CHARLES UNIVERSITY

Faculty of Law

Jan Mais

Obligations *Erga Omnes* as a Basis of Legal Standing in International Law

Master's Thesis

Master's Thesis Supervisor: JUDr. Milan Lipovský, Ph.D.

Department: Department of International Law

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UNIVERZITA KARLOVA

Právnická fakulta

Jan Mais

Závazky *erga omnes* jako zdroj *ius standi* v mezinárodním právu

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DECLARATION

Hereby, I declare that this master's thesis is my original work and that I have written it independently. All sources and literature that I have used during the elaboration of the thesis are fully cited and listed. This thesis has not been used to obtain any other or the same degree.

I further declare that the text of this thesis including the footnotes has 185 865 characters and spaces.

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Jan Mais

In Prague on 16th July 2023

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Content

Introduction

Obligations *erga omnes* have become a fundamental part of the international responsibility framework. The existence of obligations owed to the international community as a whole surpasses a purely bilateral approach of responsibility between a State that breached a particular obligation and an injured State. After the International Court of Justice recognized the existence of obligations *erga omnes* in the *obiter dictum* of *Barcelona Traction*[1], a wave of interest in the issue followed. Despite the International Law Commission dedicating part of Articles on Responsibility of States for Internationally Wrongful Acts[2] to this matter, and despite the notion of obligations *erga omnes* being raised before international courts from time to time, the precise contours of the institute remain unclear and are subject to intense debate even 50 years after the *Barcelona Traction* judgment. The more positive approach celebrates obligations *erga omnes* for constituting a means for alteration of the international responsibility paradigm, thereby strengthening the international community's position at the expense of the sovereignty of individual States. The more guarded stance insists that the role of obligations *erga omnes* in the system of international responsibility is rather exaggerated considering the scarce State practice and weak applicability outside academic discussions.

One of the most significant attributes of obligations *erga omnes* is that their addressees share an interest in their protection. Depending on these addressees of the obligation, two categories of obligations can be identified. The first category consists of the "regular" obligations *erga omnes* under general international law which are owed towards the international community as a whole and therefore any State has an interest in their protection. The second category are the so-called obligations *erga omnes partes* which are owed only to a certain group of States, often parties to a multilateral treaty, and interest in their protection is thus restricted only to these particular States.

Accordingly, in the event of a breach of an obligation *erga omnes*, one of the suggested means through which the interest in their observance translates into practice is by granting States the capacity to bring a claim for their protection before an international court or tribunal. In such a scenario, the claimant is submitting a case before a court not as someone injured in their individual capacity, but as a member of the community towards which the obligation is owed.

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[1] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain) (Second Phase),* Preliminary Objections, Judgment, ICJ Reports 1970 (5 February), 3, paras 33–34 (*Barcelona Traction*).
[2] UNGA Res 56/83 'Responsibility of States for internationally wrongful acts' (28 January 2002) UN Doc A/RES/56/83, Annex, Art 48 (ARSIWA/Articles).

Each State should therefore have the possibility to institute proceedings before an international court against a State breaching a norm that protects a fundamental collective interest. This inevitably raises questions as to what exactly the collective interest is, what are the limits and limitations of such proceedings, or how effective the institute is in its practice.

In 2023 there have been three notable cases pending before the ICJ in which States base their interest on the breach of *erga omnes* or *erga omnes partes* obligations. The first two cases concern the prohibition of genocide. In the *Gambia v Myanmar*[3], the applicant as a not directly injured party is seeking justice for the perpetration of the Rohingya genocide. In *Ukraine v Russian Federation*[4], a case following Russian aggression against Ukraine, multiple States intervene with claim that their shared interest (the observation of norms prohibiting genocide) has been violated. The third and the newest of these cases is the *Canada and Netherlands v Syrian Arab Republic*[5], where applicants are invoking responsibility for the commitment of the torture and other inhuman acts to Syrian people. These cases follow an increasing trend in the number of proceedings based on alleged breach of obligation *erga omnes* before the ICJ over the past decade. Such a proliferation proves the increasing significance of the institute as a means to combat international impunity and leads to an even more pressing need to clarify its concept, boundaries and effects.

In order to satisfy this need, the thesis undertakes an in-depth analysis of the current status of obligations *erga omnes* in contemporary international law, with particular emphasis on their function as a basis of legal standing in cases brought before the ICJ. It aims to answer the fundamental question of whether obligations *erga omnes (partes)* effectively establish legal standing before international courts and tribunals.

Due to space constraints, the focus lies solely on the aspects of the obligations *erga omnes* necessary for the understanding of their role as a basis of legal standing. Topics such as their possible consequence as third-party countermeasures or the differentiation between the obligations and rights *erga omnes*, therefore fall outside of the scope of this thesis. For similar reasons,

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[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Preliminary Objections, Judgment (22 July 2022) <www.icj-cij.org/case/178/judgments> accessed 10. July 2023 *(The Gambia v Myanmar)*.

[4] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States intervening)*, Admissibility of the Declarations of Intervention, Order (5 June 2023) <www.icj-cij.org/case/182/intervention> accessed 10 July 2023 (*Ukraine v Russian Federation*).

[5] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v Syrian Arab Republic)*, Join Application Instituting Proceedings (8 June 2023) <www.icj-cij.org/case/188/institution-proceedings> accessed 10 July 2023 (*Canada and the Netherlands v Syrian Arab Republic*).

the study of norms representing obligations *erga omnes* or the method of their identification are not addressed in detail. In terms of judicial proceedings based on obligations *erga omnes*, the thesis restricts itself only to those before the ICJ, proceedings initiated before other international courts and tribunals are not discussed. The thesis does not enumerate all the practical obstacles connected to this type of proceedings, rather it debates selected key issues in a scope necessary for answering the set-out objective.

In order to achieve the stated objectives, the thesis predominantly employs analytical methodology. It gives an analytical overview on selected issues and provides partial conclusions for each of them. The descriptive method is limited only to parts where a more detailed exposition of specific topics is necessary (specifically Ch 1.1 with respect to *Barcelona Traction* proceedings and Ch 3.1 with regard to the procedure before the ICJ). Given that the notion of obligations *erga omnes* has been significantly influenced by sources outside the State practice, the thesis gives particular attention to the study of ICJ case law and the separate and dissenting opinions of its Judges. Essential is also the ILC's work on ARSIWA and other obligations *erga omnes*-related topics, which together with the publications of international scholars renowned for expertise in this field (such as James Crawford, Christian Tams, Bruno Simma or Antônio Augusto Cançado Trindade) form a rich source of material to analyse in order to follow the current developments and estimate those upcoming.

In the first chapter, the thesis examines the notion of obligations *erga omnes* itself and delves into its various aspects such as the circumstances of its emergence, its core characteristics as presented in the *Barcelona Traction* judgment, and its distinction from other *erga omnes* effects in international law. The second chapter situates the concept of obligations *erga omnes* within the broader framework of international law. It analyses their interrelation with *jus cogens* and their function within the system of international responsibility. The chapter further clarifies the concept of obligations *erga omnes partes* and focuses particularly on their relationship with obligations *erga omnes* under general international law. Finally, the second chapter examines the notion of the international community in order to better understand the role of obligations *erga omnes* in the protection of the international community's interest.

This thorough clarification of the *erga omnes* obligations concept provides the necessary foundation for the third chapter of the thesis, which focuses on the practical utilization of said obligations as a basis for legal standing before the ICJ. After putting the issue of legal standing within the context of the Court's procedure in the first part of this chapter, the thesis focuses directly on its relationship with obligations *erga omnes*. Building upon the examination of the pre-

Barcelona Traction approach, the analysis encompasses proceedings established both on the invocation of a breach of obligations *erga omnes* under general international law and proceedings established on the invocation of breach of obligations *erga omnes partes*. Special attention is given to the potential use of obligations *erga omnes* as a justification for intervention into ongoing proceedings where violation of such a norm is in question. Finally, the third chapter addresses the relationship between obligations *erga omnes* and the Court's jurisdiction, as it represents the most significant obstacle to their effective utilization in practice.

1 The Emergence of Obligations *Erga Omnes*

To comprehend the issue addressed in this thesis, it is necessary to first define and closely analyse the notion of obligations *erga omnes* itself. The concept of norms owed towards the international community as a whole represents a paradigm shift from traditional international law, which had been based primarily on strictly bilateral *inter partes* obligations between States, where responsibility relations were restricted solely to those States among which the primary obligation existed. However, as is often the case with many developments in international law, such a shift, if it happened at all, did not occur instantaneously through the adoption of a single instrument or delivery of one ruling. Instead, the crystallization of the concept of obligations *erga omnes* in its present understanding has been a result of gradual evolution over a span of more than 50 years.[6]

Before delving deeper into the subject, it is fitting to expound the meaning of the rather cryptic Latin term *"erga omnes"* and to an extent foreshadow some initial insights into its meaning and significance. With regard to the literal meaning, *"erga omnes"* can be translated from Latin as "toward all"[7] or "applicable to all"[8]. When applied to obligations, it can be understood as an obligation with respect to all persons in a relevant group. In the context of international law, it is generally applied to an obligation "owed by one state to all other states or the international community at large".[9] This denotes the effect that certain norms have due to the importance of the rights they protect on behalf of the international community as a whole.[10]

The notion of these norms has been called by various names. Highlighting their link to international society, they are occasionally referred to as "communitarian norms".[11] Some scholars use the term obligations *erga omnes* "of protection", adding a modifier to highlight their importance in safeguarding fundamental human rights.[12] Nonetheless, the most widespread

[6] The idea of "*erga omnes"* effects in international law is, admittedly, even older. However, those approaches considerably differ from the contemporary understanding of obligations *erga omnes* as adopted in the *Barcelona Traction* case. The differentiation between those conceptions is discussed in detail in Ch 1.3.
[7] Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) 88.
[8] Victor Gustav Hiemstra and Henri Louis Gonin, *Drietalige Regswoordeboek/Trilingual Legal Dictionary* (3rd edn, Juta 1992) 249.
[9] Fellmeth and Horwitz (n 7) 88.
[10] Martha M Bradley, '*Jus Cogens'* Preferred Sister: Obligations *Erga Omnes* and the International Court of Justice – Fifty Years after the *Barcelona Traction* Case' in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): disquisitions and disputations* (Brill | Nijhoff 2021) 199.
[11] See James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours de l'Académie de Droit International* 201, 204.
[12] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers 2010) 312. It is worth noting that the connection between obligations *erga omnes* and human rights

denomination remains simple "obligations *erga omnes*" as the scholars follow the terminology adopted by the ICJ in its caselaw.[13]

One of the aspects that distinguishes the subject of obligations *erga omnes* from general international law is the source of its origin. Unlike other developments, such as the recognition of international organizations' personality or the emergence of multilateral treaties, the notion of obligations *erga omnes "occurred largely outside the realm of State practice"* through the work of the ICJ, ILC and subsidiarily by the work of scholars.[14] In this context, the ICJ's judgment in the *Barcelona Traction* case from 1970 serves as the best starting point for the present inquiry.

1.1 *Barcelona Traction* Case

The concept of obligations *erga omnes*, as interpreted today, was introduced to the legal system of international law by the ICJ through its well-known *obiter dictum* of the *Barcelona Traction* judgment.[15] At the core of the proceedings stood a peculiar triangular relationship that set the stage for the litigation before the Court – Barcelona Traction, Light and Power Company, Ltd was a Canadian enterprise incorporated under Canadian law that had headquarters of the company in Spain and 88 per cent of its shares held by Belgium nationals.[16]

The history of the case before the Court dates back to 1958 when Belgium filed a claim against Spain in order to seek reparation for the damage inflicted upon Barcelona Traction company, which was pronounced bankrupt by Spanish judicial organs during Franco's regime. According to Belgium, this was done in violation of international law.[17] The *First Phase* of the case lasted for 3 years and ended after Belgium requested the Court to discontinue the proceedings with the hope that the parties would be able to reach a settlement of their dispute through negotiations.[18] As the idea did not lead to a resolution, Belgium instituted new proceedings

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is not as clear as Cançado Trindade suggests. However, as the precise nature of this link is not directly pertinent to the subject matter of this thesis, the issue is not discussed in detail.

[13] See *Barcelona Traction*, para 33. It is worth mentioning that the ILC chose to use the more general "obligations owed to the international community as a whole" in its Art 48(1)(b) ARSIWA. However, the ILC's more recent works, such as the Draft Conclusions on Peremptory Norms, demonstrate that the Commission now utilizes both the ARSIWA version and ICJ's obligations *erga omnes*. See ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)' (Seventy-third session, 2022) UN Doc A/77/10, para 43, Conclusion 17 (Draft Conclusions on Peremptory Norms).

[14] Crawford, 'The Course of International Law' (n 11) 195.

[15] *Barcelona Traction,* paras 33–34.

[16] ibid para 3.

[17] *Barcelona Traction*, Preliminary Objections, Judgment, ICJ Reports 1964 (24 July), 6, 10–11.

[18] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 1997) 3. For a more detailed commentary on the *Barcelona Traction* proceedings, see Richard B Lillich, 'Two Perspectives on the Barcelona Traction Case' (1971) 65 AJIL 522; Rosalyn Higgins, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.' (1971) 11 Va J Int'l L 327, 327–329; Stephan Wittich, 'Barcelona Traction Case' (last

before the ICJ against Spain in 1962 known as the *Second Phase*. Instead of relying on the damage done to the company again, Belgium modified its claim and sought reparation for damage done to its nationals in the position of shareholders of the company. In response, Spain, arguing that international obligations concerning the protection of foreign nationals are strictly bilateral in nature, submitted two preliminary objections regarding the lack of the Court's jurisdiction over the case and two objections concerning the inadmissibility of Belgium's claim. In the judgment on the preliminary objections from 1964, the Court dismissed the two objections regarding jurisdiction and joined the latter two objections to the upcoming merit ruling.[19]

The Court delivered its judgment on merits in 1970, the central legal question being whether Belgium may exercise diplomatic protection of Belgium's shareholders in a company incorporated in Canada when the measures were taken against the company itself rather than Belgium's nationals.[20] Warning before the confusion and insecurity that endorsement of such hypothesis would bring to the sphere of international economic relations, the Court stated that Belgium's argument might be theoretically considered only after the original right of the national State of the company ceases to exist. Nonetheless, the fact that Canada did not seek diplomatic protection in the case did not imply that such a right was extinguished. Consequently, the theoretical secondary right of protection could not have come into play,[21] and as a result, the claim was ultimately found inadmissible without any pronouncement on any other subject of the case.[22]

Thus, after 12 years, the Court has concluded proceedings of a case concerning diplomatic protection, a matter of international law representing bilateralism at its finest, without any question of public interest involved. Notably, within the text of the complex judgment, two of the paragraphs attract attention. The most significant part of the *obiter dictum* that later entered the domain of international law reads as follows:

> "*33.* […] *In particular, an 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*

updated May 2007) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) paras 4–5 <www.mpepil.com> (accessed 7 June 2023).

[19] *Barcelona Traction*, Preliminary Objections, Judgment 1964, 46–47.

[20] *Barcelona Traction*, para 42.

[21] *Barcelona Traction*, para 96.

[22] *Barcelona Traction,* paras 101–103.

of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."[23]

The Court then went on to present some examples that would constitute such obligations:

"34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law […]*; others are conferred by international instruments of a universal or quasi-universal character."* [24]

1.1.1 Background of the adoption

On initial reading, it proves challenging to comprehend the connection between the case concerning the diplomatic protection of shareholders of a foreign corporation and two isolated paragraphs addressing somewhat noble concepts of an international community and the protection of its rights. Nonetheless, the Court's actions were not entirely unanticipated. The answer to this enigma is not to be found in the proceedings of *Barcelona Traction* itself, alleviating the need to delve extensively into the details of the case, which file is famous for its obscure length of exceeding 60.000 pages.[25] Instead, to understand the *obiter dictum's* origins, it is necessary to consider other prominent events of international law back then that influenced its adoption.[26] Seeing the broader context of the development of the ICJ's caselaw during that time, two significant events had considerable influence on the Court's course of action.

The first event pertained to the *South West Africa* proceedings.[27] Going a few years back prior to the delivery of the *Barcelona Traction* judgment to the period of the height of the decolonization era, the Court was confronted with actions brought for by Ethiopia and Liberia against South Africa for an imposition of apartheid upon South West Africa, present Namibia. By this action, South Africa allegedly breached its obligations as an administrator of the League of Nations mandate for South West Africa. Following the initial

[23] *Barcelona Traction*, para 33.
[24] ibid para 34.
[25] Ragazzi (n 18) 10 fn 44.
[26] ibid 3.
[27] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)*, Merits, Judgment, ICJ Rep 1966 (18 July), 6 (*South West Africa*).

judgment from 1962 where the Court upheld the jurisdiction by 7 to 6 votes[28], in 1966 the Court practically reversed its position by the casting vote of President Spender in a judgment, dismissing the case on the grounds that applicants failed to establish any legal rights or interest appertaining to them in the subject-matter of the claims in question.[29] Following such a narrow majority judgment denying the admissibility, the Court faced severe criticism on the political stage leading to "a crisis of confidence" towards the principal judicial organ of the United Nations.[30] From the legal point of view, the judgment seemed as a preference for a strictly narrow interpretation of the range and efficacy of public international law in matters of public interest and perhaps an outright rejection of the multilateral rights and obligations concept.[31] Subsequently, the *Barcelona Traction* dictum is widely regarded as the Court's attempt to remedy its previously adopted very restrictive approach, hoping to restore its tarnished image after the much-criticized *South West Africa* ruling.[32]

The second pivotal event of that time was the adoption of the Vienna Convention on the Law of Treaties[33] that occurred chronologically between the *South West Africa* and *Barcelona Traction* judgments in 1969. The VCLT was particularly relevant to obligations *erga omnes* due to debates on the peremptory norms (also known as "*jus cogens*") that were introduced in the convention for the first time in its Arts 53 and 64.[34] However, the idea of international norms of higher legal value appeared rather controversial at the time, leading to a series of heated debates. Even at the time of the adoption of the VCLT by a majority of 79 States to 1 with 19 abstentions, France criticized the concept of *jus cogens* for its alleged danger to the stability of treaty law and

[28] *South West Africa (First Phase)*, Preliminary Objections, Judgment, ICJ Rep 1962 (21 December), 319.
[29] *South West Africa (Second Phase)*, 6, para 100.
[30] Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 412. The Court later restored its reputation when it delivered an advisory opinion, requested by the UN Security Council, where it not only upheld its previous reasoning from *South West Africa (Phase One)* but also declared the continued presence of South Africa in Namibia unlawful. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971 (21 June), 16, paras 51–54, 133.
[31] Crawford, 'The Course of International Law' (n 11) 196.
[32] See e.g., Ian Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations' (1995) 255 *Recueil des Cours de l'Académie de Droit International* 86; Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 *Recueil des Cours de l'Académie de Droit International* 398; James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 77; Bradley, '*Jus Cogens'* Preferred Sister' (n 10) 196. This conclusion may also be supported by the fact that the Court included protection against racial discrimination as one of the examples of obligations *erga omnes* in the *Barcelona Traction* dictum. See *Barcelona Traction*, para 34.
[33] Vienna Convention on the Law of Treaties (Vienna, 22 May 1969) 1155 UNTS 331, *entered into force* 27 Jan 1980 (VCLT).
[34] Stefan Kadelbach, 'Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill | Nijhoff 2006) 21.

consequently was the only State to vote against the adoption.[35] Therefore, numerous authors suggest that the Court was reluctant to resort to referring to the most controversial part of the VCLT merely a year after its adoption and thus potentially endanger its entry into force.[36] The Court's recourse to the concept of obligations *erga omnes* in the *Barcelona Traction* case provided it with a convenient solution that answered the calls of the international community to abandon a strictly bilateral reciprocal nature of the international obligations, whilst respecting a reserved stance of some States towards the notion of peremptory norms.

1.1.2 Content of the *Barcelona Traction Obiter Dictum*

The question of whether the Court's approach to addressing the issue of public interest was correct can only be answered by delving into the substance of the two notorious paragraphs. After examining the broader context of the *obiter dictum's* adoption, it is now appropriate to return to its wording. To remind the text of the first paragraph in question:

> *"33.* […] *In particular, an 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."*[37]

As evident from its first sentence, the Court drew a clear distinction between two types of obligations. Accordingly, *"an 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* […]*".*[38] While the latter follows the traditional bilateral concept of obligations in international law, the former *"is the concern of all States"*.[39] The ICJ therefore clearly recognized a specific "sub-

[35] UN Conference on the Law of Treaties: Second Session Vienna 9 April – 22 May 1969 'Official Records –Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (1 July 1970) UN Doc A/CONF.39/11/Add.1, p 203.
[36] James Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 411; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017) 31.
[37] *Barcelona Traction*, para 33.
[38] ibid.
[39] ibid.

category of norms of general international law"[40] of a "non-bilateral nature"[41]. The Court further asserts *"*[i]*n the 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."*[42] As a consequence, obligations *erga omnes* are considered to be such obligations that are owed to the collective of all States. It is important to note that obligations owed to several States or even a large number of them do not constitute such *erga omnes* obligations.[43] The *erga omnes* character is only present when the community of States is entitled to demand the fulfilment of an obligation in question.[44] Consequently, *Barcelona Traction* marks the emergence of the key idea that States can have obligations owed not individually to other States, but collectively.[45] However, the requirements of obligations *erga omnes* are not solely limited to the structural scope of their addressees. To constitute an obligation *erga omnes*, the norm in question must also protect a particularly important value. Only when this prerequisite is met can the obligation be distinguished from other obligations of general international law and give rise to the legal interest of all States in its protection.[46]

Such conclusions are also supported by Tams' four-step summary of the obligations *erga omnes* concept.

1. *"International law draws a distinction between the general rules governing the treatment of aliens, and a special set of rules protecting fundamental values.*
2. *To this special set of rules protecting fundamental values applies a special regime of standing. The right to raise claims in response to violations is not restricted to the state of nationality (as it is under diplomatic protection).*
3. *Instead, certain fundamental values, being the concern of the international community as a whole, can be protected by each and every state.*

[40] Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 *Recueil des Cours de l'Académie de Droit International* 55.
[41] Mariko Kawano, 'The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes' (2013) 346 *Recueil des Cours de l'Académie de Droit International* 397.
[42] *Barcelona Traction*, para 33.
[43] This does not hold true for obligations *erga omnes partes* that are owed to a group of States, as later discussed in Ch 2.3.
[44] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 298–299.
[45] Crawford, 'The International Court of Justice and the Law of State Responsibility' (n 32) 77.
[46] *Barcelona Traction*, para 33; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 156; Tullio Treves, 'The Expansion of International Law' (2019) 398 *Recueil des Cours de l'Académie de Droit International* 266.

4. *Finally, these rights of protection do not have to be conferred expressly by treaty, but can (also) exist without a special written 'empowerment' – and would then flow from general international law."*[47]

Two additional characteristic features of obligations *erga omnes* were identified by Ragazzi, namely "universality" and "solidarity". [48] "Universality" implies that obligations *erga omnes* are binding upon all States without exception. Such a claim gives rise to controversy and friction as such characteristic collides with the international legal system, which as a rule, is based on legal relations established on a consensual basis. "Solidarity" means that every State is deemed to have a legal interest in protection of these obligations. Consequently, this element represents the interconnectedness of obligations *erga omnes* with the wider issues of enforcement and standing in international law.[49]

Following the description and characteristics of *erga omnes* obligations, it is now an opportune moment to emphasize their most significant attribute: they are a matter of international responsibility. Although the Court did not directly establish this in the *Barcelona Traction* judgment, it can be deduced from the lead offered in the text of *obiter dictum* speaking of the "legal interest" of all States and the "corresponding rights of protection".[50] Such an interpretation suggests that the Court views the *erga omnes* character as a specific feature of the secondary rules governing the invocation of responsibility for the violation of a certain type of obligation, rather than as a scope of primary obligations.[51] Consequently, obligations *erga omnes* are norms with a particular procedural feature – they can be invoked not only by individual beneficiaries but by all States in case of a breach.[52] Therefore, the substance of obligations *erga omnes* lies in secondary norms. In other words, they do not impose obligations on States of which violation may generate responsibility; instead, they pertain to the rules governing the consequences that follow such a violation. The connection between obligation *erga omnes* and international responsibility remained rather ambiguous at the time of the *Barcelona Traction*, with the Court

[47] Christian J Tams and Antonios Tzanakopoulos, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781, 792.
[48] Ragazzi (n 18) 17.
[49] ibid.
[50] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 102.
[51] ibid.
[52] ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, para 389 (Fragmentation of International Law).

providing limited insight into its consequences or modalities, leaving a blank page to be filled by future efforts and further exploration of this aspect.

1.2 What Constitutes Obligations *Erga Omnes*

Even though there is no agreed consensus on an exhaustive enumeration of norms constituting obligations *erga omnes*, there is a basic agreement on some.[53] While the Court has never provided a detailed test for the identification of such norms in its case law, in the *Barcelona Traction*, the Court offered some examples as a starting point. It observed that *"*[s]*uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the rights of the human person, including protection from slavery and racial discrimination."*[54] Two findings from this sentence need to be emphasized. Firstly, the Court offers only a demonstrative list. Secondly, by referring to the "contemporary international law", the Court acknowledges that the pool of obligations *erga omnes* is subject to the development of international law and can be further expanded in the future. For example, in the *East Timor* case the Court added the right of peoples to self-determination,[55] and in *Wall Advisory Opinion* even certain obligations of international humanitarian law.[56] These examples provided by the Court are also referenced by ILC in its Commentary to ARSIWA,[57] which, in addition, considered the protection of the maritime environment.[58]

Offering a detailed method for the identification and enumeration of all norms which would constitute obligations *erga omnes* effect exceeds the scope of this thesis as it would require a separate comprehensive study.[59] For the purposes of this topic, it is sufficient to take into consideration the aforementioned examples provided by the Court, which offer a more concrete idea of the notion.

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[53] James Crawford, *State Responsibility: The General Part* (CUP 2013) 365.
[54] *Barcelona Traction*, para 34.
[55] *East Timor (Portugal v Australia)*, Jurisdiction, Judgment, ICJ Rep 1995 (30 June), 90, para 29 (East Timor). The issue was also recently confirmed in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Rep 2019 (25 February), 95, para 180.
[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004 (9 July), 136, para 157.
[57] ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' in *Yearbook of the International Law Commission 2001 Vol II (Part Two)* (UN Publications 2007) 127, para 9 (ARSIWA Commentary).
[58] ILC, 'ARSIWA Commentary' (n 57) 127, para 10.
[59] See e.g., Ragazzi (n 18); Brian D Lepard, *Customary International Law: A New Theory with Practical Implications* (CUP 2012) 261–267.

1.3 *Erga Omnes* Effects Not Falling under the *Barcelona Traction* Understanding

As mentioned earlier, the concept of the *"erga omnes"* effect was not novel at the time of the *Barcelona Traction* judgment, as it had been addressed by academia, practice, and jurisprudence regularly long before the ruling.[60] However, the "traditional" pre-*Barcelona Traction* understanding of the concept was not uniform and significantly differed from the meaning adopted by the ICJ in 1970. To maintain clarity and comprehensiveness in the subsequent discussions, the following part will differentiate between the "pre-*Barcelona Traction*" and "post-*Barcelona Traction*" approaches. Same will also further serve to clarify and define the scope of the present thesis.

The most extensive analysis of this issue is provided by Tams, who identifies four different contexts in which discussions on the *"erga omnes"* effect emerged. The first context relates to controversial treaties that establish objective regimes, imposing obligations on third-party non-signatory States, as was the case of the *Aaland Islands*.[61] The second context pertains to treaties transferring territorial titles and titles *in rem*, with the *Island of Palmas* arbitration being one well-known case in this regard.[62] The third context involves discussions on the concept of international legal personality. The fourth context arose from the desire to overcome the rigidity of Art 59 ICJ Statute by enabling certain Court's judgments to have consequences not only for parties of a dispute. [63]

While all four contexts have, in one way or another, given rise to the *erga omnes* effects, they often did so in a sense entirely unrelated to questions of common interest, standing, or law enforcement, as was the case of *Barcelona Traction*. In this instance, the Court thus adopted the already existing notion of the *erga omnes* effect and assigned it a new meaning.[64] Consequently, according to Tams, the difference between the traditional pre-*Barcelona Traction* approach and ICJ's *Barcelona Traction* approach lies, in the fact that the former modifies the scope of the primary obligation itself with the intention to broaden the circle of States bound by the rule, whereas the latter emphasises the specific features of the secondary procedural aspect of the obligation governing the invocations of responsibility for its violation.[65]

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[60] Ragazzi (n 18) 42; Bradley, '*Jus Cogens'* Preferred Sister' (n 10) 196.
[61] *The Aaland Islands Question (Advisory Opinion)* Report of the Committee of Jurists, LNOJ, Special Supplement No 3, Oct 1920.
[62] *Island of Palmas case (Netherlands/USA)* 1928, RIAA, Vol II, 831, 840.
[63] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 104–05.
[64] ibid 100.
[65] ibid 102, 105–06.

The diversity of understandings regarding the *erga omnes* concept further complicates the precise study of the notion. In addition to the insufficient definition of the term, the analysis is also hindered by its inconsistent use in the Court's case law even after the delivery of the 1970 judgment.[66] Nonetheless, the understanding of the *erga omnes* concept adopted in the *Barcelona Traction* has become predominant in the world of international law, despite the occasional confusion.[67] The present thesis operates with the *erga omnes* concept solely in line with the interpretation put forth in *Barcelona Traction*.

1.4 *Barcelona Traction* Evaluation

In *Barcelona Traction* the Court introduced a new concept of international law that responded to the demand for multilateral rights and obligations. However, it did so in a rather peculiar manner. While Thirlway denounced the Court's dictum as "little more than empty gesture",[68] the reactions to the inclusion of *obiter dictum* in the text of the judgment were mostly positive, with many praising the Court for its change of course from the *South West Africa* judgment. To illustrate, Simma perceived this as "a great leap forward". [69] Consequently, the following debate did not revolve around the legitimacy of the inclusion of the obligations *erga omnes* in the text of the judgment, but rather focused on the questions of "What did the Court mean by it?" and "Does it matter?"[70]

The undeniable truth is that the Court simply evaded addressing some of the key aspects of the *erga omnes* obligations. Notably, it did not develop the link with the law of international responsibility and remained completely silent on the consequences of their breach. As a result, the issue of third-party countermeasures or, the focus of the present thesis, the legal standing before international tribunals for the violation of *erga omnes* norms, continues to be the subject of ongoing discussion. Another principal shortcoming was the Court's failure to address the then very controversial concept of peremptory norms or their relationship with obligations *erga omnes*.

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[66] For a detailed assessment of this issue see Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 103–16.

[67] For instance, Kadelbach argues that *erga omnes* obligations encompass *„also rules which govern the status and boundaries of States, cities, islands and internationalized territories which may be easily modified by treaty".* See Kadelbach, 'Jus Cogens, Obligations Erga Omnes and other Rules' (n 34) 25. However, as demonstrated in this section of the thesis, while such rules may have an "*erga omnes* effect", they are distinct from the obligations *erga omnes* as understood in the *Barcelona Traction* case.

[68] Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part One' (1989) 60 BYIL 1, 102.

[69] Simma (n 44) 293.

[70] Tams and Tzanakopoulos, '*Barcelona Traction* at 40' (n 47) 791.

The latter omission was the reason why Crawford expresses reservations about Simma's positive stance by referring to the dictum as a "great leap sideways".[71]

However, it is important to note the substance of the *Barcelona Traction* proceedings did not concern anything related to a broader realm of public interest and obligations *erga omnes*. At the time, the ICJ's statement represented only one drop in the ocean that viewed the system of international responsibility as a strictly bilateral matter. Despite its imperfections, the first seed was planted, and the case served as a setting stone for future developments of the notion of obligations *erga omnes*, which was gradually shaped by the subsequent Court's case law, work of ILC, and in the last decades also through slowly but surely increasing State practice. Consequently, it is appropriate to echo Crawford's sentiments and quote his apt remark that *"Barcelona Traction is only beginning of the story"*.[72]

[71] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 569.
[72] Crawford, 'Multilateral Rights and Obligations in International Law' (n 36) 425.

2 Current Approach towards Obligations *Erga Omnes*

Over five decades have passed since the delivery of the *Barcelona Traction* judgment and, as affirmed by the ILC, the *erga omnes* applicability of certain international law norms *"has been deeply rooted in international practice"*.[73] Thus, when the Institut de Droit International adopted its resolution on obligations *erga omnes* in 2005, it could with confidence observe that *"certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community".*[74]

The subsequent part will follow on the post-*Barcelona Traction* development, with the aim to provide an analysis and clarification of the most debated aspects of obligations *erga omnes*, such as their relationship with peremptory norms, their position within the ambit of international responsibility, and their role in the enforcement of international community's interest. This part will also introduce the obligation *erga omnes partes* and expound their relationship with obligations *erga omnes* under general international law.

2.1 Relation between Obligations *Erga Omnes* and *Jus Cogens*

The interim period following the *Barcelona Traction* witnessed numerous discussions on the interaction between obligations *erga omnes* and *jus cogens*, providing an opportunity to revisit and attempt to redress one of the most significant omissions of the judgment.[75] As previously mentioned, the introduction of obligations *erga omnes* by ICJ in *Barcelona Traction* has been regarded by some as a certain substitute for *jus cogens*.[76] However, the further development of international law has demonstrated that both notions differ in certain aspects and represent fully-fledged independent categories of international law norms. Although the number of discussions surrounding this subject has shown that the precise distinction between the two notions is not entirely straightforward, certain conclusions can be drawn to enhance understanding of the nature of obligations *erga omnes* within the system of international law.

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[73] ILC, 'Fragmentation of International Law' (n 52) para 381.
[74] Institut de Droit International, 'Report: Obligations Erga Omnes in International Law' (Krakow Session 2005) preamble.
[75] See e.g., Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nordic J Int'l L 211; Kadelbach, 'Jus Cogens, Obligations Erga Omnes and other Rules' (n 34); Paolo Picone, 'The Distinction between Jus Cogens and Obligations Erga Omnes' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011); Erika de Wet, 'Jus Cogens and Obligations Erga Omnes' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).
[76] Crawford, 'The Course of International Law' (n 11) 197.

2.1.1 The Distinction of *Jus Cogens* from Obligations *Erga Omnes*

As a starting point, it is suitable to compare the fundamental characteristics of both notions. For the purposes of this thesis, *jus cogens* can be interpreted as norms having a particular legal quality – namely that the importance of the rule that *jus cogens* represent does not allow for a derogation from such norms.[77] The ILC's in its Draft Conclusions on Peremptory Norms defines *jus cogens* in the following way:

> *"A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*[78]

As previously mentioned, peremptory norms have already been discussed during the adoption of the VCLT, whereby the conflict of the treaty with *jus cogens* renders the treaty void.[79] Additionally, they have their own dedicated chapter in ARSIWA, dealing with the consequences of their serious breaches under international responsibility.[80]

Obligations *erga omnes*, however, pertain to the subjective scope of the norm. Due to the fundamental character of the norms they protect, they are owed towards the whole international community and consequently, all States have a vested interest in their fulfilment.[81]

The distinction between these two notions is highlighted in *Prosecutor v Furundžija* by ICTY. In this case, the tribunal observed that the obligations *erga omnes* appertain to the area of international enforcement in *lato sensu*, while *jus cogens* are norms enjoying a higher importance in the international hierarchy which consequence is that the principle at issue cannot be derogated.[82]

2.1.2 The Connection between *Jus Cogens* and Obligations *Erga Omnes*

Based on the characterisation of both categories, it can be assumed that there is a significant overlap between them.[83] To illustrate it with a specific example, a *jus cogens* norm prohibiting

[77] Robert Kolb, *Peremptory International law – Jus Cogens: A General Inventory* (Hart Publishing 2015) 2.
[78] ILC 'Draft Conclusions on Peremptory Norms' (n 13) Conclusion 3.
[79] VCLT, Arts 53, 64, 71.
[80] ARSIWA, Part II Chapter III.
[81] *Barcelona Traction*, para 33. See Ch 1.1.2.
[82] *Prosecutor v Furundžija*, Case No IT-95-17/1-T ICTY (10 December 1998), para 153.
[83] Gaja, 'The Protection of General Interests in the International Community' (n 40) 55; Treves (n 46) 266.

genocide, characterized by the importance of the obligation protected that does not allow to derogate from this rule, also encompasses a mirrored obligation *erga omnes*, based on which all States have a shared interest in act of genocide not being committed. Therefore, when a State breaches this rule and perpetrates an act of genocide, the interest of the international community is violated and every other State has an interest in its protection, invoking the consequences under the law of international responsibility.[84] Therefore, the *jus cogens* are "actualized" through obligations *erga omnes*.[85]

The described understanding of the inherent connection between *jus cogens* and obligations *erga omnes* is also shared by the ILC:

> *"Conclusion 17. Peremptory norms of general international law (jus cogens) as obligations owed to the international community as a whole (obligations erga omnes)*
>
> *1. Peremptory norms of general international law (jus cogens) give rise to obligations owed to the international community as a whole (obligations erga omnes), in relation to which all States have a legal interest."* [86]

Special Rapporteur Tladi lends support to this assumption by referring to the State practice, deriving it from both the statements of delegates in the Sixth Committee and the case law of national courts.[87]

Concerning the position of the ICJ on this subject, the Court has not since revisited the *Barcelona Traction* dictum on this matter and, thus, has remained silent on the link between *jus cogens* and obligations *erga omnes*. Nonetheless, this is not much surprising information since it goes in line with the reserved approach of the principal judicial organ of the UN towards the *jus cogens*. To illustrate the Court's restraint on this subject: it took ICJ over 40 years after

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[84] It is also suggested that both doctrines of *jus cogens* and obligations *erga omnes* extend beyond the State-to-State part of international responsibility and have an impact on international criminal responsibility where they serve as a basis for the exercise of universal jurisdiction. Following this argument, by violating a peremptory norm, the individual is committing an offence against the international community as a whole. As a consequence, the performance of obligations *erga omnes* arising from peremptory norms requires the custodial State to extradite or prosecute this individual, notwithstanding the lack of ordinary jurisdictional links as the one of territoriality or personality. See *Prosecutor v Furundžija*, para 153; M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) Law&ContempProbs 63, fn 46; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2015) 271.

[85] Weatherall (n 84) 351.

[86] ILC 'Draft Conclusions on Peremptory Norms' (n 13) Conclusion 17.

[87] ILC 'Report of the International Law Commission on the Work of its 73rd Session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10, 65.

the adoption of the VCLT to include the mere words "peremptory norms" in the text of its judgment, and even that was only a bare acceptance of the term rather of any particular legal consequences.[88] Consequently, given also the lack of its contrary conclusions, the Court's silence on the subject should not be interpreted to the detriment of the conclusion that *jus cogens* give rise to obligations *erga omnes*, but rather as the general restraint in addressing this, for many still quite controversial, concept of international law.

2.1.2.1 All Jus Cogens Norms Give Rise to Obligations Erga Omnes

In regard to the special link of *jus cogens* to obligations *erga omnes*, it can be asserted that all norms constituting *jus cogens* simultaneously give rise to obligations *erga omnes*.[89] Cançado Trindade emphasizes that such a conclusion is even "widely recognized".[90] Both *jus cogens* and obligations *erga omnes* are regarded as norms of higher importance, with the former protecting the most significant values. The Czech Republic in its statement in the Sixth Committee of the UNGA observed that *"jus cogens obligations were erga omnes obligations, which did not allow for any derogation, including by means of an agreement"*.[91] The assumption that all *jus cogens* norms give rise to their parallel obligation *erga omnes* is also widely supported in doctrine.[92]

This assumption is supported by further examination of concrete examples of norms representing *jus cogens*. While the precise enumeration of *jus cogens* is a topic for another debate, for current needs, it can be asserted that there is no recognized *jus cogens* norm not deemed to have its obligation *erga omnes* counterpart. In conclusion, every *jus cogens* norm gives rise to an equivalent obligation *erga omnes* that serves to protect the same rule.

2.1.2.2 Not all Obligations Erga Omnes give rise to Jus Cogens Norms

However, it is important to note the reverse does not hold true. Not all obligations *erga omnes* represent a norm that would have a *jus cogens* counterpart. Obligations in which fulfilment the whole international community has an interest are not always peremptory norms. Even though

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[88] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Rep 2006 (3 February), 6, para 64 (*Armed Activities on the Territory of the Congo)*; Costelloe (n 36) 49–50.
[89] ILC 'Draft Conclusions on Peremptory Norms' (n 13) Conclusion 17.
[90] Cançado Trindade, *International Law for Humankind* (n 12) 312.
[91] UNGA 'Summary Record of the 26th Meeting: 6th Committee, held on 3 November 1994' (21 November 1994) UN Doc A/C.6/49/SR.26, para. 19.
[92] See e.g., Byers (n 75) 238; Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 151; de Wet, 'Jus Cogens and Obligations Erga Omnes' (n 75) 553–555.

they protect values of significant importance, not in every case is the value so cardinal, that their derogation would be impossible, as is the case with peremptory norms.

All the examples of obligations *erga omnes* listed in *Barcelona Traction* and subsequent ICJ case law are deemed to have the corresponding *jus cogens* norm.[93] However, in addition to them, there were also other norms submitted as constituting obligations *erga omnes*. For instance, ITLOS stated in its advisory opinion that *"the obligations relating to preservation of the environment of the high seas and in the Area"* are of the *erga omnes* character.[94] According to the tribunal it is possible to implicitly derive this conclusion from Art 137(2) of the United Nations Convention on the Law of the Sea[95] which provides that the Seabed Authority shall act "on behalf" of mankind. Other proposed norms that may fall under obligations *erga omnes* are, among others, freedom of navigation, the safety of civilian aviation, and certain obligations related to the protection of the environment.[96]

However, it is necessary to note that the extent of State practice and depth of academic debate vary for these individual examples, proving it difficult to conclude with certainty that they unquestionably constitute obligations *erga omnes*. It therefore remains unclear which obligations *erga omnes* do not overlap with *jus cogens*. In this regard, Tams suggested that *"*[e]*rga omnes outside jus cogens is likely to remain uncharted territory until States begin to invoke the concept more commonly in formalised proceedings"*.[97] based on the examples provided, it is however apparent that these obligations do not represent norms from which no derogation would be permitted. In other words, they do not constitute norms *jus cogens*.

2.1.3 Partial Conclusions

As established above, *jus cogens* and obligations *erga omnes* differ in certain aspects. The emphasis of *jus cogens* lies with the priority of the norm by not allowing for its derogation, whereas the obligations *erga omnes* concern the procedural aspect, under which all States

[93] ILC, 'ARSIWA Commentary' (n 57) 112, para 7.
[94] *Responsibilities and obligations of States with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Chamber)*, Advisory Opinion, ITLOS Rep 2011 (1 February), 10, para 180.
[95] United Nations Convention on the Law of the Sea (Montego Bay, 10 Dec. 1982) 1833 UNTS 3, 21 ILM 1261 (1982), *entered into force* 16 Nov 1994 (UNCLOS).
[96] See e.g., *Wimbledon case*, PCIJ Reports, Ser A, No.1 (1923), 20 (*Wimbledon*); *Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, Separate Opinion of Vice-President Weeramantry, ICJ Rep 1997 (25 September), 88; *The Artic Sunrise Arbitration (Netherlands v Russia)*, Memorandum of the Kingdom of Netherlands, PCA Case No 2014-02, Para 121; Crawford, *State Responsibility* (n 53) 363.
[97] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 157. An example of such invocation is the Netherlands' reliance on the freedom of navigation as an obligation *erga omnes*, on which it alternatively based its legal interest for enforcement. See *The Artic Sunrise Arbitration (Netherlands v Russia)*, Memorandum of the Kingdom of Netherlands, PCA Case No 2014-02, paras 121–28.

have a legal interest in everyone's compliance with them. Despite these differences, there is a fundamental shared element. It is a mutual basic idea that there is a common interest of the international community, which should be protected by a special set of universally applicable rules of non-bilateral nature.[98] Both concepts thus serve the shared notion that protects the "fundamental interest of the international community" creating something as a broader category of "fundamental interest obligations".[99]

It has been observed that there is a significant overlap between these two categories. All *jus cogens* norms bring about obligations *erga omnes*, but the reverse cannot be automatically assumed. This distinction and the relationship between the two concepts have practical implications under the law of international responsibility, which will be discussed in the following part.

2.2 Obligations *Erga Omnes* and the Law of International Responsibility

State responsibility is the primary area where obligations *erga omnes* find application.[100] The previously discussed ambiguous initial position of obligations *erga omnes*, with regard to their consequences under the law of international responsibility, has undergone significant development since the delivery of the *Barcelona Traction* judgment. The gauntlet thrown down by the Court was later taken up by the ILC which subsequently refined the vague parameters of obligations *erga omnes* in the course of its work on the Articles on State Responsibility for Internationally Wrongful Acts.[101]

To briefly introduce the ARSIWA, the Articles constitute a seminal codification of the rules governing the international responsibility of States and represent one of the flagship projects in the Commission's work. Given the inherently contentious nature of the subject of international responsibility, ARSIWA have not been embodied in a binding international convention, unlike numerous preceding initiatives of the Commission. Instead, the final outcome has been integrated as an annex to the UN General Assembly's Resolution 56/83, adopted on 12th December 2001. Yet, ARSIWA play an indispensable role in the functioning of contemporary international law.

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[98] Kawano (n 41) 398.

[99] Christian J Tams and Allesandra Asteriti, 'Erga Omnes, Jus Cogens, and their Impact on the Law of Responsibility' in Malcolm Evans, Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 167. It is necessary to stress that this conclusion applies to obligations *erga omnes* under general international law and not to the as opposed to later discussed obligations *erga omnes partes*, which are not universally applicable.

[100] ILC, 'Fragmentation of International Law' (n 52) para 400.

[101] UNGA Res 56/83 'Responsibility of States for internationally wrongful acts' (28 January 2002) UN Doc A/RES/56/83, Annex.

They are widely recognized as having a strong customary value, and as such, are extensively cited and applied by both domestic and international courts.[102] Moreover, ARSIWA hold significant implications in the international arena, offering necessary guidance for States on how to conduct themselves and operate lawfully in their international relations. This relationship between ARSIWA and State practice is mutually reinforcing. Simultaneously, as States refer to and adhere to the principles and rules embodied in ARSIWA, their customary character is getting strengthened. In turn, this enhances the normative authority of ARSIWA and further solidifies their significance in the contemporary international legal system.

2.2.1 Adoption of ARSIWA

The advancement of the obligations *erga omnes* within the ARSIWA has not been a straightforward process over the period of ILC's deliberations, and the final outcome significantly differs from the initially proposed version. To properly understand the position of obligations *erga omnes* within the ambit of the Articles, it is crucial to begin with the process leading to their adoption in 2001.

The history of codification of the law of international responsibility traces back to the era of the League of Nations whose mission was later passed to the UN. The ILC, as its main international law expert body, began its work in 1955, and the initial report on the issue was presented by the first-appointed Special Rapporteur García-Amador in the following year.[103] The notion of obligations *erga omnes* within this concept was presented by Special Rapporteur Ago. Given his previous role as the Chair of the Vienna Conference on Law of Treaties, Ago was well aware of the issue of peremptory norms embedded in Art 53 of the VCLT and the subsequent emergence of obligations *erga omnes* in the ICJ case law. In his report from 1976, as a reflection of these developments, Ago raised the question of whether all violations of international law give rise to the same regime of international responsibility or whether there are differences.[104] In this regard, Ago proposed differentiating between particularly serious violations of international law representing "international crimes", and a broader category encompassing a whole range of less

[102] For more recent practices of international courts, tribunals and, other relevant bodies in this regard see UNGA 'Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General' (29 April 2022) UN Doc A/77/74.
[103] See ILC 'Summaries of the Work of the International Law Commission: State Responsibility' (*International Law Commission*, 29 June 2023) <https://legal.un.org/ilc/summaries/9_6.shtml> accessed on 10 July 2023.
[104] Jochen A Frowein, 'Obligations erga omnes' (last updated December 2008) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) para 9 <www.mpepil.com> (accessed 8 June 2023).

serious offences, later known as "international delicts".[105] The ILC subsequently adopted provisional Art 19 defining international crimes, which, to a significant degree reflected the examples of obligations *erga omnes* and *jus cogens*.[106] However, the issue of international crimes proved to be very controversial among many UN members States. Based on the report of Special Rapporteur Crawford,[107] the ILC held an extensive debate on the position of international crimes within the system of international responsibility, and, subsequently reached the conclusion that there is no consensus on the issue.[108] Ultimately, following the second reading of the draft Articles, the notion of international crimes was abandoned.[109] However, the idea of obligations owed to the international community as a whole was not completely disregarded.

2.2.2 Obligations *Erga Omnes* under ARSIWA

Obligations *erga omnes* found their place in Part III Chapter I of the ARSIWA dealing with the invocation of international responsibility. More precisely, they are reflected in Art 48 which reads as follows:

> *"Article 48. Invocation of responsibility by a State other than an injured State*
>
> *1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:*
>
> *(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or*
>
> *(b) the obligation breached is owed to the international community as a whole.*

[105] ILC, 'Fifth report on State responsibility by Mr Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (continued)' in *Yearbook of the International Law Commission 1976 Vol II (Part One)* (UN Publications 1997) 26.

[106] ILC, 'Draft Articles on State Responsibility with Commentaries thereto Adopted by International Law Commission on the First Reading' in *Yearbook of the International Law Commission 1996 Vol II (Part Two)* (UN Publications 1998) 58. Examples of international crimes provided by Draft Art 19(2) are e.g. violations of norms concerning the maintenance of international peace and security (such as the act of aggression), breaches of the right to self-determination, violations of obligations safeguarding and preserving the human being (prohibition of slavery, genocide, apartheid) or violation of obligations for safeguarding and preserving the human environment. For a deeper analysis of the concept of international crimes see e.g., Joseph HH Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Walter de Gruyter 1989); Allain Pellet, 'Can a State commit a crime? Definitely, Yes!' (1999) 10 EJIL 425.

[107] ILC, 'First report on State responsibility by Mr James Crawford, Special Rapporteur' in *Yearbook of the International Law Commission 1998 Vol II (Part One)* (UN Publications 2008) 1.

[108] See ILC, 'Report of the International Law Commission on the Work of its 50th Session' (20 April–12 June and 27 July–14 August 1998) in *Yearbook of the International Law Commission, 1998 Vol II (Part Two)* (UN Publications 2001), paras 241–330.

[109] ILC, 'ARSIWA Commentary' (n 57) 111, para 7.

2. *Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:*
   (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. *The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1."*[110]

Art 48 stands in opposition to Art 42 which deals with the invocation of responsibility by the directly injured state. Through reference to the invocation of responsibility *"by a State other than an injured one"*, ILC incorporates the idea of obligations owed to the international community as a whole into the paradigm of international responsibility.[111] Consequently, the Articles are not limited only to breaches of obligations of bilateral character but they *"apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole*".[112] Despite not directly adopting the term "obligations *erga omnes*", the ILC acknowledges that the ARSIWA *"intends to give effect to the statement by ICJ in the Barcelona Traction case"*.[113]Art 48 therefore serves as a basis for the integration of obligations *erga omnes* into the system of the Articles.

In the second paragraph, the article enumerates claims that a non-injured State invoking responsibility has at its disposal. Compared to the options available to a directly injured State under Art 42, the means under Art 48 are limited.[114] Under the point a) the non-injured State may claim cessation of the internationally wrongful act and, should the circumstances require it, seek assurances, and guarantees of non-repetition. The point b) permits the non-injured State to claim reparation. This option is, however, limited to claiming reparation in the interest of the injured

[110] *Barcelona Traction*, para 33.
[111] The type of obligations referred to in Art. 48(1)(a) ARSIWA, commonly known also as obligations *erga omnes partes*, is addressed in Ch.2.3. It is worth mentioning that the reflection of the Art. 48 ARSIWA can be also found in Art. 49 of the ILC's Draft articles on the responsibility of international organizations. See ILC 'Draft articles on the responsibility of international organizations' in *Yearbook of the International Law Commission, 2011 Vol II (Part Two)* (UN Publications 2018) 40.
[112] ILC, 'ARSIWA Commentary' (n 57) 32, para 5.
[113] ibid 127, para 8.
[114] ibid. 127, para 10.

State or the beneficiaries of the breached obligation. It is important to note that the invocation of responsibility under Art 48 by a non-injured State does not preclude the injured one to make claims under Art 42.

In contrast to the consequences that may arise under Part II Chapter III of ARSIWA, which concerns "serious breaches of obligations under peremptory norms of general international law", the invocation of Art 48 does not require the breach to be serious. Thus, a "regular" violation will suffice.[115] A closer examination of the relationship between chapter on the serious breaches of peremptory norms and Art 48 can prove to be beneficial. According to Art 41, as a consequence of a serious breach of a peremptory norm,[116] all States bear an obligation to cooperate in bringing an end to the breach through lawful means. In addition, all States are barred from recognizing the situation as lawful or providing aid or assistance in maintaining it.[117] Recalling that all *jus cogens* norms bring about obligations *erga omnes*, any serious breach within the meaning of the chapter could consequently also lead to claims provided for by Art 48(2) if the responsibility is to be invoked by a non-injured State. However, as not all obligations *erga omnes* give rise to *jus cogens*, this is not necessarily the case in reverse. To induce consequences under Chapter III of Part II of ARSIWA, the obligation *erga omnes*, which breach is being invoked under Art 48, would have to correspond to a norm *jus cogens*. Moreover, to fulfil the requirements of the chapter, the breach would have to be serious.

Observing the legal consequences entailed in Art 41 and 48 as a group, they do not impose punishment on States that breached the norm, they rather merely reflect the gravity of the breach, affirming ILC's departure from the idea of international crimes. [118]

2.2.3 Partial Conclusions

Crawford comments that the Articles "give teeth to communitarian norms" by providing States with a correction tool to enforce compliance in cases of a breach of obligations in the interest of all.[119] However, Dupuy takes a more sceptical stance and regards the final form of Articles

[115] Elena Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (CRC Press 2010) 79.
[116] According to Art 40(2) ARSIWA, a breach within the meaning of the chapter is considered serious *"if it involves a gross or systematic failure by the responsible State to fulfil the obligation"*. Further explanation is provided by ILC, 'ARSIWA Commentary' (n 57) 113, paras 7–8.
[117] ARSIWA, Art 41.
[118] Proukaki (n 115) 79.
[119] James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 240.

as a "valuable, but incomplete project".[120] In his view, the abandonment of Ago's initial proposal of "international crime" and their substitution by "obligations owed to the international community as a whole" as enshrined in Art 48 ARSIWA, and serious breaches of peremptory norms under Part II Chapter III ARSIWA, leads to a paradoxical situation. While the multilateral dimension of the law of State responsibility is affirmed, it is done so without providing States with a concise answer regarding the content of these obligations and specification of measures to be taken in case of their breach.[121]

Perhaps the "teeth", mentioned by Crawford, are not necessarily the sharpest ones. But to demand from ILC to present a flawless most pro-international community-oriented solution would not be fair given the means that the Commission has at its disposal. Indeed, the primary objective of the ILC's work is *"the promotion of the progressive development of international law and its codification"*.[122] Achieving this goal requires close cooperation with the UN member States, which are the ones that ultimately translate ILC's proposals into practice. The Sixth Committee of the UN General Assembly serves as the main platform for exchanging views between the Commission and UN member States. However, as it is a well-established practice for Sixth Committee to reach a consensus on its proposals prior to submitting them to the UN General Assembly, it makes the acceptance of the final resolution rather challenging.

As evident from the manner in which the ARSIWA was adopted, the responsibility of States is a controversial issue. This is particularly apparent in the case of obligations owed to the international community as a whole.[123] Should the ILC adopt a more liberal approach towards the obligations *erga omnes* within the Articles, it would be confronted with significantly stronger opposition from the States than in the current case. While the adopted version of ARSIWA may not be perfect, it represents a needed equilibrium between the need for advancement of obligations *erga omnes* and the lingering scepticism of some States.

In conclusion, examining the system of international responsibility as a whole, it becomes apparent that obligations *erga omnes* considerably modify it. They do not, however, alter the system of international responsibility's fundamental functioning. Instead, they operate within the set parameters of the existing system as formed by the work of ILC, State practice and case

[120] Pierre-Marie Dupuy, 'The Deficiencies of the Law of State Responsibility Relating to Breaches of "Obligations Owed to the International Community as a Whole": Suggestions for Avoiding the Obsolescence of Aggravated Responsibility' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 213.
[121] ibid 217.
[122] Statute of the International Law Commission (UNGA 21 November 1947) Art 1(1).
[123] Crawford, 'The Course of International Law' (n 11) 203.

law of international courts and tribunals.[124] In this understanding, they are to be viewed as means to 'fine-tune' the application of responsibility in instances involving breaches of particularly fundamental norms of international law.[125]

2.3 Obligations *Erga Omnes Partes*

ILC in Art 48 (1)(a) of ARSIWA recognizes the possibility of any State other than the injured one to invoke the responsibility for breach of obligation if the obligation is *"owed to a group of States including that State, and is established for the protection of collective interest of a group"*. These norms are referred to as obligations *erga omnes partes*. Unlike obligations *erga omnes*, obligations *erga omnes partes* typically derive from multilateral treaties.[126] To emphasize this connection, they are on occasion called *"obligations erga omnes contractantes"*.[127] The existence of this type of obligations has been confirmed also by the ICJ case law. In the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* the Court found such a "common interest" in the Arts 6(2), and 7(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[128], pertaining to obligations of prosecute or extradite.[129] In this regard, the Court stated that all State parties share a common interest in compliance with these obligations, and consequently, this common interest implies that obligations in question *"are owed by any State party to all the other States parties to the Convention"*.[130]

A norm protecting a common interest has also certain consequences that distinguish obligations *erga omnes partes* from typical general obligations that can be ordinarily found in international treaties. Sicilianos observes that these obligations are not of a synallagmatic nature and fall outside the interplay of reciprocity. He illustrates this with an example, *"[a] breach*

[124] Tams and Asteriti, 'Erga Omnes, Jus Cogens, and their Impact on the Law of Responsibility' (n 99) 166.
[125] ibid 167.
[126] ILC, 'ARSIWA Commentary' (n 57) 126, para 6. In addition, the commentary also mentions international customary law as a source of obligations *erga omnes partes*. Since the main attribute of this type of obligation is the fact that they are owed to a group of particular states, it is reasonable to think that when mentioning customary law, it was regional customary that ILC had in mind.
[127] Bradley, '*Jus Cogens'* Preferred Sister' (n 10) 220.
[128] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 Dec 1984) 1465 UNTS 85, 23 ILM 1027 (1984), as modified by 24 ILM 535 (1985), *entered into force* 26 June 1987 (Convention against Torture).
[129] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Merits, Judgment, ICJ Rep 2012 (20 July), 422, para 68 (*Belgium v Senegal*).
[130] *Belgium v Senegal*, para 68.

of human rights by state A, however serious it may be, in no way changes the position of other states regarding compliance with their own obligations in the same area."[131]

Due to their treaty-based nature, obligations *erga omnes partes* are subject to certain particularities arising from their origin. Specifically, a treaty under which they are recognised regularly specifies certain modalities that govern the collective obligation in question.[132] This frequently involves specific regulation of its enforcement, as also envisaged by the ILC, which comments that the invocation of obligations *erga omnes partes "needs to be further qualified by the insertion of additional criteria"*.[133] Therefore, since State parties have a possibility to set these rules during the treaty negotiations, the regime governing obligations *erga omnes partes* can be deemed as more flexible compared to that of ordinary obligations *erga omnes*.[134]

2.3.1 Conditions to Establish an Obligation *Erga Omnes Partes*

To constitute an obligation *erga omnes partes*, two specific requirements must be fulfilled. Firstly, the norm must be owed to a specific group and not towards the international community as a whole.[135] Thus, not every State is entitled to an invoke responsibility as opposed to "ordinary" obligations *erga omnes*, where such a prerogative is derived from mere membership in an international community and thus pertains to any non-injured State.[136] Secondly, the obligation must have been established for collective interest.[137] Therefore, not every obligation under a multilateral treaty constitutes an obligation *erga omnes partes*, as not every multilateral treaty establishes a collective interest. Moreover, in cases where a collective interest is established in a multilateral treaty, not all its provisions necessarily concern this collective interest.

Subsequently, the question of what can be deemed as "collective interest" arises. As can be expected, there is no universally agreed list of obligations under multilateral treaties that qualify as being of collective interest. Yet, it is attainable to present several examples that are commonly regarded as having *erga omnes partes* character. In its commentary to ARSIWA, ILC proposes obligations related to the protection of the environment or security of the region, the latter

[131] Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1135.
[132] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 126.
[133] ILC, 'ARSIWA Commentary' (n 57) 127, para 10.
[134] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 127–28.
[135] ILC, 'ARSIWA Commentary' (n 57) 126, para 6.
[136] Gaja, 'The Protection of General Interests in the International Community' (n 40) 62. States other than parties to the treaty can invoke responsibility only if there is a corresponding obligation in general international law with the same content. In that scenario, a State invoking responsibility would have to proceed according to Art 48 (1)(b) ARSIWA, meaning it would have to claim breach of obligation *erga omnes* and not obligation *erga omnes partes.*
[137] ILC, 'ARSIWA Commentary' (n 57) 126 para 6.

exemplified by a regional nuclear-free zone treaty.[138] Additionally, certain provisions of conventional humanitarian law, such as Common Art 1 of the Geneva Conventions[139], are of *erga omnes partes* nature.[140] The most prominent domain of obligations *erga omnes partes* are unquestionably treaties for the protection of human rights.[141] To provide concrete examples of instruments establishing collective interests in some of their provisions, core international human rights treaties such as Genocide Convention[142] or Convention against Torture come to mind. Another significant group of human rights treaties encompassing obligations *erga omnes partes* are those establishing regional systems of human rights protection, such as the European Convention on Human Rights[143] and the American Convention on Human Rights[144].[145]

2.3.2 Relationship of Obligations *Erga Omnes Partes* with Obligations *Erga Omnes*

The question of the relationship between obligations *erga omnes partes* and obligations *erga omnes* is of particular relevance. Specifically, it is necessary to determine whether they truly represent two completely separate categories, as implied by the formulation of Art 48 of ARSIWA, or if there is some interconnection between them. The underlying premise is that obligations *erga omnes* are obligations under general international law, while obligations *erga omnes partes* are those of conventional origin. However, revisiting the *Barcelona Traction obiter dictum*, Tams points out the last sentence which states that obligations *erga omnes* could derive from general international law as well as *"international instruments of a universal or quasi-universal character"*.[146] This would suggest that obligations *erga omnes* are more inclusive and could also

[138] ILC, 'ARSIWA Commentary' (n 57) 126 para 7.
[139] See e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva 12 August 1949) 75 UNTS 287, *entered into force* 21 October 1950.
[140] ICRC, 'Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes' (*ICRC*) <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144> accessed on 10 July 2023. The core principles of humanitarian law are ideal examples of obligations that could represent both obligations *erga omnes* under general customary international law and obligation *erga omnes partes* under conventional law. From a practical perspective, as all four Geneva Conventions are nearly universally accepted it would be more feasible to rely upon obligations *erga omnes partes* as the existence of the treaty obligation is easier to prove than the corresponding existence of customary international rule. The role of the obligation *erga omnes* could however come still in play with regard to Additional Protocols of Geneva Conventions since not every State is a party to them.
[141] ILC, 'ARSIWA Commentary' (n 57) 126, para 7; Cançado Trindade (n 12) 316.
[142] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 September 1948) 78 UNTS 277, *entered in force* 12 January 1951 (Genocide Convetion).
[143] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), 213 UNTS 221, *entered into force* on 3 September 1953 (ECHR).
[144] American Convention on Human Rights (San Jose, Costa Rica, 22 November 1969), 1144 UNTS 123, *entered into* force 18 July 1978.
[145] Pavel Šturma, 'Is There Any Regional *Jus Cogens* in Europe? The Case of the European Convention on Human Rights' in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): disquisitions and disputations* (Brill | Nijhoff 2021) 310.
[146] *Barcelona Traction*, para 34; Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 122.

derive from multilateral treaties, which would otherwise be expected to encompass obligations *erga omnes partes*.

However, this should not be understood as excluding the latter category of obligations but rather as a relationship of mutual influence. As general international law can affect the interpretation of a specific provision, treaties may help to identify rules of general international law.[147] The multilateral treaties protecting a collective interest, especially the widely ratified ones, can thus assist in the establishment of an obligation *erga omnes* under general international law. Yet, this relationship does not exclude the obligation *erga omnes partes* established among the parties of the treaty. An ideal example can be seen in the Genocide Convention as the prohibition of genocide is considered both as obligation *erga omnes* and *erga omnes partes*.[148] Thus, despite some potential overlap, both types of obligations can coexist in parallel.

In practice, there are instances where obligations *erga omnes partes* are mistakenly referred to by the general term "obligations *erga omnes*". The issue with such an inclusive all-encompassing approach is that it creates needless confusion as it goes against the fundamental attributes that characterize the category of obligations *erga omnes*, specifically the requirements of universality and solidarity.[149] The subsumption of obligations *erga omnes partes* within the scope of obligations *erga omnes* leads to a situation where the latter category includes also the norms that are owed not towards all States but only to a restricted group. Since both categories have their own distinct characteristics and rules governing them, treating them as one category is neither desirable nor accurate.

2.3.3 Partial Conclusions

Although the category of obligations *erga omnes partes* may have sparked controversy initially, their position within international law has been affirmed by the ARSIWA and Court's judgment in *Belgium v Senegal*. They can be found in the provisions of the multilateral treaties established for the protection of collective interest, the most prominent areas being instruments protecting human rights. A certain overlap of obligations *erga omnes partes* and obligations *erga omnes* is possible, as the latter can be derived also from multilateral treaties, which are primarily associated with obligations *erga omnes partes*. This relationship between the categories mutually influences and strengthens both types of norms. An obligation *erga omnes* under general international law may influence the interpretation of a treaty provision of *erga omnes partes*

[147] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 124.
[148] *Barcelona Traction*, para 34; *Gambia v Myanmar*, para 107.
[149] See Ch 1.1.2 above.

character, and *vice versa* the adoption of a multilateral treaty encompassing obligation *erga omnes partes* may influence its establishment in general international law as obligation *erga omnes*. Both types of obligations can coexist side by side, as is the case, for instance, with the prohibition of genocide.

2.4 Obligations *Erga Omnes* and the International Community

The concept of obligations *erga omnes* serves as an exemplary reflection of the international value system.[150] As discussed earlier, the values they aim to protect are so fundamental that their potential violation becomes not only a concern for the individual injured State but for the *"international community as a whole*".[151] In this regard, obligations *erga omnes* operate on the presumption of the existence of an international community. The Court, however, never explicitly clarified the content of this key term. The following part will delve into the substance of the international community concept, with a particular emphasis on the significance of obligations *erga omnes* within it. This analysis will provide more clarity regarding the values protected by obligations *erga omnes* and will identify the actors in a position to enforce obligations *erga omnes* as well as the beneficiaries of such obligations.

2.4.1 The Notion of the International Community

The phrase "international community" is omnipresent in international law. It is regularly mentioned in legal documents, where it can be frequently found in their preambular parts or embedded in the principles, serving as a guiding framework for interpreting and implementing these documents.[152] In continuous discussions on the current state of international law, the term international community is often relied upon by academia. The concept of the international community also extends beyond the confines of international law and is frequently referenced in the political sphere, including speeches at the UN General Assembly and individual proclamations by States. The extensive and abstract usage of this notion gives rise to different interpretations, making it challenging to precisely define what the international community truly encompasses.

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[150] Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 14.

[151] *Barcelona Traction*, para 33. On this occasion, it is also fitting to recall Crawford's "communitarian norms" as a name for the obligations *erga omnes*. See Ch.1.

[152] Rüdiger Wolfrum, 'Solidarity and Community Interest: Driving Forces for the Interpretation and Development of International Law' (2019) 416 *Recueil des Cours de l'Académie de Droit International* 58.

As a general starting point, it can be propounded that the term "international community" is associated with a theory that suggesting that a certain rule or decision may have legitimacy that transcends a group of States and their individual interests.[153] This assumption directly opposes the traditional understanding of international law, which can be described as *"the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other"*.[154] In this regard, traditional international law is inherently a State-centric system emphasizing the notion of sovereignty, the relations between States being primarily of a reciprocal bilateral nature. In contrast, the term "international community" implies that States are under obligation to cooperate, and such cooperation is based upon the acceptance of common values and objectives, not on the will.[155] Thus, the presumption of the existence of some common values and their enforcement is the very "antithesis of bilateralism".[156]

A prominent illustration of the continual tension between the idea of the international community and the traditional principle of sovereignty can be observed in the ongoing discussions surrounding the proposed establishment of Special Tribunal on the crime of aggression against Ukraine. One of the leading arguments for its creation is the claim that the collective will of the international community has sufficient authority to pierce the personal immunity shield of State officials. Thus, the legitimation of such a tribunal, given for instance through its recognition in the UN General Assembly, endows it with the authority to try alleged perpetrators regardless of their continuing term of office. In contrast, lies the fact that immunities are one of the essential manifestations of the State's sovereignty leading to a counterargument that the immunities cannot be set aside without the consent of the State concerned– not even by a tribunal authorized by the international community.[157] Therefore, the discussion reflects the collision between the two contrasting principles – the demand of the international community to hold perpetrators accountable for one of the gravest crimes under international law, and the traditional customary notion of immunities representing the unyielding principle of State sovereignty.

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[153] Wolfrum, 'Solidarity and Community Interest' (n 152) 58.
[154] Philip Allott, *Eunomia: New Order for a New World* (OUP 1990) 324.
[155] Wolfrum, 'Solidarity and Community Interest' (n 152) 60.
[156] Simma (n 44) 233.
[157] For a deeper analysis of this debate see e.g., Kevin Jon Heller 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' (2022) Journal of Genocide Research forthcoming, 8-11; Carrie McDougall, Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics' (*Opinio Juris*, 15 March 2022) <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/> accessed 10 July 2023; Carrie McDougall, 'The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine' (2023) JC&SL forthcoming; Katarína Šmigová, 'Is it possible to prosecute the head of state?' (2022) 13 CYIL 193.

Considering this tension, the notion of the international community is frequently presented as indicative of the evolution of international law.[158] Judge Bedjaoui, in this regard, argues that the current international law has already departed from the *Lotus* case[159], according to which States have freedom of action as long as there is no explicit prohibition in international law:

> *"It scarcely needs to be said that the face of contemporary international society is markedly altered.* [...] *Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of "international community"* [...] *A token of all these developments is the place which international law now accords to concepts such as obligations erga omnes, rules of jus cogens, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the* [twentieth] *century* […] *has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community."*[160]

However, as explored in the following part, the current state of international law is not necessarily as optimistic as Judge Bedjaoui may have hoped, and the international community continues to encounter obstacles in the implementation of its values.

2.4.2 Community interest and the issue of their enforcement

The idea of community interest has emerged in response to advancing globalisation, as it aimed to address its challenges and protect certain values against encroachments by individual States.[161] The community interest represents the common values of the international community, and Simma tentatively defines it as *"a consensus according to which the respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States"*.[162]

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[158] Proukaki (n 115) 17.
[159] Lotus case, PCIJ Rep Ser A, No 10 (1927).
[160] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, Declaration of President Bedjaoui, ICJ Rep 1996 (8 July), 268, para 13.
[161] Isabel Feichtner, 'Community Interest' (last updated February 2007) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) para 56 <www.mpepil.com> (accessed 14 June 2023).
[162] Simma (n 44) 233.

Following this, he proposes several examples including international peace and security, protection of the environment, the common heritage concept, or universal protection of human rights.[163] Despite their varied nature and the broad range of these examples, these values share the common principle of transcending the interest held by individual States.[164]

The emergence of common values consequently leads to the continuous tension between promoting the interest of the international community and the advancement of individual interests of States, which stem from the protection of their sovereignty. The tension arises from a basic assumption – that strengthening of the international community comes at the expense of State sovereignty, resulting in a reluctance from the side of individual States to cooperate.[165] Consequently, the current role and strength of the international community must be measured by the extent that sovereignty yields to rules designed to enhance community values.[166]

As a consequence of this tension, it is apparent that the community interest is in reality not always observed. Naturally, in order to ensure the protection of these values, the international community needs to cooperate in providing a collective response. However, the international community nowadays does not constitute a fully centralized entity with enforcement structures and mechanisms in effect comparable to ones available to a State within its territory. In each individual case, the international community is dependent on the volatile will of its members to cooperate and provide the means for the protection of the common interest. The question, therefore, is exactly how far this cooperation goes. The problematic relationship between the promotion and enforcement of common values is aptly captured by Kritsiotis, who comments:

> *"Our 'international community' is 'deep' enough to have conceived of the idea of jus cogens but not deep enough to know what to do with it.* [...] *That said, just how deep is the 'international community' that composed the 1948 United Nations Convention on the Prevention and Punishment of Genocide and stood back in 1994 when Rwanda was overtaken by the very murderous convulsions that the Convention was design to prevent. Just how deep is the commitment*

[163] Simma (n 44) 236–44.
[164] ibid 244.
[165] Naturally, as supported by ILC in its commentary to ARSIWA, certain obligations can serve both individual and collective interests. See ILC, 'ARSIWA Commentary' (n 57) 127, para 10. An ideal example in this regard is the prohibition of aggression which is a simultaneously peremptory norm and obligation erga omnes. The fact that the international community as a whole has an interest in aggression not being committed, does not exclude individual states' interest in not wanting to become its victim.
[166] José E Alvarez, 'State Sovereignty is Not Withering Away: A Few Lessons for the Future' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 27.

of this community to universal human rights, to disarmament and world peace, to economic and environmental justice, to the self-determination of all peoples?"[167]

Vidmar understands Kritsiotis's view in a way that the international community has accepted certain values beyond sovereignty. The challenge, however, lies in determining how to enforce or protect these values without sacrificing too much from the State sovereignty.[168] The reluctance to cooperate and respond to breaches of community interest continues to reflect the current state of the international community, with little progress in this regard.

In cases where cooperation fails, the international community needs to possess certain mechanisms that allow for the enforcement of its values through alternative means. Consequently, the inability of a collective response presents a situation where obligations *erga omnes* can play an essential role. They equip the international community with a convenient tool that enables any State as its member to take action and invoke their violation under the law of international responsibility. Through this mechanism, obligations *erga omnes* transform the community idea into a legal concept.[169] While this approach cannot fully substitute for institutionalized collective responses, community interest needs such decentralized mechanisms for its implementation for *"as long as the institutionalization of the most important obligations that are so central to human survival remains shockingly incomplete"*.[170] Consequently, obligations *erga omnes* play a vital role in safeguarding the common fundamental values that create the foundations of the international community.

2.4.3 Members of the International Community

The international community has not emerged as an independent subject of international law.[171] Rather than that the interests of the international community are formulated and protected by its members acting on its behalf. A key question, therefore, is who exactly those actors are. The traditional understanding speaks only about the States as members of the international community. However, such a stance started to be challenged over time to include also other subjects. The more

[167] Dino Kritsiotis 'Imagining the International Community' (2003) 12 EJIL 961, 990–91.
[168] Vidmar (n 150) 39.
[169] Andreas Paulus, 'International Community' (last updated March 2013) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) para 31 <www.mpepil.com> (accessed 14 June 2023).
[170] Andreas Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 103.
[171] Tomuschat (n 30) 78.

extensive approach is adopted, the international organizations, or even humankind are successively included.[172]

The States are regarded as members of the international community simply by definition.[173] In this sense, their privileged position is also evident from their role in the creation of international law. Kelsen argued that *"it is the international community that, using the individual States as its organs, creates international law, just as it is the national community, the State, which by its organs creates national law".*[174] This premise is supported by the wording of Art 38 ICJ Statute, which highlights the primacy of "state-created" sources of international law, as are international treaties and international customs.[175] Another piece of evidence further strengthening the role of States in international law-making can be found in Art 53 VCLT. By requiring that a peremptory norm has to be accepted and recognized by the *"international community of States as a whole"*,[176] the convention emphasizes that it is only States that have the power to identify the most fundamental norms of international law.

But the VCLT wording was not, followed by the Court in *Barcelona Traction* when it made reference to the *"international community as a whole"*,[177] dropping the part with direct reference to States without further clarification. A plausible explanation of why the Court adopted a broader understanding is once again its effort to distance itself from the *South West Africa* case by introducing a more liberal wording.[178] When ILC later incorporated the idea of obligations *erga omnes* into its Art 48 of ARSIWA, it decided to follow the Court's path and omitted the words "of States". By this step, the ARSIWA broadens the scope of the phrase in a way to include also other subjects of international law.[179]

The passage of time changed the perceptions of the phrase "international community as a whole" and gave it new meaning as more actors got into a position to influence the affairs addressed by the international community. In this regard, Crawford argues that broader understanding of the international community is more accurate. As a practical example, he points

[172] Wolfrum, 'Solidarity and Community Interest' (n 152) 58.
[173] ILC, 'ARSIWA Commentary' (n 57) 127, para 10.
[174] Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1961) 123–25.
[175] Statute of the International Court of Justice (24 October 1945) 1 UNTS XVI, *entered into force* 24 October 1945, Art 38 (ICJ Statute); Gaja, 'The Protection of General Interests in the International Community' (n 40).
[176] VCLT, Art 53.
[177] *Barcelona Traction*, para 33.
[178] Jean Allain, 'Jus Cogens and the International Community "of States" as a Whole' in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): disquisitions and disputations* (Brill | Nijhoff 2021) 82.
[179] Paulus, 'International Community' (n 169) para 5.

out the European Union, which, although not a State, is a "full contributor" to the development of international law and thus must be certainly counted as a part of the international community.[180]

At this point, further discussions as to exact subjects that could be deemed as members of the international community would exceed the needs of the present thesis. To sum up, there is an agreement that primary members of the international community remain to be States. However, with the developments of the second half of last century, the practice of international law showed that many international organizations could also be included, as nowadays they play a vital role in shaping the present form of international law.

2.4.4 Beneficiaries of Norms Protected by the International Community

It is also important to identify the beneficiaries of the protected norms and to distinguish them from the actors involved in their creation. The protected values do not solely serve the interest of States that are members of the international community.[181] As Gaja puts forward, the idea that international law is capable of reaching entities other than States and international organizations is no longer considered heretical.[182] Conversely, Wolfrum suggests that the beneficiary is humanity itself, speaking in broad terms.[183] Simma expands on this idea by stating that the community interest corresponds to the *"needs, hopes and fears of all human beings"*.[184] These grand ideas can be translated into more practical terms. The ILC recognizes that not only States are beneficiaries under the regime of international responsibility.

> *"In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements."*[185]

[180] Crawford, 'The Course of International Law' (n 11) 202.
[181] Feichtner, 'Community Interest' (n 161) para 26.
[182] Gaja, 'The Protection of General Interests in the International Community' (n 40), 23.
[183] Wolfrum, 'Solidarity and Community Interest' (n 152) 59.
[184] Simma (n 44) 244.
[185] ILC, 'ARSIWA Commentary' (n 57) 95, para 4.

To illustrate, the ECHR serves as a concrete example of a convention in which individuals are the direct beneficiaries of guaranteed rights.[186]

2.4.5 Partial Conclusions

In conclusion, although the precise meaning of the term "international community" may remain in some aspects blurred, it is evident that such a community exists and is founded on shared common values. The international community has managed, to some extent, to alter the strictly bilateral reciprocal nature of international law. However, the ongoing reluctance to engage in collective efforts aimed at enforcing these shared values highlights a failure to fully realize Judge Bedjaoui's vision, as State sovereignty continues to play hold significant importance, if not a primary role. Nevertheless, within this decentralized framework, the obligations *erga omnes* represent a valuable mechanism for enforcing the community interest, as individual States can act as agents of the international community and invoke responsibility for breaches of norms owed to the international community as a whole. This part has served to identify the actors who, as members of the international community, contribute to shaping its common values, and to determine that, ultimately, the beneficiary of these values is humanity at large. All these conclusions further contribute to establishing the parameters for invoking the breach of obligations *erga omnes*.

2.5 Conclusion of the Chapter

The chapter explored how obligations *erga omnes* have established themselves within the international legal order and investigated their interconnection with some of its key components. Obligations *erga omnes* constitute a distinct category from *jus cogens* but are closely interlinked with them, as they both concern the protection of the most fundamental norms of the international legal order. Obligations *erga omnes* have been translated into the practice of law of international responsibility when ILC incorporated them in Art 48 of ARSIWA. Alongside obligations *erga omnes*, the category of obligations *erga omnes partes* emerged, which also protects common values. Unlike them, the latter is owed towards a restricted group of States, typically parties to a multilateral treaty. The last chapter emphasized the role of obligations *erga omnes* as a means that has the international community at its disposal for protecting its interest.

[186] Šturma, 'Is There Any Regional *Jus Cogens* in Europe?' (n 145) 310.

However, the question remains as to how the legal interest translates to specific actions taken in the case of a breach of obligations *erga omnes (partes)*. In this regard, two main possible mechanisms through which obligations *erga omnes* can be realised are suggested – (a) the possibility of resorting to third-party countermeasures, or (b) initiating judicial proceedings before the international court or tribunal. While both of these mechanisms offer substantive grounds for discussion as time shows their lasting relevance, third-party countermeasures remain discussed in other works, the rest of this thesis analyses the role of obligations erga omnes and obligations erga omnes partes in the judicial settlement of disputes.

3 Obligations *Erga Omnes (Partes)* as a Basis of Legal Standing before the ICJ

One of the mechanisms through which States realize their interest in the protection of obligations *erga omnes (partes)* is through the institution of judicial proceedings. The international litigation of disputes concerning the breaches of obligations *erga omnes (partes)* has attracted attention since the emergence of the concept itself as the judicial procedure provides States with a suitable way to enforce the responsibility for these violations in a decentralized setting such as the international community. As emphasized by Judge *ad hoc* Kress in *Gambia v Myanmar*, *"the international community is not fully institutionalized and* […]*, as a result, individual States have an important function in allowing the "common interest" to be provided with judicial protection".*[187]

In this paradigm, the principal judicial organ of the UN plays a prominent role in two regards. Firstly, as "the only court of a universal character with general jurisdiction"[188], the ICJ has the competence to decide disputes that may relate to the whole range of international law.[189] This positions the Court as a privileged adjudicator of disputes involving the violations of obligations *erga omnes (partes)*, as it is not limited only to a specific field or branch of international law, unlike other specialized international courts and tribunals. Secondly, recalling Crawford's words that the concept of obligations *erga omnes (partes) "occurred largely outside the realm of State practice"*[190], the general subject-matter jurisdiction also places the ICJ in a unique position allowing it to develop the concept further. In other words, the ICJ is the ideal judicial body to which disputes involving the violation of obligations *erga omnes (partes)* can be brought and simultaneously, its decision-making in the matter further shapes the form of the concept itself. Thus, the research of the ICJ's case law together with the opinions and dissents of its judges, makes the most fitting source to study for the needs of the present thesis.

The practical employment of proceedings based on violations of obligations *erga omnes (partes)* has encountered certain difficulties. The main reason for this is the reserved attitude of the Court, which has persisted even after the adoption of the *Barcelona Traction* dictum. Following the ruling in *Belgium v Senegal* and with the ongoing *Gambia v Myanmar* case,

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[187] *Gambia v Myanmar*, Declaration of Judge *ad hoc* Kress, para 14.
[188] Gleider I Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 BYIL 13, fn 244.
[189] ICJ Statute, Art 38. Commentary to the Statute observes that *"Since the ICJ is empowered to hear all kinds of legal disputes and not restricted to specialized legal fields, it is the only judicial body that applies generally binding international law as broadly defined in Article 38, para. 1 of the ICJ Statute".* See Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 215–6.
[190] Crawford, 'The Course of International Law' (n 11) 195.

it appears that the stance of the Court has shifted and that it now opens the doors to cases brought not only by directly injured States but also by those bringing the claims based on a violation of collective interest. To fully comprehend the Court's stance and the role of obligations *erga omnes (partes)* in international litigation, it is necessary to address the following question: How does the "legal interest" carried by the not directly injured States in a case of violation of obligation *erga omnes (partes)* translate into the Court's competence to deliver a judgment on merits? Specifically, which preconditions of the Court's competence does it satisfy?

The chapter first briefly clarifies the requirements of instituting proceedings before the ICJ and the preconditions necessary for rendering a judgment on merits which are relevant for such types of cases. Then it analyses proceedings before the Court based on the violation of obligations *erga omnes (partes)* in relation to the issue of legal standing. The last part of the chapter addresses the relationship of *obligations erga omnes (partes)* with the jurisdiction of the Court as it presents one main limitation of such proceedings in practice.

3.1 ICJ's Preconditions to Render a Judgment on Merits

To analyse the cases based on the *obligations erga omnes (partes)* before the ICJ, it is essential to first clarify the Court's procedural framework and the relevant aspects that pertain to this particular type of proceedings. In international adjudication, the fundamental principle governing the functioning of the international court is that it may speak only when the law allows it to do so.[191] Therefore, before the Court can engage in discussion on the merits of a case and subsequently render a judgment on it, certain conditions must be satisfied. The pivotal elements that must always be present are the notions of jurisdiction and admissibility.[192] Since certain aspects of these notions may in practice often touch upon the other, the distinction between them is often blurred. Nonetheless, it is still possible to make some general characterizations despite this overlap.

3.1.1 Jurisdiction

Put simply, the jurisdiction is the power to decide according to law.[193] It represents the channel through which a court or tribunal obtains its power to decide a case with a binding

[191] Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar Publishing 2016) 171.
[192] Zimmermann and others, *The Statute of the International Court of Justice: A Commentary* (n 189) 783.
[193] Hugh Thirlway, *The International Court of Justice* (OUP 2016) 35.

force for the parties to that case.[194] Jurisdiction is generally separable from the merits of a case as it rather concerns the institution handling the case rather than the particularities of the claim itself. For this reason, its existence is addressed by the Court on its own motion without the need for the respondent's objections.[195]

The ICJ's jurisdiction is twofold – (a) contentious jurisdiction, the capacity to adjudicate legal disputes in accordance with international law submitted to it by States, and (b) advisory jurisdiction, its capacity to deliver advisory opinions on legal matters.[196] Even though the advisory opinions of the Court also constitute a rich source of study of obligations *erga omnes (partes)*, the issue of standing based on their invocation appertains directly to the sphere of contentious jurisdiction. In these proceedings, the theory differentiates between three aspects of contentious jurisdiction – material, personal, and consensual. Only if all three are satisfied, the Court has jurisdiction in a given case and can proceed to the merits of the dispute.[197]

The material jurisdiction (*ratione materiae*) pertains to the subject matter of the case itself and it addresses the questions of the Court's jurisdiction regarding that particular subject matter.[198] In the context of the contentious jurisdiction the role of the Court is to resolve disputes, and thus the matter brought before it must be one.[199] In *Nuclear Tests,* the Court emphasized that *"the existence of a dispute is the primary condition for the Court to exercise its judicial function"* and the question is "essentially preliminary".[200] When it comes to adjudicating claims based on the alleged violation of obligations *erga omnes (partes)*, the issue of the existence of a dispute is particularly relevant due to the inherently indirect relationship between the not directly injured applicant and respondent. In such circumstances, the presence of a dispute between the parties may not be as apparent as opposed to "regular" proceedings. In addition, a dispute before the Court must be of legal nature and must relate to international law.[201] Under Art 38 of the Statute, the Court's function is to *"decide in accordance with international law such disputes as are*

[194] Shabtai Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications' (last updated March 2006) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) paras 1–2 <www.mpepil.com> (accessed 10 July 2023).
[195] Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 168, 171,
[196] ICJ Statute, Art 38; Charter of the United Nations (24 October 1945) 1 UNTS XVI, *entered into force* 24 October 1945 Art 96 (UN Charter).
[197] See Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 177.
[198] ibid.
[199] ibid 180.
[200] *Nuclear Tests (Australia v France)*, Jurisdiction and Admissibility, Judgment, ICJ Rep 1974, 253 (20 December, para 24.
[201] Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 182–183.

submitted to it".[202] For this purpose, the ICJ possesses a general substantive jurisdiction,[203] which means, as mentioned above, that it may rely upon the entire range of international law in the course of adjudication.

Regarding the personal jurisdiction of the Court (*ratione personae*), Art 34(1) of the Statute provides that disputes brought before the Court must be only the ones between States. Therefore, no other subjects of international law or other entities may be a party to a dispute before the ICJ in contentious proceedings.

However, even though all UN Member States are *ipso facto* parties to the ICJ Statute, does not suffice since the delegation of power to ICJ under the Charter and Statute is limited by the condition that the disputant States consent to adjudication.[204] The so-called consensual jurisdiction (*ratione consensus*) is thus a direct consequence of State sovereignty and reflects its role in the international legal order.[205] In order to establish this type of jurisdiction, the Court must be presented with a title from which the consent of the parties derives.

Three distinct titles and one special title of States' consent to proceedings can be distinguished. The first option is entering into a special agreement to submit the dispute to the Court as provided in Art 36(1) ICJ Statute. The second option, envisaged by the same article, are the so-called "compromissory clauses", provisions generally stating that in a case of a dispute over the application or interpretation of a treaty, the dispute can be, subject to certain conditions, brought before the Court. The third title are optional clauses under Art 36(2) ICJ Statute, which recognize Court's compulsory jurisdiction over disputes brought before it by parties having made the same declaration. Such declaration may under Art 36(3) ICJ Statute include certain reservations which then apply between the parties reciprocally. The fourth, final, special title, not directly mentioned in the Statute but accepted by practice, is the doctrine of *forum prorogatum*. This refers to a situation, where one party files an application and unilaterally invites the respondent to accept the Court's jurisdiction in the particular dispute where it would not otherwise exist. Provided that the respondent State accepts this invitation, the Court has jurisdiction.[206]

[202] ICJ Statute, Art 38.
[203] Erika de Wet, 'Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 38 S Afr YB Int'l L 1, 10.
[204] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2016) 70.
[205] Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 185.
[206] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 1076.

3.1.2 The Admissibility and Legal Standing

The notion of admissibility refers to elements that a claim must contain for a court to be able to examine it. Unlike jurisdiction, admissibility pertains directly to the claim itself and its specific qualities.[207] In the *Oil Platforms* case the Court observed that *"*[o]*bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."*[208] Typically, objections to the admissibility are raised by the respondent party, rather than the Court examining them from its own initiative. This is because there is no finite number of factors that need to be considered when assessing the admissibility of a case. To provide a few practical examples, the Court may be called to examine issues such as the absence of *litispendence* and *res judicata*, the involvement of rights of third States, or the exhaustion of compulsory negotiations.[209]

For the purposes of this thesis, the most relevant of these issues is the one of legal standing. The concept known also as *ius standi,* as one of the constituents of admissibility, can be defined as a "right of appearance in a court of justice".[210] Before the ICJ, the issue of standing is relevant in two dimensions. The first dimension relates to the general possibility for an entity to be a party to contentious proceedings – an issue similar to personal jurisdiction – only States are allowed to be parties before the Court. The second dimension, particularly pertinent to obligations *erga omnes (partes)*, concerns the entitlement to submit a claim relating to a specific subject matter.[211] In this context, standing represents *"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"*.[212] Under ordinary circumstances, such standing is conferred directly through a multilateral treaty or is established as a result of injury directly affecting the State initiating proceedings.[213] However, in the context of obligations *erga omnes (partes)*, the question arises as to whether such a link is present in cases where these multilateral treaties and direct

[207] Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 167–8.
[208] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, Judgment, ICJ Rep 2003 (6 November), 161, para 29.
[209] For detailed enumeration see Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 174–7.
[210] Henry Campbell Black, *Black's Law Dictionary* (6th edn, West Publishing 1990) 941.
[211] See Giogo Gaja, 'Standing: International Court of Justice (ICJ)' (last updated June 2018) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) para 1 <www.mpepil.com> (accessed 7 June 2023).
[212] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 26.
[213] Priya Urs, 'Obligations erga omnes and the question of standing before the International Court of Justice' (2021) 34 LJIL 505, 506.

injuries are absent, and the standing is derived solely from a collective interest arising from an in allegedly breached obligation *erga omnes (partes)*.

3.2 Obligations *Erga Omnes (Partes)* as a Basis of Legal Standing before ICJ

Following the *Barcelona Traction obiter dictum*, the pivotal question arises: What does the "legal interest in protection" entail in relation to the standing? In theory, the concept of standing based on the invocation of responsibility for violation of obligations *erga omnes (partes*) can be understood in two ways – restrictive and broad.[214] While the more cautious interpretation can be captured by Judge De Castro's suggestion that *Barcelona Traction* dictum "should be taken *cum grano salis*",[215] the more liberal interpretation aligns with the work of ILC and its Art 48 ARSIWA.

The following part will analyse the ICJ's case law in order to determine the answer to this question. To achieve this objective, the present study commences by examining the pre-*Barcelona Traction* jurisprudence and subsequently focuses directly on the ICJ's case law concerning legal standing in relation to the invocation of responsibility for breach of obligations *erga omnes* and *erga omnes partes*. As both categories have distinct characteristics, and considering that generally the Court approaches them separately, each type of proceeding will be examined individually.

3.2.1 Pre-*Barcelona Traction* Development

3.2.1.1 PCIJ Case Law

Before delving directly into the ICJ's jurisprudence, it is important to note that the early indications of the standing based on the protection of the collective interest of a group of States can be traced back to the League of Nations era and the PCIJ case law concerning special regimes established for common interest.

The most notable of these is the decision in the *Wimbledon* case from 1923. This case revolved around Germany's alleged breach of its obligations under the Treaty of Versailles[216] by denying to grant access to the S.S. Wimbledon vessel through the Kiel Canal. The United Kingdom, France, Italy and Japan, as applicants in this case before the PCIJ, relied upon

[214] Tams, *Enforcing Obligations Erga Omnes in International Law* (n 46) 159.
[215] *Nuclear Tests (Australia v France)*, Jurisdiction and Admissibility, Dissenting Opinion of Judge de Castro, ICJ Rep 1974 (20 December), 372, 387.
[216] Treaty of peace between the allied and associated powers and Germany (Versailles, 28 June 1919), Art 380 (Treaty of Versailles).

the Art 386 of the Treaty of Versailles which stipulated that the power to establish the proceedings concerning the clauses related to the Kiel Canal pertained to "any interested power".[217] As the vessel was registered in the UK and chartered by France, the interest of the first of two applicants in this case was apparent. However, the position of Italy and Japan was less clear. When assessing whether it can take cognizance of the suit, the PCIJ noted that the Kiel Canal *"has been permanently dedicated to the use of the whole world"*[218] and concluded that *"each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags."*[219] Therefore, the applicants were covered by Art 368 of the treaty, regardless of the fact that not all of them could adduce a prejudice to some pecuniary interest.[220]

Despite not being injured in their individual capacity, PCIJ acknowledged in its pronouncement that all States share a collective interest in the observance of the regime established for the Kiel Canal as some sort of manifestation of the freedom of navigation. The PCIJ thus found a general interest in the Treaty of Versailles and interpreted the vague jurisdiction clause in Art 386 broadly to the benefit of this interest.[221] The PCIJ maintained its liberal approach also in the *Memel Statute* case[222], where the court implicitly accepted applicants' standing based on a general interest in the observance of the treaty establishing a specific status – the guaranteeing the Memel Territory certain rights of autonomy.[223]

Even though the attributes relating to the special regimes may not have encompassed all aspects of obligations *erga omnes (partes)* as they are understood currently,[224] both PCIJ's cases represented the first proceedings in which the parties were permitted to derive standing not based on their individual injuries, but rather on a collective obligation established in the general interest.

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[217] Treaty of Versailles, Art 386.
[218] *Wimbledon*, 28.
[219] ibid 20.
[220] ibid 20.
[221] Antonios Tzanakopoulos, 'The Permanent Court of International Justice and the 'International Community'' in Malgosia Fitzmaurice and Christian J Tams (eds), *Legacies of the Permanent Court of International Justice* (Brill | Nijhoff 2013) 356.
[222] *Memel Statute Interpretation case*, Preliminary Objections, PCIJ Rep, Ser A/B, No 47 (1932) (*Memel Statute*).
[223] *ibid* 357. The case concerned alleged violations of the treaty-based regime granting certain autonomous rights to the Prussian city of Memel and surrounding territory, the former most north-eastern part of the German Empire whose sovereignty was after the First World War transferred to Lithuania by Great Britain, France, Italy, and Japan in the Paris Convention from 1924. The cession was subjected to conditions that the Memel maintains certain autonomous rights which observance Lithuania had to guarantee as established in the Statute of Memel, an annex to the treaty. An alleged failure to do so later led to the dispute before PCIJ when the parties to the Paris Convention requested the Court to decide on the conformity of Lithuanian actions with the instrument. See Marcelo G Kohen, 'Memel Territory Statute, Interpretation of, Case' (last updated May 2006) in Anne Peters and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (OUP 2008–) paras 4–5 <www.mpepil.com> (accessed 10 July 2023).
[224] See Ch 1.1.1 above.

3.2.1.2 Early ICJ's case law – South West Africa cases

After the ICJ took the reins, it initially adopted a significantly different approach from its predecessor. In the aforementioned *South West Africa* cases, the Court took a highly restrictive stance towards any standing that did not derive from an individual injury. For an in-depth analysis of the proceedings, it is essential to examine the core of the dispute, which revolved around the League of Nations' Mandate system. This public interest institution was intended for territories which, after World War I, did not remain under the sovereignty of colonial powers and yet, at that time were not considered capable of forming an independent State.[225] The Mandate consisted of an obligation undertaken by a State willing to act as a Mandatory to administer and develop the territory as a "sacred trust of civilization" for the benefit of its people. This obligation was formalized in an instrument similar to a bilateral treaty, concluded between the Mandatory and the League of Nations.[226] In the case of South West Africa, this obligation was assumed by South Africa. However, following the League of Nations' dissolution, South Africa refused to transfer the territory under UN control and maintained its administration, impending its path towards independence.[227] These actions, along with the imposition of apartheid, led Ethiopia and Liberia to submit applications to the ICJ in 1960, claiming that South Africa was in breach of its obligations as a Mandatory.[228] The question was whether the applicants, as former members of the League of Nations, had the right to enforce the rights held in the public interest, which were entrusted to an international organization no longer capable of fulfilling that role.[229]

To establish their standing in the case, the applicants relied on the compromissory clause contained in Art 7(2) of the Mandate which provided that:

> *"*[I]*f any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate* […] *if it cannot be settled by negotiation,* [it] *shall be submitted to the Permanent Court of International Justice* […]*."*[230]

In the judgment on preliminary objections from 1962, the Court was originally satisfied with these grounds and observed that the provision indicated that League of Nations members *"were*

[225] Covenant of the League of Nations (Versailles, 28 April 1919), Art 22 (Covenant).
[226] Covenant, Art 22; Crawford, 'Multilateral Rights and Obligations in International Law' (n 36) 348.
[227] Pok Yin S Chow, 'On Obligations Erga Omnes Partes' (2021) 52 Geo J Int'l L 469, 474. For a more detailed overview of the proceedings, see Richard A Falk, 'The South West Africa Cases: An Appraisal' (1967), 21 Int'l Org, 1, 2–5.
[228] *South West Africa*, ICJ Pleadings 1966, 6, 26.
[229] Crawford, 'Multilateral Rights and Obligations in International Law' (n 36) 348.
[230] *South West Africa (First Phase)*, 335.

understood to have a legal […] *interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."*[231] However, the recognition of applicants' standing in the dispute encountered a strong dissent and was passed only by a narrow majority of eight to seven judges.[232] Following a partial change in the composition of the Court, the polarity of the opinions among the judges led to a practical reversal of its position as it returned to the already settled question of standing in the second judgment from 1966, despite expectations to directly rule on merits.[233] After President Spender, who had previously been one of the main dissenting voices against the first judgment, decided by its casting vote the six-to-six split, the Court concluded that applicants lack standing in the dispute, finding the case inadmissible.[234]

To justify the shift, the majority presented reasoning, although many found it uncompelling, that distinguished between standing to bring a case to the Court and standing for the relief sought. While the issue of standing to bring a case was addressed in the 1962 judgment, the 1966 judgment focused on standing for the relief sought.[235] In this regard, the Court observed that the rights of the parties should be examined *"at the point in time when the mandates system was being instituted"*. Based on this test, the Court reached the conclusion that the performance of the Mandate fell under the jurisdiction of the League Council and not the PCIJ, as it found that Art 7(2) of the Mandate did not explicitly provide for the capability of League members to launch such proceedings. To further refute this option, the Court added that such an *"argument amounts to a plea that the Court should allow the equivalent of an "actio popularis", or right resident in any member of a community to take legal action in vindication of a public interest"* and followed that such a right *"is not known to international law as it stands at present."*[236]

The fact that the Court reached the conclusion that the power to review the performance of the obligation under the Mandate rested solely with a body of a long-time dissolved organization underlines the controversy the decision raised. Regardless, the opinion that the States are not allowed to pursue the enforcement of obligations established in general interest contradicted the established practice in international law. The disapproval of the Court's pronouncement was expressed by Judge Jessup who observed, relying on the PCIJ's case law, that *"international law has accepted and established situations in which States are given a right*

[231] *South West Africa (First Phase)*, 343.
[232] ibid 347.
[233] Chow (n 227) 476.
[234] *South West Africa (Second Phase)*, para 100.
[235] Chow (n 227) 477.
[236] *South West Africa (Second Phase)*, para 88.

of action without any showing of individual prejudice or individual substantive interest as distinguished from the general interest".[237] With regard to the Court's pronouncement on the *actio popularis*, its association with *South West Africa* proceedings is not entirely appropriate, as the action did not originate from a purely abstract relationship but rather relied on an existing link between the parties derived from the obligations assumed under the Mandate.

As previously discussed, the Court's strict pronouncement in the South West Africa cases sparked criticism amongst the members of the international community and led to the introduction of *Barcelona Traction obiter dictum* by ICJ as a response.[238] However, the recognition of the community-oriented obligations was not decisive in regard to the issue of standing, as the consequences and implications of the notion were not addressed in the judgment, and further development was left to future case law.[239]

3.2.2 Standing Based on the Obligation *Erga Omnes Partes*

In regard to proceedings based on the invocation of the responsibility for the breach of obligations *erga omnes partes*, the Court demonstrated a more favourable stance toward this category compared to the obligations *erga omnes* under customary law. Still, it took the Court many years after the delivery of the *Barcelona Traction* dictum before directly addressing legal standing based on the breach of obligations *erga omnes partes*. Even during the delivery of judgment on preliminary objections in the *Bosnian Genocide* case[240] in 1996, Judge Oda expressed his doubts about whether the violation of obligations *erga omnes partes* could establish the standing of any party to the Genocide Convention. In his declaration, he agreed that the convention establishes obligations borne by each contracting party *erga omnes*, but in his view, these obligations *"are not obligations in relation to any specific and particular signatory Contracting Party"*.[241] Therefore, in his opinion, the failure of any party to "prevent and punish" genocide cannot be rectified and remedied by invoking the responsibility of States in inter-State relations before the ICJ.[242] As evident, the standing resulting from obligations *erga omnes partes* long remained unclear as well.

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[237] *South West Africa (Second Phase)*, Dissenting Opinion of Judge Jessup, 325, 387–8.
[238] See Ch.1.1.1.
[239] de Wet, 'Invoking Obligations Erga Omnes in the Twenty-First Century (n 203) 13.
[240] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Preliminary Objections, Judgment, ICJ Rep 1996 (11 July), 595 (*Bosnian Genocide*).
[241] *Bosnian Genocide*, Declaration of Judge Oda, 625, para 4.
[242] ibid.

3.2.2.1 Belgium v Senegal

The change came with *Belgium v Senegal,* the most renowned case on this matter in which the Court, for the first time, explicitly acknowledged the standing of a State based on the violation of obligation *erga omnes partes*. The subject of the case revolved around the failure of Senegal to observe the principle of *aut dedere aut judicare* in relation to the former Chadian president Hissène Habré, at the time resident of Senegal, who was accused of perpetrating certain atrocity crimes, including torture, during the time of his presidency.[243] Senegal's inaction was seen as a breach of its obligations under the Convention against Torture and customary international law, and thus Belgium requested the Court to adjudge and declare that Senegal is obliged to either initiate proceedings against Habré or extradite him to Belgium.[244] To establish its standing before the Court, Belgium interestingly argued that it had a special interest in the case as the Belgian courts had been actively involved in Habré case since 2000, some of the victims of his crimes were Belgian nationals, and Belgium had issued a pending extradition request on the basis of *aut dedere aut judicare* obligation under both the Convention against Torture and customary international law.[245] Belgium claimed, based on these arguments, that it could invoke responsibility directly under Art 42 of ARSIWA as an "injured state".[246] However, Belgium hedged its bets by asserting its entitlement to invoke responsibility under Art 48 ARSIWA, either as a party to the Convention against Torture or as a member of the international community under customary international law, granting it standing before the Court.[247]

The Court, instead of addressing Belgium's special interest, focused exclusively on its position as a party to the Convention against Torture. After the Court confirmed the *erga omnes partes* character of its certain provisions (establishing a common interest of the parties in their observance),[248] it proceeded to consider their implications for the standing before Court:

> *"69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows*

[243] *Belgium v Senegal*, para 1.
[244] ibid para 44.
[245] *Belgium v Senegal*, Memorial of Kingdom of Belgium (Vol I), para 5.17.
[246] ibid para 5.14.
[247] ibid paras 5.14–5.18. In relation to the victims, it is appropriate to point out that they were not Belgian nationals at the time of the commission of the alleged offences. See *Belgium v Senegal*, paras 64-65.
[248] *Belgium v Senegal*, para 68.

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, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end."[249]

For these reasons, the Court concluded that Belgium, as a party to the Convention against Torture, has standing to invoke Senegal's responsibility for the breach of provisions that are of *erga omnes partes* character.[250] The Court further emphasized that such standing is sufficient by itself, rendering any additional pronouncement on whether Belgium has a special interest in the case unnecessary.[251]

However, the recognition of the standing based on the invocation of the responsibility for the breach of an obligation *erga omnes partes* was not supported unanimously by the members of the Court. Judges Xue and Judge *ad hoc* Sur voted against it, and Judge Skopnikov expressed similar reservations in his separate opinion.[252] Their critique focused on two main points – first, that the pronouncement did not reflect the state of the law of international responsibility, and second, that it failed to adopt the correct interpretation of the Convention against Torture.[253]

First, regarding international responsibility, Judge Xue propounded that the judgement misuses the *Barcelona Traction obiter dictum* to create a legal standing in cases of violations of *erga omnes*, although neither *Barcelona Traction* nor relevant case law referred to the issue.[254] Furthermore, she argued that the interest in compliance and standing were two separate issues, and a State party must demonstrate which obligation owed towards it was breached by another party.[255] Judge Skotnikov supported this view, arguing that under ARSIWA, a State must either be directly injured or that the right of action has to be specifically conferred by the relevant treaty.[256] Judge *ad hoc* Sur further expressed doubts about the customary nature of Art 48 ARSIWA.[257] Second, regarding the correct interpretation of the Convention against Torture, Judge Xue argued that the convention did not encompass obligations *erga omnes partes*, as the State parties did not intend to create such obligations.[258] This argument was further

[249] *Belgium v Senegal*, para 69.
[250] ibid para 70.
[251] ibid.
[252] ibid para 122.
[253] Fernando Lusa Bordin 'Procedural Developments at the International Court of Justice' (2013) 12 LPICT 81, 95.
[254] *Belgium v Senegal*, Dissenting opinion of Judge Xue, 571, paras 15–6
[255] ibid para 17.
[256] *Belgium v Senegal*, Separate opinion of Judge Skotnikov, 481, para 21.
[257] *Belgium v Senegal*, Dissenting opinion of Judge *ad hoc* Sur, 605, paras 30–1.
[258] *Belgium v Senegal*, Dissenting opinion of Judge Xue, 571, para 20.

supported by the claim that the convention envisages a specific mechanism for action in the collective interest, which the parties may opt out of. It was also noted that the compromissory clause of the convention could be subjected to reservations, and that the Court disregarded the subsequent practice of the parties to the convention, which was free of inter-state complaints.[259] In general, the common thread pervading all the dissenting opinions was represented by Judge *ad hoc* Sur's concern about the Court not fulfilling its function of settling disputes, but rather trying to create new law by pushing the notion of obligations *erga omnes partes* into its judgment, which was thus produced like "a rabbit from a magician's hat".[260]

The Court's approach has been defended by Judge Donoghue, who observed that the duties of the party to the Convention against Torture correspond with the rights of other parties, and any different interpretation would lead to unacceptable results in which the alleged offender would enjoy the safe haven that the Convention intended to eliminate. Therefore, the obligations at issue would be entirely hollow unless being obligations *erga omnes partes*".[261] She further considered that the existence of the optional mechanisms for implementation or dispute resolution under the treaty does not exclude the implications of obligations *erga omnes partes* under general international law unless a contrary intention is clearly expressed.[262]

The *Belgium v Senegal* case thus represents the first concrete application of obligations *erga omnes partes* by the Court in practice. Although the Court did not directly refer to Art 48 ARSIWA, the decision is perceived to be "firmly in line with it".[263] However, it needs to be stressed that the Court adopted the narrowest possible interpretation of the scope of rights of protection based on violations of obligations *erga omnes*, by situating them purely within a treaty regime.[264] Still, the Court's affirmative pronouncement towards the standing proved to the international community that such proceedings are indeed possible and served as a certain stimulus for their future actions.

3.2.2.2 Whaling in the Antarctic

The first of the cases concerning standing derived from the alleged breach of obligations *erga omnes partes* following *Belgium v Senegal* was the *Whaling in the Antarctic* case[265].

[259] Bordin (n 253) 97.
[260] *Belgium v Senegal*, Dissenting opinion of Judge *ad hoc* Sur, 605, paras 4, 31, 44.
[261] *Belgium v Senegal*, Separate opinion of Judge Donoghue, 584, para 11
[262] ibid para 17; Bordin (n 253) 98.
[263] Crawford, 'The Course of International Law' (n 11) 204.
[264] Hernández (n 188) 49.
[265] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Merits, Judgment, ICJ Rep 2014 (31 March), 226 (*Whaling in the Antarctic*). For an explanation of the dynamics of the case see Christian J Tams, 'Roads

In it case, Australia instituted proceedings against Japan for its continued pursuit of a large-scale program of whaling under the Japanese Whale Research Program whereby breaching obligations assumed under the International Convention for the Regulation of Whaling, as well as its other international obligations for the preservation of marine mammals and the marine environment.[266] Interestingly, Japan did not contest Australia's standing in the case, and the Court itself did not engage in the matter, simply accepting the case as admissible.

Yet, in its substance, the case revolved around the standing based on invoking the breach of obligation *erga omnes partes*. The actions of Japan did not directly injure Australia in its individual capacity, but rather pertained to the collective interest of all parties to the convention, which was adopted for the purpose of *"ensuring the conservation of all species of whales while allowing for their sustainable exploitation"*.[267] Australia, during oral proceedings, directly acknowledged that the action was established for the observance of such interest and that it sought *"to uphold its collective interest, an interest it shares with all other parties".*[268]

The absence of discussion on this issue has been criticized as "striking".[269] However, given the proximity of the case to *Belgium v Senegal*, it may be presumed that Japan did not want to waste time with this argumentation, and the Court implicitly accepted it as it was in line with its reasoning from the recent judgment. Therefore, the *Whaling in the Antarctic* case can serve as an argument confirming the standing in cases where a party is seeking to enforce the observance of the collective interest under a multilateral treaty. Moreover, in proceedings where the *erga omnes partes* character of the invoked obligation is apparent, it may seem unnecessary for the Court to explicitly examine such an issue if there are no objections to its admissibility present.

3.2.2.3 Gambia v Myanmar

Most recently, in *Gambia v Myanmar*, the Court recognized the standing of a party invoking the responsibility for the breach of certain obligations *erga omnes partes* under the Genocide Convention. A significant aspect of the ongoing proceedings is that the Gambia based its claim

Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the *Whaling* Judgment' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and the Implications of the ICJ Judgment* (Brill | Nijhoff 2016).

[266] *Whaling in the Antarctic*, para 1.

[267] ibid para 56.

[268] *Whaling in the Antarctic*, Verbatim Record CR 2013/18 (9 July 2013), 28, para 19.

[269] Urs (n 213) 514.

solely on the grounds of obligations *erga omnes partes* without any additional claim of existing special interest, as Belgium had done in *Belgium v Senegal*.[270]

The dispute revolves around the alleged perpetration of the genocide against the Rohingyas community by Myanmar's military forces, culminating during the years 2016-2017. The Rohingya people, a Muslim minority, were subjected to clearance operations conducted by Myanmar's military, resulting in deaths of tens of thousands and the migration of over 700,000 Rohingya who sought refuge in neighbouring Bangladesh. Despite not being directly affected by Myanmar's actions, Gambia was mandated by the Organization of Islamic Cooperation to institute proceedings before the ICJ. This step aided in overcoming the reservation to the Genocide Convention made by the affected Bangladesh, which prevented Bangladesh from carrying out the proceedings directly. The case thus entailed a similar question as *Belgium v Senegal* – whether a violation of obligations *erga omnes partes* embodied in a multilateral convention may serve as a self-sufficient basis for the standing before the Court.

To proclaim the action as inadmissible, Myanmar contended Gambia's standing, arguing that Gambia does not have an individual interest in the case.[271] In response, Gambia opposed that its standing is derived from the breach of obligations *erga omnes partes*.[272] The Court agreed with Gambia's position and recalled its pronouncement from advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, where it stated that *"the contracting States* [of the Genocide Convention] *do not have any interests of their own; they merely have, one and all, a common interest",* ensuring the prevention, suppression and punishment of genocide by committing themselves to fulfilling the obligations contained in the Convention. *[273]* Building on the reasoning from *Belgium v Senegal*, the Court further observed that such a common interest makes them obligations *erga omnes partes*, and each State party has an interest in compliance with them in any given case.*[274]* Consequently, *"*[t]*he common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party*

[270] Khush Bhachawat, 'Standing of Non-Injured States in Cases of Breach of Obligations Erga Omnes Partes: The Gambia v Myanmar' (*International Law Blog*, 5 December 2022) <https://internationallaw.blog/2022/12/05/standing-of-non-injured-states-in-cases-of-breach-of-obligations-erga-omnes-partes-the-gambia-v-myanmar/> accessed 10 June 2023.
[271] *Gambia v Myanmar*, para 93.
[272] ibid para 100.
[273] ibid para 106.
[274] ibid para 107.

for an alleged breach of its obligations erga omnes partes […] *through the institution of proceedings before the Court".*[275]

In its second preliminary objection, Myanmar proposed that even if a State has the right to invoke responsibility under general international law, this does not automatically imply that such a State has standing before the Court, as those two aspects are separate issues. To bring the claim before the Court, the State would have to be "specially affected" by an internationally wrongful act. However, following its argumentation from *Belgium v Senegal*, the Court rejected this argument, since *"*[i]*f a special interest were required for that purpose, in many situations no State would be in a position to make a claim."*[276]

The Court adopted the judgment by a majority of fourteen to one, with only Judge Xue maintaining her dissent from *Belgium v Senegal*.[277] Therefore, the *Gambia v Myanmar* judgment can be regarded as a final step in consolidating the legal standing based on the violation of obligations *erga omnes partes.* Consequently, when a collective interest in the treaty is found, any State party has the standing to institute proceedings before the Court to remedy its violation.

3.2.2.4 Canada and Netherlands v Syria

The accuracy of these conclusions will be subject to verification by the latest and still ongoing proceedings based on the breach of obligations *erga omnes partes* – the case initiated in June jointly by Canada and the Netherlands against the Syrian Arab Republic for the alleged violations of Convention against Torture dating back to at least 2011.[278] Relying on *Belgium v Senegal*, applicants seek to compel Syria to fulfil its obligations under the convention as they are *erga omnes partes* owed to them as State parties.[279]

As the proceedings are still in the early stages, no official Court decision has been made at the time of the writing of this thesis. Following the scrutiny of the Court's post-*Belgium v Senegal* case law, it can be assumed that the case against Syria should not encounter significant procedural difficulties regarding the applicants' standing. However, what sets the Canada-Netherlands joint action apart from *Belgium v Senegal* is the extent of the obligations for which compliance is

[275] *Gambia v Myanmar*, para 108.
[276] ibid.
[277] ibid para 115.
[278] ICJ, 'Press release: Canada and the Kingdom of the Netherlands jointly institute proceedings against the Syrian Arab Republic and request the Court to indicate provisional measures' (12 June 2023) <https://www.icj-cij.org/case/188/press-releases> accessed 10 July 2023.
[279] *Canada and the Netherlands v Syrian Arab Republic*, Join Application instituting proceedings (8 June 2023), para 7.

sought, and thus claimed to be of *erga omnes partes* character. For these purposes, the applicants provide a wide, non-exclusive enumeration of the alleged breaches of the convention, which they claim to be of collective character. In addition to the previously acknowledged *erga omnes partes* obligations to prosecute the perpetrators, the applicants further allege that Syria is in breach of the convention for committing the acts of torture, and other cruel, inhuman or degrading treatment or punishment. Furthermore, Syria is accused of failing to observe some of its positive obligations, such as taking effective legislative, administrative, judicial, or other measures to prevent torture, or failing to systematically review interrogation rules.[280] The discussed *Gambia v Myanmar* judgment on preliminary objections could provide some guidance, as the Court accepted standing based on wider treaty obligations beyond obligations relating solely to prosecuting or extraditing. Therefore, it is conceivable that the Court will expand these conclusions to the Convention against Torture and identify more of its provisions as obligations *erga omnes partes*.

3.2.3 Standing Based on the Obligation *Erga Omnes*

In the aforementioned judgments, the Court restricted itself to pronouncements only on the standing based on the breach of obligations *erga omnes partes*. The question remains whether the standing can be established also in a case of a breach of obligations *erga omnes* under customary law.

Just three years after the *Barcelona Traction* judgment, the issue of legal standing based on the invocation of responsibility for the breach of obligations *erga omnes* was presented before the Court after Australia and New Zealand established proceedings against France for conducting nuclear weapons tests in the South Pacific.[281] As one of the grounds of their standing, applicants asserted that the prohibition of atmospheric nuclear tests constituted an obligation *erga omnes* under customary law. Relying on the recent *Barcelona Traction* dictum, applicants argued that they had a vested interest in the observance of this prohibition which provided it with the standing before a Court.[282] However, as France later announced its intention to cease conducting atmospheric nuclear tests, the Court, in its judgment on preliminary objection, dismissed the claim

[280] *Canada and the Netherlands v Syrian Arab Republic*, Join Application instituting proceedings (8 June 2023), para 59.
[281] *Nuclear Tests (Australia v France)*, Jurisdiction and Admissibility, Judgment, ICJ Rep 1974 (20 December), 253; *Nuclear Tests (Australia v New Zealand)*, Jurisdiction and Admissibility, Judgment, ICJ Rep 1974 (20 December), 457 (*Nuclear Tests*).
[282] *Nuclear Tests (Australia v France)*, Memorial on Jurisdiction and Admissibility submitted by the Government of Australia (23 November 1973), paras 448–9; *Nuclear Tests (New Zealand v France)*, Memorial on Jurisdiction and Admissibility submitted by the Government of New Zealand (29 October 1973), para 207.

and thus avoided any discussion on the implications of obligations *erga omnes* in relation to the standing.[283]

Nonetheless, the polarity of the opinions on the matter was reflected in the separate opinions of the Judges. Dissenting Judge Bawrick expressed more positive view, stating that should the proposed prohibition indeed constitute obligation *erga omnes* under customary law, the applicant would "*have the requisite legal interest, the locus standi to maintain this basis of its claim"*.[284] However, earlier mentioned Judge de Castro (the one defending the restrictive approach), adopted more negative stance, expressing his doubts, that the *Barcelona Traction* dictum was intended to allow for claims between States where the applicant is not affected in his individual capacity.[285]

The Court was given another opportunity to address the issue in the *East Timor* case where Portugal explicitly raised the alleged breach of the rights *erga omnes*, specifically the rights of East Timor to self-determination. Portugal claimed that these rights were breached when Australia entered into a treaty with Indonesia establishing a Zone of cooperation in the maritime area between "the Indonesian Province of East Timor and Northern Australia".[286] When assessing the application, the Court accepted Australia's objection that its decision would be required to pronounce upon the rights and obligations of Indonesia, over which it had no jurisdiction. Because this action would violate the principle known from PCIJ's *Monetary Gold* case prohibiting adjudging on the rights and obligations of the third States without their consent, the Court dismissed Portugal's claim, once again without pronouncing on the relationship between the invocation of obligations *erga omnes* and legal standing. Nonetheless, Judges Skubiszewski and Weeramantry expressed their conviction that should the jurisdictional issues be overcome, the Court would then have to directly decide on the applicant's standing, which they considered to be present.[287] To support this conclusion, Judge Weeramantry argued that *"[t]he present case is one where quite clearly the consequences of the erga omnes principle follow through to their logical conclusion - that the obligation which is a corollary of the right may well have been contravened. This would lead, in my view, to the grant of judicial relief for the violation of the right."*[288]

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[283] *Nuclear Tests (Australia v France)*, para 62; *Nuclear Tests (Australia v New Zealand)*, para 65.
[284] *Nuclear Tests*, Dissenting Opinion of Judge Barwick, 391, 437.
[285] *Nuclear Tests*, Dissenting Opinion of Judge de Castro 372, 387.
[286] *East Timor*, para 29.
[287] *East Timor*, Dissenting opinion of Judge Skubiszewski, 224, 256; *East Timor*, Dissenting opinion of Judge Weeramantry, 139, 221.
[288] *East Timor*, Dissenting opinion of Judge Weeramantry, 139, 215.

As discussed above, the jurisdictional obstacles prevented the Court to pronounce on the standing based on obligations *erga omnes* in *Belgium v Senegal*. But more recently, the Marshall Islands instituted proceedings against a number of States alleged of failing to negotiate a move towards nuclear non-proliferation.[289] As a basis of their standing they presented the invocation of the responsibility for a breach of obligations *erga omnes*. In this regard, Marshall Islands asserted that *"every State has locus standi to seek to enforce the obligations to "pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" since this obligation is an obligation erga omnes* […]. *As such, every State has a legal interest in its timely performance."*[290] The Court, however, found that there is no direct dispute between the applicant and individual respondents, and for this reason, dismissed the case before touching upon the issue of standing.[291] The Court's approach has faced criticism as it came up with a new definition of a dispute which, ultimately, allowed it to avoid deciding on the legal standing based on the obligations *erga omnes* once again.[292] However, as the judgment was adopted only by the narrowest majority, it may be assumed that the Court will revisit its approach in future cases.

Already in 1995, Judge Weeramantry stressed that *"[t]he erga omnes concept has been at the door of this Court for many years" and such disregard "makes a serious tear in the web of international obligations, and the current state of international law requires that violations of the concept be followed through to their logical and legal conclusion.*"[293] More than 50 years passed since the *Barcelona Traction* judgment, yet the Court still has not explicitly clarified whether the legal interest in the observance of the obligations *erga omnes* entails standing for a party willing to enforce the breach through judiciary means. On the other hand, such an option has not been refuted either and many Judges are of the opinion that it is indeed possible. Hopefully, the future ICJ case law will resolve this issue once and for good.

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[289] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Preliminary Objections, Judgment, ICJ Rep 2016 (5 October), 255; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)*, Preliminary Objections, Judgment, ICJ Rep 2016 (5 October), 552; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Preliminary Objections, Judgment, ICJ Rep 2016 (5 October), 833 (*Marshall Islands v United Kingdom*).

[290] See e.g., *Marshall Islands v United Kingdom*, Memorial of the Marshall Islands (16 March 2015), para 103.

[291] See eg., *Marshall Islands v United Kingdom*, para.56

[292] See, e.g., *Marshall Islands v United Kingdom,* Dissenting opinion of Judge Crawford, 1093. For a deeper analysis of the new test of the existence of the dispute see Milan Lipovský, 'Existence of a Dispute in front of ICJ' (2017) 8 CYIL 150.

[293] *East Timor*, Dissenting opinion of Judge Weeramantry, 139, 216.

3.2.4 Third-party interventions based on the invocation of obligations *erga omnes (partes)*

One of the proposed means through which the interest in safeguarding obligations *erga omnes (partes)* manifests in the sphere of international adjudication is by conferring legal standing not only for the direct establishment of proceedings pertaining to such obligations, but also for enabling intervention in ongoing proceedings.[294]

The possibility to intervene in proceedings before the Court is presumed in Art 62 of the ICJ Statute, which provides the possibility to request permission to intervene for a State that claims *"an interest of a legal nature which may be affected by the decision in the case"*. Alternatively, under Art 63 ICJ Statute, a State has the right to intervene *"whenever the construction of a convention to which states other than those concerned in the case are parties is in question"*, with the condition that *"the construction given by the judgment will be equally binding upon it"*. A question arises as to whether such interests can be derived from an invocation of a breach of obligations *erga omnes partes*.

Initially, the practice of intervention in cases involving breach obligations *erga omnes (partes)* did not seem attractive.[295] Although some indications were made by Canada, and the Netherlands to intervene in the *Gambia v Myanmar* case,[296] their intentions remained unfulfilled. A radical change occurred with the ongoing case *Ukraine v Russia*, in which an unprecedented number of 33 States intervened. In their declarations of intervention, many observed that their interest in the intervention derives exactly from the *erga omnes (partes)* character of obligations under the Genocide Convention. For instance, the Czech Republic asserted that *"all States Parties to the Genocide Convention have a common interest in proper interpretation, application and fulfilment of those obligations. It is precisely for those reasons that the Czech Republic decided to exercise its right to intervene in the proceedings* […] *in order to support the Court in upholding the integrity of the Genocide Convention"*.[297]

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[294] See Urs (n 213) 523.
[295] Urs (n 213) 523.
[296] Government of the Netherlands, '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' (2 September 2020) <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> accessed 10 July 2023.
[297] *Ukraine v Russian Federation*, Declaration of the Intervention of the Czech Republic under Article 63 of the Statute of the International Court of Justice (21 October 2022), para 11. See also e.g., *Ukraine v Russian Federation*, Declaration of the Intervention Pursuant to Article 63 of the Statute of the Court by the Government of New Zealand (28 July 2022), paras 12–13; *Ukraine v Russian Federation*, Declaration of Intervention under Article 63 of the United Kingdom of Great Britain and Northern Ireland (1 August 2022), para 12.

In its order from June 2023, the Court decided that all interventions, except for one, are admissible.[298] In its reasoning, the ICJ clarified that the object of the intervention under Art 63 ICJ Statute is limited to the construction of the convention concerned. Therefore, the Court is not required to ascertain whether the State seeking to intervene has "an interest of legal nature" which "may be affected by the decision", as required by intervention under Art 62. The reason for this is that the presence of such interest under Art 63 is simply presumed by virtue of the intervening State's status as a party to the convention in question.[299] Thus, in this stage of the proceeding, the Court was not required to pronounce whether the interest can be derived from obligations *erga omnes (partes)*, as this issue will arise only when the States intervene in the merits stage under Art 62.

As interventions based on the invocation of the breach of obligations *erga omnes (partes)* are still not firmly established in practice, the future stages of *Ukraine v Russia* proceedings will be essential in the determination of the contours and value of such a type of participation in the Court's proceedings. Through supporting observations, the intervening parties can provide the Court with a deeper insight into the dispute. However, an excessive number of interventions may needlessly complicate the proceedings and potentially conflict with the consideration of the judicial economy, as they would merely delay the Court in its progress.

3.3 Obligations *Erga Omnes (Partes)* and the ICJ's Jurisdiction

Even if the applicant State has legal standing in the dispute, it only satisfies one of the constituent elements of the Court's power to pronounce on the merits of the case. Assuming there would be no other obstacles rendering the case inadmissible, the Court still needs to have jurisdiction over the case.

The *South West Africa Second Phase* pronouncement regarding the absence of *actio popularis* in international law reflects that the source of the Court's jurisdiction is the consent of States. The Court's clarification on whether the character of the obligations *erga omnes (partes)* is able to overcome such an issue was made in the *East Timor* case:

> *"*[T]*he erga omnes character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked,*

[298] *Ukraine v Russian Federation*, Admissibility of the Declarations of Intervention, Order (5 June 2023), para 102 < https://www.icj-cij.org/case/182/orders> accessed 10 July 2023.
[299] *Ukraine v Russian* Federation, para 27.

> *the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right erga omnes."*[300]

Besides invoking the *Monetary Gold* principle, which prevented the Court from pronouncing on the rights and obligations of Indonesia, the ICJ firmly rejected the idea that the character of the *erga omnes* norm in question alone would endow the Court with consensual jurisdiction over the case to compensate for the missing consent from the other party. This pronouncement was later also upheld in the *Armed Activities* case where the Court reiterated its previous conclusion and extended it also on the peremptory norms:

> *"*[T]*he mere fact that rights and obligations erga omnes or peremptory norms of general international law (jus cogens) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties* […]*."*[301]

The fact that obligations *erga omnes (partes)* do not confer the right to exercise jurisdiction of the Court undoubtedly poses challenges to their enforcement. Nonetheless, it is important to consider that the consensual jurisdiction strengthens the Court in some aspects. Since the Court lacks its own enforcement mechanism, it needs to rely upon the willingness of the State upon which it renders a decision. With the State's consent to the proceedings, the likelihood that the judgment will be enforced is significantly increased.[302] Therefore, should the Court's jurisdiction proceed only from the nature of obligations *erga omnes (partes)*, and not the consent of the respondent State, the execution of ICJ's judgments would be considerably less efficient.

Consequently, when seeking the adjudication on the violation of obligation *erga omnes (partes)*, one of the four traditional jurisdictional titles of State consent needs to be identified.[303] In practice, cases where the respondent actively agrees on the Court's jurisdiction over the case concerning alleged breach of an obligation *erga omnes (partes*) are rare. As a result, special agreements between both parties and *forum prorogatum* can be set aside. The focus

[300] *East Timor*, para 29.
[301] *Armed Activities on the Territory of the Cong*, para 125.
[302] Kolb, *The Elgar Companion to the International Court of Justice* (n 191) 185–186.
[303] See Ch.3.1.1.

remains, thus, on the two remaining titles, namely compromissory clauses and optional declarations under Art 36(2) Statute.

The compromissory clauses are the primary domain of obligations *erga omnes partes*. As norms originating from multilateral conventions, these treaties often include provisions addressing the possibility to bring disputes over the interpretation or application of the treaty before the ICJ, subject to certain conditions. Such clauses provided the title of Courts jurisdiction in cases such as *Belgium v Senegal* or *Gambia v Myanmar*. However, in the absence of such a clause in the treaty, another title of jurisdiction must be found, and the only remaining alternative is the optional declaration under Art 36(2) ICJ Statute, as seen, for example, in the *Whaling in the Antarctic* case. Nonetheless, as these declarations are only submitted by a little more than one-third of the States,[304] and are often limited by reservations, the dependence on this title is not always reliable.

Turning to obligations *erga omnes*, the remaining alternative here is the optional clause under Art 36(2) ICJ Statute. Nonetheless, just as the Court has never allowed to proceed with a case concerning a standing based on the breach of an obligation *erga omnes*, there has also never been a case where the Court would need to confirm its jurisdiction. The *East Timor* case failed on the third indispensable party principle as Indonesia did not make the declaration under Art 36(2). In the *Marshall Islands* case, the majority of the Court did not find the existence of a dispute. However, should these obstacles be overcome, it can be reasonably assumed that the optional declaration would present a sufficient source for jurisdiction in cases where the obligation *erga omnes* is being invoked.

[304] As of July 2023, 74 declarations have been filled. See ICJ, 'Declarations recognizing the jurisdiction of the Court as compulsory' <https://www.icj-cij.org/declarations > accessed 10 July 2023.

Conclusion

The introduction of obligations *erga omnes* in the *Barcelona Traction* case undoubtedly stirred the reciprocal bilateral waters of traditional international law. Nonetheless, the Court did so in a manner that has left many questions unanswered. It would take more than five decades of continuous development to further shape and clarify the contours of the concept – and as demonstrated, the process still in many aspects remains unfinished.

The first two parts of this thesis thus focused on the necessary clarifications of the concept of obligations *erga omnes*. It was observed that their emergence in the *Barcelona Traction* judgment was influenced by the necessity to remedy the controversial ruling in *South West Africa (Second Phase)* and to reflect the introduction of *jus cogens* in the VCLT. The understanding of obligations *erga omnes* under *Barcelona Traction* was further differentiated from other *erga omnes* effects, as it was firmly situated in the context related to the law of international responsibility and enforcement of collective interest.

As the Court in *Barcelona Traction* did not develop the concept of the obligations *erga omnes* in detail nor addressed its consequences, the second part of the thesis analysed their gradual establishment in the international legal order. The thesis established a close relationship between obligations erga omnes and *jus cogens*, as every peremptory norm has its obligation *erga omnes* counterpart (although not *vice versa*). While *jus cogens* are characterized by the importance of the norm in question, which does not allow for its derogation, the obligation *erga omnes* rather pertain to the procedural aspect as they give interest in their observance. Both types of norms thus complement each other in their collective effort to protect the most fundamental interests of the international community.

The idea that obligations *erga omnes* are owed not reciprocally between States but towards the international community itself contrasts with traditional international law, which has been dominated by the principle of state sovereignty. Given that the international community is not fully centralized, obligations *erga omnes* represent a valuable mechanism for enforcing its most fundamental interests, as individual States may act as agents of the international community and invoke responsibility for the breach of said obligations. When the States undertake such actions, they do so not solely for their own benefit, as the beneficiaries of the norms protected by obligations *erga omnes* are not only States themselves, but also for humanity in a broader sense.

Next to the obligations *erga omnes*, another category has emerged with the aim to protect certain collective interests – obligations *erga omnes partes*. As opposed to the obligations *erga*

omnes under general international law, obligations *erga omnes partes* are not owed towards the international community as a whole, but only to a specific group of States, typically parties to a multilateral convention in which certain obligations are established in the collective interest. It has been observed in practice that a certain rule can be simultaneously deemed as obligation *erga omnes* and obligation *erga omnes partes*. This provides a State entitled to invoke responsibility for their breach with more methods on how to approach the enforcement of such rule.

The fact that the domain of obligations *erga omnes (partes)* falls within the realm of the law of international responsibility has been also confirmed by the ILC's ARSIWA, which in Art 48 provides for the possibility to invoke the responsibility also by the States not directly injured. One of the avenues through which the responsibility for the breach of obligations *erga omnes (partes)* can be realised, is the international adjudication, which was the subject of the third chapter of this thesis. Despite a slow start following the *Barcelona Traction* dictum, as witnessed in *Nuclear Tests* or *East Timor* cases, the pronouncement in the *Belgium v Senegal* led to an upswing in proceedings based on obligations *erga omnes (partes)* before the Court. After all, out of the 42 contentious proceedings instituted after *Belgium v Senegal*, 8 proceedings involve, at least in some terms, standing based on obligations *erga omnes (partes)*.[305] This makes nearly one-fifth of the contentious cases brought before the Court – a fairly significant proportion.

The core problem addressed in this thesis is whether the invocation of the obligations *erga omnes (partes)* provides for one of the constituents of admissibility, specifically legal standing before the ICJ.

Regarding obligations *erga omnes partes*, following first the *Belgium v Senegal* and most recently the *Gambia v Myanmar* judgments, the acceptance of legal standing based on the invocation of a breach of such norms can now be deemed as an established practice. The matter of the future case law will be the extent of the obligations under the multilateral conventions deemed to have an *erga omnes partes* character, thereby allowing the invocation of responsibility for their breach. The *Canada and Netherlands v Syria* proceedings are expected to play a significant role in shaping this aspect.

[305] Namely *Whaling in the Antarctic*, three *Marshall Islands Cases*, *Gambia v Myanmar*, *Ukraine v Russian Federation*, and *Canada and the Netherlands v Syrian Arab Republic* out of 42 contentious proceedings instituted after *Belgium v Senegal.* See ICJ, 'Contentious cases' </www.icj-cij.org/contentious-cases?dateorder=introduction&order=desc> accessed 10 July 2023.

Concerning the proceedings instituted on the invocation of obligations *erga omnes* under customary law, the explicit endorsement of such a possibility by the Court has not yet been made. Nonetheless, the thesis assumes the option is feasible, as there are no decisions to the contrary and many Judges and authors concur with such a conclusion. Therefore, it is desirable for the Court to provide clarification on the standing on obligations erga omnes under customary law when encountering this issue in the future.

Furthermore, the thesis concluded that the interest in the observance of obligations *erga omnes (partes)* can also serve as a basis for intervention in proceedings where such obligations are in question. The outcome of the *Ukraine v Russian Federation* case will shed more light on the possibility and efficacy of such actions.

In conclusion, based on the analysis presented, the answer to the question of whether obligations *erga omnes (partes)* provide for legal standing before the Court is affirmative, even though certain question marks remain. Judge Higgins' assertion that obligations *erga omnes* solely relate to the issue of legal standing holds true, and the *Barcelona Traction* dictum is *"frequently invoked for more than it can bear"*.[306] Obligations *erga omnes* provide for only one prerequisite needed for the Court to deliver a judgment on merits, while the ICJ still needs to have jurisdiction over the case and there can be no other obstacles to its admissibility.

The objective of this thesis could not have been the complete enumeration of all issues and shortcomings related to the proceedings established on the invocation of the obligations *erga omnes (partes)*. Nonetheless, it is pertinent to highlight at least some of the issues identified in the course of this study. Most importantly, already in the *East Timor* case, the Court emphasized that obligations *erga omnes (partes)* do not make up for the Court's lack of jurisdiction in the absence of the respondent State's consent. This jurisdictional issue is generally less problematic for obligations *erga omnes partes*, as State parties may, in addition to optional declarations under Art 36(2) ICJ Statute, rely on the typically present compromissory clauses. In the case of obligations *erga omnes* under customary law, the options are more limited, and thus the only practical avenue that remains are the aforementioned optional declarations.

Furthermore, as cases based on the legal standing derived from obligations *erga omnes (partes)* are brought by not directly injured States, such proceedings inherently face other challenges both in terms of jurisdiction and admissibility. As the relationship between

[306] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate opinion of Judge Higgins, 207, para 37.

the applicant and the respondent in proceedings concerning obligations *erga omnes* is by nature more distant compared to that of the State parties to a multilateral convention in proceedings related to obligations *erga omnes partes*, it can be assumed the former is more susceptible to procedural difficulties than the latter.

Despite these limitations, the obligations *erga omnes* still serve as a significant tool for the enforcement of community interest, as States can seek responsibility for the breach of these obligations within the decentralized system of the international community. To echo Crawford's words one last time *"*[b]*etter to give States standing in Court to protect what they perceive as global values than to leave them only with non-judicial means of dispute settlement, whether in the guise of countermeasures or under the rubric of "responsibility to protect". "*[307]

[307] Crawford, 'Responsibility for Breaches of Communitarian Norms' (n 119) 225–26.

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Obligations *Erga Omnes* as a Basis of Legal Standing in International Law

ABSTRACT

Obligations *erga omnes* represent the norms protecting the most fundamental interests in international law. Despite their longstanding presence, some aspects of these obligations remain unclear. The thesis aims to determine whether it is possible to enforce these norms by invoking responsibility for their breach before international courts and tribunals, specifically before the International Court of Justice (ICJ). The primary objective is to determine whether obligations *erga omnes* and their treaty counterparts, obligations *erga omnes partes*, effectively establish legal standing in ICJ proceedings.

To achieve this aim, the thesis comprehensively examines the emergence of obligations *erga omnes*, their relationship with *jus cogens*, and their role in safeguarding community interests in order to situate the studied notion in the framework of law of international responsibility. By analysing the ICJ's case law, Judge opinions, the work of the International Law Commission, and prominent scholarly contributions, the study investigates how States' interest in protecting obligations *erga omnes (partes)* translates into the ability to invoke responsibility for their breaches through judicial proceedings.

The analysis reveals that obligations *erga omnes (partes)* are indeed capable of establishing legal standing before the ICJ. The answer, however, is only partially based on the judicial practice. While the Court has repeatedly acknowledged legal standing based on the invocation of breaches of obligations *erga omnes partes*, legal standing based on obligations *erga omnes* under general international law remains unclear, as the Court has not yet directly addressed the issue. Given the absence of a decision to the contrary, and taking into account arguments supporting such possibility, the analysis observes obligations *erga omnes* are also capable of providing for a legal standing before the Court. Regarding the enforceability of both types of obligations, it is however necessary to note, that even with effective *ius standi*, the States must still face the biggest obstacle hindering access to the Court, the lack of consent to the ICJ's jurisdiction. Despite these obstacles, proceedings based on obligations *erga omnes (partes)* serve as a valuable mechanism for addressing the violations of community interest in the decentralized system of international law. With the increasing number of such proceedings before the ICJ, the need for clarity on the discussed issues the need of clarification of the discussed issues rapidly grows.

***Keywords*:** *obligations erga omnes, obligations erga omnes partes, legal standing, international responsibility, International Court of Justice*

Závazky erga omnes jako zdroj *ius standi* v mezinárodním právu

ABSTRAKT

Závazky *erga omnes* představují normy chránící nejzákladnější zájmy v mezinárodním právu. Navzdory jejich dlouhodobé existenci v systému mezinárodního práva však zůstávají některé aspekty těchto závazků nejasné. Diplomová práce si klade za cíl prozkoumat do jaké míry lze dodržování těchto norem vymáhat před mezinárodními soudy a tribunály, konkrétně před Mezinárodním soudním dvorem (MSD). Hlavním cílem práce je zodpovědět otázku, zda závazky *erga omnes* a jejich smluvní protějšky, závazky *erga omnes partes*, zakládají *ius standi* před MSD, tedy právo vystupovat před soudem v konkrétním sporu.

Za účelem zodpovězení této otázky práce komplexně zkoumá původ závazků *erga omnes*, jejich vztah k *jus cogens*, roli při ochraně zájmů mezinárodního společenství, a zasazuje je do kontextu práva mezinárodní odpovědnosti. Na základě analýzy judikatury MSD, stanovisek jeho soudců, práce Komise OSN pro mezinárodní právo, a významných akademických publikací práce zjišťuje jak se zájem států na ochraně závazků *erga omnes (partes)* promítá do možnosti dovolávat se odpovědnosti za jejich porušení prostřednictvím soudního řízení.

Práce dospívá k závěru, že závazky *erga omnes (partes)* jsou skutečně způsobilé založit *ius standi* před Mezinárodním soudním dvorem. Odpověď je nicméně pouze částečně založená na soudní praxi. Zatímco Soud opakovaně uznal *ius standi* na základě dovolávání se porušení závazků *erga omnes partes*, *ius standi* založené na závazcích *erga omnes* dle obecného mezinárodního práva zůstává nejasné, neboť se Soud odpovědi na tuto otázkou doposud vyhýbá. Vzhledem k chybějícímu odmítnuté konceptu a zohlednění argumentů podporujících tuto možnost práce předkládá, že i tento typ závazků je způsobilý založit *ius standi* před MSD. Je však nezbytné poznamenat, že i přes existenci *ius standi* se vymahatelnost obou typů závazků musí nadále vypořádat s hlavní překážkou přístupu k Soudu, a to nedostatkem souhlasu k jeho jurisdikci.

Navzdory popsaným překážkám slouží řízení založená na závazcích *erga omnes (partes)* jako cenný nástroj pro řešení porušování zájmů Společenství v decentralizovaném systému mezinárodního práva. Se zvyšujícím se počtem takových řízení před Mezinárodním soudním dvorem potřeba diskutované otázky náležitě vyjasnit významně roste.

Klíčová slova: *závazky erga omnes, závazky erga omnes partes, ius standi, mezinárodní odpovědnost, Mezinárodní soudní dvůr*