes and Nouvelle Protection Diplomatique' *Opinio Juris*, 25 August 2020, available at opiniojuris.org/2020/08/25/rohingya-symposium-judicial-intervention-and-the-duty-to-prevent-genocide-in-the-rohingya-genocide-case-the-role-of-obligatio-erga-omnes-and-nouvelle-protection-diplomatique/.

ability to establish *locus standi* might be impeded by the absence of a hook – such as a jurisdiction clause or the object and purpose of a treaty – on which to hang such a right.[109]

3.2. The enduring requirement of consent to jurisdiction

The Court's conferral of *locus standi* to invoke the responsibility of a state in breach of an obligation *erga omnes* is in all events conditioned upon the requirement of the breaching state's consent to the contentious jurisdiction of the Court, whether through the issuance of a declaration under Article 36(2) of the Statute of the International Court of Justice or in accordance with a treaty's compromissory clause. The satisfaction of this procedural requirement is usually regarded as a condition precedent in discussions of standing.[110] Accordingly, 'whatever its effects in the field of standing, the *erga omnes* concept does not affect the consensual character of the Court's jurisdiction'.[111] Yet others seek to overcome what they perceive to be a barrier to the effectiveness of obligations *erga omnes* by suggesting that the Court, in issuing its dictum in *Barcelona Traction*, 'could not [have] overlook[ed] the possible consequences of [obligations *erga omnes*] for the jurisdiction of the Court'.[112] Accordingly, in the words of Judge Weeramantry, the enforcement of obligations *erga omnes*, 'which transcend the individual rights and obligations of litigating States', requires that international law 'look[s] beyond procedural rules fashioned for purely *inter partes* litigation'.[113] This tension between the effectiveness of obligations *erga omnes* and the requirement of consent to jurisdiction arises not only in the application of the indispensable third party rule, discussed in *East Timor*, but also in respect of the permissibility of a reservation that purports to

[109] It is also more difficult to establish the content of an obligation *erga omnes* under customary international law. Kawano, *supra* note 12, at 215–16.
[110] See e.g. Art. 3, Obligations *Erga Omnes* under International Law, Resolution of the Institut de Droit Internationale (2005); Tams (2005), *supra* note 2, at 161–2; G. Gaja, 'The Protection of General Interests in the International Community', (2011) 364 *Collected Courses of the Hague Academy of International Law* 15, 111–12; Kawano, *supra* note 12, at 219–20; S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law', (2010) 21 *EJIL* 387, 414–15.
[111] Tams (2005), *supra* note 2, at 159–60.
[112] Frowein, *supra* note 59, at 427.
[113] Weeramantry Separate Opinion, *supra* note 58, at 118. See also Weeramantry Dissent, *supra* note 58, at 172–3.

exclude the application of a treaty's compromissory clause, as well as the permissibility of adjudication in the collective interest absent the participation of an injured state.

When it came to the application of the indispensable third party rule, the majority of the Court in *East Timor* concluded that, where the legal interests of a third state constitute the subject-matter of the dispute, the requirement of that state's consent to jurisdiction is essential even if the enforcement of obligations *erga omnes* is at stake.[114] The Court rightly carved out of an otherwise expansive right of standing disputes in respect of which an indispensable third party state has not consented to its jurisdiction.[115] Its decision to do so nevertheless proved controversial; according to one commentator, 'it is ironic that the very Court that spelled out the concept [of obligations *erga omnes*] in the first place has now subjected it to the procedural rigours of traditional bilateralism'.[116] Similarly, for Judge Weeramantry, applying the indispensable third party rule in respect of obligations *erga omnes* effectively allows the respondent state to 'plead another State's responsibility as an excuse for its own failure to discharge its own responsibility'.[117] This is only true to the extent that the responsibility of the respondent state for the breach of an obligation *erga omnes* cannot not be determined independently of the responsibility of a state not party to the proceedings for the breach of the same obligation.[118] In all cases in which obligations *erga omnes* require that states take action individually, the indispensable third party rules is unlikely to apply.

A second, analogous manifestation of the conflict between the enforcement of obligations *erga omnes* and the requirement of consent to jurisdiction, pertaining specifically to multilateral treaties, is the issuance by states parties of reservations purporting to exclude the jurisdiction of the Court in respect of the obligations *erga omnes partes* arising thereunder. For its part, the Court has rejected

[114] *East Timor*, *supra* note 54, at 104–5, para. 34.
[115] *East Timor*, *supra* note 54, at 104–5, para. 34. See also Ruffert, *supra* note 97, at 303–4.
[116] Simma (1994), *supra* note 6, at 297.
[117] Weeramantry Dissent, *supra* note 58, at 173.
[118] See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, 261, para. 55. See also Gaja, *supra* note 110, at 118. Neither does the indispensable third party rule require the participation in the proceedings of all the states to which the obligation is owed. Gaja *supra* note 110, at 117–18.

the suggestion that a reservation to a treaty's compromissory clause is impermissible when it comes to the enforcement of obligations *erga omnes partes*.[119] As emphasised by Judge Xue in *Obligation to Extradite*, the blanket conferral of standing on states parties by virtue of their status as such is therefore ineffective to the extent that the breaching state party has excluded either the substantive obligation that is the subject of the dispute, precluding the possibility of a breach in the first place,[120] or the application of the compromissory clause conferring jurisdiction upon the Court.[121] In the same case, Judge ad hoc Sur explained that

> it is very difficult … to introduce verticality into a system which is by nature horizontal, in which parties' rights and obligations must be considered not in a general and abstract way, but on a party-by-party basis, according to the commitments they have made …[122]

A generalised right of standing for states parties is thus limited by the extent to which states parties may be permitted to exclude, by way of reservation, the application of the treaty's compromissory clause and therefore the jurisdiction of the Court. This is not to endorse, however, the position taken by Judges Xue and Sur, that the permissibility of a reservation to exclude the application of the treaty's compromissory clause likewise excludes *locus standi* for the enforcement of obligations *erga omnes* arising under the treaty even where no reservation has been made.[123]

Against this backdrop, it is sometimes asserted that certain obligations, including obligations *erga omnes*, 'constitute an indivisible whole', thereby precluding reservations which would run counter

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[119] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, [2002] ICJ Rep. 219, 245–6, paras. 71–2.
[120] The permissibility of a reservation, if unspecified, depends on the reservation's compatibility with the object and purpose of the treaty. *Reservations*, *supra* note 1, at 24. As Simma explains, community interest in multilateral treaties 'manifests itself at two levels'. First, through 'adherence by as large a number of States as possible', notwithstanding that a state 'has relativized its consent to the substance of the treaty by way of reservations', and secondly, to maintain 'the integrity of at least the essence of the treaty obligations by stating the precondition of the compatibility of the reservations made with the object and purpose of the treaty'. Simma (1994), *supra* note 6, at 340–2. The focus of the article being on the question of standing, the permissibility of reservations excluding obligations *erga omnes partes* is not discussed further.
[121] Xue Separate Opinion, *supra* note 96, para. 6.
[122] Sur Dissent, *supra* note 63, at 616–17, para. 39.
[123] Xue Separate Opinion, *supra* note 96, para. 6.

to the collective interest.[124] Put differently, where multilateral treaties impose obligations *erga omnes partes* which 'cannot possibly be … effected on a bilateral basis', reservations – which represent an essentially bilateral operation of multilateral treaties – become impermissible.[125] Whether this logic can be extended to rule out reservations that withhold consent to the application of the treaty's compromissory clause, and therefore the jurisdiction of the Court, remains doubtful.[126] The better approach, and one which does not easily dispense with the requirement of consent, is the express articulation in multilateral treaties encompassing obligations *erga omnes partes* of a rule excluding reservations to its compromissory clause, albeit at the potential cost of limiting acceptance by states of the treaty. To the extent that states are bound by a treaty's compromissory clause, the exercise of the Court's jurisdiction will depend on its wording. So far, only Judge Oda has taken a position on the issue, suggesting that the alleged violation by a state of an obligation *erga omnes partes* does not necessarily give rise to a dispute as to the application or interpretation of the treaty.

Finally, in *Rohingya Genocide*, the question of consent arose in a slightly different constellation, and is deserving of brief discussion. According to Myanmar, had Bangladesh instituted the proceedings as a specially affected and therefore injured state,[127] the proceedings would have been precluded – per Bangladesh's own exclusion of compulsory jurisdiction under Article IX of the Genocide Convention – by the requirement of Myanmar's consent to jurisdiction. In Myanmar's view,

> if a State such as The Gambia that is *not* specially affected by an alleged breach of a treaty could bring a case, in circumstances where a State that *is* specially affected cannot, this would represent

[124] Integral obligations are also included. Alvarez Dissent, *supra* note 91, at 52–3; Simma (1994), *supra* note 6, at 342–4; Crawford (2014), *supra* note 2, para. 324.
[125] Simma (1994), *supra* note 6, at 342.
[126] The answer depends on whether a reservation to a compromissory clause constitutes a minor and therefore permissible reservation. *Reservations*, *supra* note 1, at 24.
[127] Myanmar seemed to take the view that all its neighbouring states would be specially affected. It is unclear why this might be the case under the Genocide Convention. See Verbatim Record I, *supra* note 94, at 53, para. 56; Verbatim Record, CR 2019/21, 12 December 2019, 14–15, paras. 15–17 (hereafter 'Verbatim Record II').

> a major inroad into fundamental principles concerning the consensual nature of the Court's jurisdiction.[128]

The Court in its order for provisional measures did not specifically address the issue, but appears to have endorsed the position taken by the dissenting Judge Weeramantry in *East Timor*, that '[a]n *erga omnes* right is … a series of separate rights *erga singulum*', which 'are in no way dependent one upon the other'.[129] Indeed, if consent to the jurisdiction of the Court exists in respect of the dispute between The Gambia and Myanmar, it is irrelevant whether Myanmar would have withheld its consent in respect of a potential dispute with Bangladesh or any other state. An appraisal of the approach effectively taken by the Court requires a consideration of the related question of the permissibility of standing in the collective interest where an injured state may be able itself to institute proceedings.

3.3. The indispensable injured state?

Myanmar's consent-based objection to the exercise of the Court's jurisdiction in *Rohingya Genocide*, while unconvincing, prompts discussion of the related question of whether a state other than an injured state may institute proceedings before the Court where an arguably injured state may be able itself to do so.[130] The issue raises practical concerns about whether an injured state is best placed to represent the collective interest,[131] or if its proximity to the breach or the breaching state creates political risks that prevent it from acting effectively or at all.[132] In this respect, *Rohingya Genocide* is clearly distinguished from the Court's prior cases since *Barcelona Traction*, in which the

[128] Verbatim Record I, *supra* note 94, at 53, para. 56.
[129] Weeramantry Dissent, *supra* note 58, at 172. See also Simma (1994), *supra* note 6, at 330–1.
[130] See Verbatim Record II, *supra* note 127, at 15, para. 16 (with Myanmar arguing that 'it is the right of an injured State to decide if, and eventually how, to invoke the responsibility of another State, and that the right of non-injured States to invoke such responsibility is subsidiary').
[131] The interests of the injured state may even diverge from those of the international community. Shelton, *supra* note 29, at 854.
[132] Injured states with 'historical, diplomatic, and economic' links to the breaching state may 'face the highest political risks in raising a claim before the ICJ'. S.R. Singh, 'Standing on "Shared Values": The ICJ's Myanmar Decision and Its Implications for Atrocity Prevention', *Opinio Juris*, 29 January 2020, available at opiniojuris.org/2020/01/29/standing-on-shared-values-the-icjs-myanmar-decision-and-its-implications-for-atrocity-prevention/.

states instituting the proceedings did so both in the collective interest and on the basis of injury, as in *East Timor* and *Obligation to Extradite*, or where there was simply no injured state to speak of, as in the *Whaling* case. Endorsing The Gambia's right to institute the proceedings in the collective interest, the Court rejected Myanmar's contention that it was only an allegedly injured state that had a right to do so. In this regard, the Court seems tentatively to have aligned itself with the ILC's progressive development of the law on the issue. While emphasising the significance of Article 48 of the ARSIWA in situations in which there is no injured state to invoke responsibility, the Commission did not eventually limit the scope of the provision in this way. Instead, Article 48(2)(b) permits a state other than an injured state to claim reparation 'in the interest of the injured State or of the beneficiaries of the obligation'. In accordance with the ILC's approach, it was permissible, in the view of the Court, for The Gambia to bring the dispute without any assessment of whether there was in fact an injured state with more firm standing upon which to do so.

Perhaps in the interest of expediency in awarding provisional measures, the Court did not, in its broad-brush endorsement of this position, engage with the consequences of affording states a right of standing even where an injured state may be able itself to act. It did not even address the question of whether Bangladesh may be considered to be a state specially affected, and therefore injured, by Myanmar's alleged violations of the Genocide Convention.

The consequences of the position effectively taken by the Court pertain, first, to the provision of remedies. On the one hand, compliance with certain obligations having been recognised to be in the collective interest, cessation of the breach and assurances and guarantees of non-repetition may no longer be regarded as remedies that are available exclusively to the injured state.[133] On the other hand, where reparation is specifically sought in the interest of the injured state (within the meaning of Article 48(2)(b)), the participation in some form of the injured state will prove

[133] For Shelton, cessation has become 'an inherent obligation of the responsible state', which is no longer a remedy conditioned on the request of the injured state. Shelton, *supra* note 29, at 839–40.

necessary.[134] Were these remedies to be conferred without the participation in the proceedings of the injured state, the indispensable third party rule would be rendered obsolete in respect of the enforcement of obligations *erga omnes*. Where, however, the state instituting the proceedings does not purport to act in the interest of an injured state (as with The Gambia), further clarification is warranted as to the preclusive effects of the Court's decision, that is, the application or not of the principle of *res judicata* to subsequent claims by the injured state or other states,[135] in particular where the remedies awarded by the Court go beyond cessation and assurances and guarantees of non-repetition.[136] For its part, the ILC did not overlook that the entitlement of a state acting under Article 48 of the ARSIWA 'will coincide with that of an injured State in relation to the same internationally wrongful act', but did not conclusively address the issue.[137] Presumably, the question is one of claim preclusion and not the stricter test of identity – including the identity of the parties – usually required for the operation of *res judicata* in international law. In accordance with the view expressed by Judge Weeramantry and seemingly adopted also by the majority in *Rohingya Genocide*, if *erga omnes* rights operate *erga singulum* then so does the principle of *res judicata*, suggesting that the principle will only apply to the same parties, that is, with conclusive but not preclusive effects.[138]

Secondly, although not relevant to the proceedings in *Rohingya Genocide*, complications may also arise from the injured state's loss of the right to invoke responsibility due to the waiver or the acquiescence in the lapse of the claim by the injured state,[139] warranting clarification as to whether

[134] The ILC anticipated that if a state other than an injured state seeks reparation for a breach, it 'may be called on to establish that it is acting in the interest of the injured party' which, if a state, will be able to represent its own interests. Commentary, *supra* note 8, at 127.
[135] See Arts. 59 and 60, Statute of the International Court of Justice 1945.
[136] Discussion of the remedies that may be awarded in favour of a state other than an injured state is limited. To date, the Court has not purported to limit itself to the remedies specified in Article 48(2) of the ARSIWA, having imposed, for example, a reporting requirement upon Myanmar in its order for provisional measures in *Rohingya Genocide*. For the view that the Court also went beyond the remedies sought by Australia in the *Whaling* decision, see Tams (2016), *supra* note 80, at 209.
[137] Commentary, *supra* note 8, at 126.
[138] See Weeramantry Dissent, *supra* note 58, at 172–3. For an overview of the ICJ's approach to *res judicata*, see N. Ridi, 'Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf* Case', (2018) 31 *LJIL* 383.
[139] See Art. 45, ARSIWA.

other states acting in the collective interest preserve the right, *erga singulum*, to invoke responsibility for the breach.[140] The primary justification to date for the Court's conferral of a right of standing being to fill a gap in enforcement,[141] a proposal that itself remains contentious, further discussion of the consequences of its permissive approach to the institution of proceedings in the collective interest – even where an injured state may be able itself to do so – is necessary.

3.4. Third state intervention

At the time of writing, The Maldives, Canada and The Netherlands have expressed an intention to intervene in the proceedings in *Rohingya Genocide*.[142] Were these or other states to intervene as states parties to a treaty whose construction is at issue, the question of their participation is straightforward: Article 63(2) of the Statute of the International Court of Justice confers upon all states parties a right to intervene in the proceedings on the condition that the construction given by the Court to the treaty 'will be equally binding upon it'.[143] Alternatively, under Article 62(1) of the Statute, a state may request permission to intervene on the ground that it has 'an interest of a legal nature which may be affected by the decision'. In this latter context, the question may be posed whether the Court's conferral of *locus standi* on states other than an injured state to institute proceedings for the enforcement of an obligation *erga omnes* logically requires that it permit, on the

[140] The Commission neither affirmed nor denied the continued availability of Article 48 where an injured state has lost its right to invoke responsibility. Commentary, *supra* note 8, at 122. Elsewhere, Crawford considers that 'in circumstances where there are continuing obligations to a wider group of states, settlement between the two states directly involved in the claim may be insufficient to resolve matters fully'. Crawford (2013), *supra* note 3, at 563. While Crawford argues that 'it does not necessarily follow' from the waiver of the injured state that 'all the rights to claim of all other states under article 48' are extinguished, Tams considers that the waiver of a claim by an injured state 'would also extinguish all claims that "other interested States" have under article 48'. Cf. Crawford (2013), *supra* note 3, at 564. If, as appears to be the approach taken in *Rohingya Genocide*, obligations *erga omnes* operate *erga singulum*, the former approach is preferred and one state's ability to invoke responsibility in the collective interest is not conditioned on the position of any potentially injured state.

[141] *Obligation to Extradite*, *supra* note 60, at 450, para. 69. See also Tams and Tzanakopoulos, *supra* note 4, at 794; Brown Weiss, *supra* note 3, at 805.

[142] Available at www.foreign.gov.mv/index.php/en/mediacentre/news/5483-the-republic-of-maldives-to-file-declaration-of-intervention-in-support-of-the-rohingya-people,-at-the-international-court-of-justice and www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice.

[143] A comparable 'right' to intervene does not exist in respect of general international law. G. Gaja, 'A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice', in U. Fastenrath et. al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), 665 at 672.

same basis, the intervention in the proceedings of all other states having a legal interest in the matter. Put differently, where the breach of an obligation *erga omnes* is at issue, there appears to be no distinction between the interest of the state instituting the proceedings and the interests of states seeking to intervene under Article 62(1).[144] As such, the intervention in the proceedings of all states to which the obligation *erga omnes* is owed must be permitted, since '[w]hatever "interest of a legal nature" is required in Article 62 of the Statute, it cannot be higher than the one that justifies bringing a claim before the Court'.[145] This permissive approach to intervention under Article 62 has the advantage of discouraging a multiplicity of proceedings pertaining to the same breach. In light of an anticipated increase in what has so far been a limited interest in intervention, however, considerations of judicial economy[146] may warrant the revision of the Court's existing procedures for intervention under the Statute.[147]

3.5. Broader considerations

In addition to the issues discussed, the conferral by the Court of *locus standi* to institute proceedings for the enforcement of obligations *erga omnes* poses the broader question as to how to strike '[the] appropriate balance between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes'.[148] Those who are reluctant to confer a right of standing for the enforcement of obligations *erga omnes* are concerned not only about an increase in inter-state adjudication but also the corresponding use and misuse of unilateral countermeasures, ostensibly in the collective interest.[149] It is also sometimes suggested,

[144] Kawano, *supra* note 12, at 236.
[145] Gaja, *supra* note 110, at 119. Cf. B. McGarry, 'Third-State Intervention in the Rohingya Genocide Case: How, When, and Why? [Part I]', *Opinio Juris*, 11 September 2020, available at opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-i/.
[146] For McGarry, a permissive approach to Article 62 will not only erode judicial economy but also potentially reduce both the institution of proceedings and respondent non-appearance. McGarry, ibid.
[147] On the need to revise the Court's intervention procedures, see Gaja, *supra* note 110, at 120–2. There is an interesting comparison to be made between the intervention in contentious cases of potentially all states to which the obligation *erga omnes* is owed and the Court's advisory proceedings in which collective interests might arguably be better addressed and in which all states are entitled to participate.
[148] Crawford (2013), *supra* note 3, at 553.
[149] Verbatim Record I, *supra* note 94, at 54, para. 57; Weil, *supra* note 5, at 433; Brown Weiss, *supra* note 3, at 805.

including by some judges at the Court, that non-adjudicatory means of dispute resolution are preferable.[150] Conversely, the sufficiency of non-adjudicatory measures to strike this balance, including within the framework of the UN, remains contested, and ignores the important contribution of the ICJ in the settlement of international disputes.[151] When it comes to countermeasures, moreover, there is considerable support for the view that the availability of adjudication is likely to reduce resort to countermeasures,[152] with one commentator suggesting that the risk of litigation incentivises greater compliance with obligations *erga omnes ab initio*.[153]

On balance, the anticipated increase in the adjudication of disputes as a justification to limit standing for the enforcement of obligations *erga omnes* is overstated. To begin with, many multilateral treaties explicitly provide for a right of standing in the collective interest.[154] The practical effects of the conferral by the Court of a generalised right of standing to institute proceedings for the enforcement of obligations *erga omnes* must not be exaggerated.[155] What is more, a state's decision whether to bring a dispute before the ICJ is a pragmatic one in which 'the odds are weighted against a decision in favour of litigation',[156] and which may be coordinated among states, as was done in *Rohingya Genocide*.[157] As one commentator observes, therefore, what is likely to be a relatively limited increase in adjudication before the Court may be a reasonable compromise for the enforcement of collective interests:

[150] Proulx, *supra* note 83, at 101.
[151] Crawford (2014), *supra* note 2, para. 341.
[152] Tams (2005), *supra* note 2, at 24; Frowein, *supra* note 59, at 427. For the view that states are in any event unlikely to resort to countermeasures for the enforcement of obligations *erga omnes*, see Tomuschat, *supra* note 101, at 367.
[153] Singh, *supra* note 132.
[154] See *supra* note 3.
[155] Thus, *locus standi* extends only to 'a narrowly defined circle of community interests'. Tams and Tzanakopoulos, *supra* note 4, at 792.
[156] Scott, *supra* note 8, at 29. See also M.A. Becker, 'The Situation of the Rohingya: Is There a Role for the International Court of Justice?' EJIL Talk!, 14 November 2018, available at www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/.
[157] See Picone, 'The Distinction between Jus Cogens and Obligations Erga Omnes', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 411 at 423–4.

> [T]he costs of a potentially frivolous or politically motivated claim, which can be disposed of as such, may be the price for a system in which states will now have the right to hold other states accountable for breaching obligations owed to the international community as a whole.[158]

What is nevertheless clear is that the 'teething problems'[159] associated with identifying the various limits and consequences of the Court's conferral of *locus standi* for the enforcement of obligations *erga omnes* require further detailed reflection.

4. Conclusion

Since its once divisive dictum in *Barcelona Traction*, the Court has recognised that the category of obligations *erga omnes* it identified in that decision confers on states to whom the obligation is owed a corresponding right to invoke the responsibility of the state in breach. While in several of its decisions, such as *East Timor*, the Court refrained from expressly conferring a right of standing for the enforcement of collective interests, it did so unequivocally in *Obligation to Extradite* and most recently in its order for provisional measures in *Rohingya Genocide*. The same position has arguably been taken in its *Whaling* decision. The Court cannot thus walk back the connection it has now clearly endorsed between the status of a primary obligation as *erga omnes* and the right of standing to institute proceedings for its enforcement. At the same time, however, the Court has not addressed the contours of what is on its face a wide right of standing, provoking the assessment in this article of the limits of *locus standi* for the enforcement, and ultimately the effectiveness, of obligations *erga omnes*. What appears to be a blanket conferral of standing to bring disputes in the collective interest is somewhat more limited than the Court's statements in *Barcelona Traction*, *Obligation to Extradite* and *Rohingya Genocide* might suggest. The first limitation is that, barring the dictum in *Barcelona Traction*, none of the Court's decisions to date confer a right of standing to enforce obligations *erga omnes* arising under customary international law, either because the

[158] Brown Weiss, *supra* note 3, at 805. See also Tomuschat, *supra* note 101, at 367; Crawford (2014), *supra* note 2, para. 341.
[159] Paddeu (2017), *supra* note 84, at 4.

proceedings were initiated pursuant to the compromissory clause of a multilateral treaty or because the case was dismissed owing to the lack of a dispute. The second is the enduring requirement of consent to jurisdiction, manifested in various ways, all effectively excluding *locus standi* in the absence of the breaching state's consent. In light of the Court's conferral of standing in the collective interest even where an injured state may be able itself to institute proceedings, a third set of constraints is likely to emerge from the partial if not total intersection of the legal interests of the state instituting the proceedings and the injured state. The participation in the proceedings of a state with a legal interest in the dispute, which would arguably include all the states to which an obligation *erga omnes* is owed, will also require clarification and perhaps attendant revision. In the final analysis, thus, the effectiveness of obligations *erga omnes* is tempered in practice by the constraints inherent in the existing architecture of international law, which remains primarily a forum for the adjudication of bilateral disputes.[160] Taken together, these considerations reflect a collective call for clarity as to the interaction between the right of standing vis-à-vis obligations *erga omnes* and the existing bilateralist international legal order, including the *inter partes* nature of the Court's contentious jurisdiction. A discussion of the limits and consequences of *locus standi* for the enforcement of obligations *erga omnes* also serves the vital function of communication to states which, uneasy about the Court's extended reach when it comes to the enforcement of collective interests, might otherwise withdraw their consent to the adjudication of disputes which they perceive as involving their breaches of obligations *erga omnes*.

[160] Villalpando, *supra* note 110, at 413–14.