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The Innovation in Concept of the Erga-Omnisation of International Law

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Abstract

In international law, the concept of erga omnes obligations refers to specifically determined obligations that states have towards the international community as a whole. In general legal theory the concept “erga omnes” (Latin: „in relation to everyone”) has origins dating as far back as Roman law and is used to describe obligations or rights towards all. In municipal law it has the effect towards all in another, general context. The concept is very important because in today’s structure of international society, composed of independent entities giving rise, as a rule, to legal relations on a consensual basis, erga omnes obligations can further enable the International Court of Justice to go beyond reciprocal relations among states based on consent in further developing international law on the basis of a natural law approach. By its very nature this affects the freedom of state consent and the sovereignty of states. The ICJ, in its 2012 judgment in the Belgium v. Senegal case, innovated erga omnes partes in much more comprehension than the old meaning. Now and at the future, the new approach of ICJ would be referred and expanded in International law and international human rights law. This paper will try to shed some light on this concept by analyzing its meaning in international law, starting from its appearance, consequent development and its position at the present time.

Key Words: *Erga omnes obligations, ratio decidendi, obiter dicta, stare decisis, jus cogens norms, aggression, genocide, slavery, racial discrimination, torture, self-determination, international court of justice.*

1. Introduction

This article seeks to critically evaluate the idea of the *erga omnes* in international law. During the last two decades, eminent scholars from both sides of the Atlantic have argued that international law is undergoing a profound transformation owing to the impact that *erga omnes* have on general international law and its special regimes.¹ Although not all scholars agree as to the extent of that impact, there seems to be a consensus that, indeed, *erga omnes* obligations are a source of change in international law. As appears from this briefest of descriptions, the fascination of this concepts is some extent due to its “mysterious” character, brought out not the least by the Latin terms denoting them. As was recently noted by James Crawford, “[l]awyers have a habit of putting labels, especially Latin labels, on things We tend to say ‘*jus cogens*’ to a norm and everyone nods their

heads sagely ... Similarly with obligations *erga omnes*". The *erga omnes* and *jus cogens* concepts are often presented as two sides of the same coin. Yet precisely because *erga omnes* and *jus cogens* are so often placed on a pedestal, it seems necessary to re-focus debates on the effects that this concept entails. This we attempt to do in the following sections, which single out three distinct areas in which the two concepts of *jus cogens* and *erga omnes* modify the regime of international responsibility applicable between States and international organizations.

The concepts of obligations *erga omnes* and *jus cogens* fascinate international lawyers, who cannot, it seems, refrain from exploring ever new facets.¹ While both have a long pedigree, in their present 'incarnation', they were launched onto the international plane about four decades ago, and in rather dramatic fashion: In 1969, the Vienna Convention on the Law of Treaties (VCLT), after much debate, recognized that certain rules of international law (among which the drafters mentioned those outlawing the use of force, slavery, piracy or genocide) admitted of "no derogation" and clarified that treaties violating such "peremptory norms" would be void.² One year later, In its dictum on the Barcelona Traction case, the ICJ, as the primary judicial organ of the United Nations, gave rise to the concept of *erga omnes* obligations in international law.³ The ICJ adapted a similar idea to the field of law enforcement, by cryptically pointing to an "essential distinction" between the regular obligations of a State and those "towards the international community as a whole":⁴ The latter, it went on, included obligations deriving "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

¹¹ - Literature on both is vast. Important contributions include the following: P. Picone, *Comunità internazionale e obblighi "erga omnes"* (Naples, Jovene, 2006); C. Tomuschat/J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Leiden et al., Brill, 2006); A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006); S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Paris, Presses Universitaires de France, 2005); C. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, Cambridge University Press, 2005, revised edition with a new epilogue, 2010) ; P.M. Dupuy, (ed.), *Obligations multilatérales, droit impératif et responsabilité internationale* (Paris, A. Pedone, 2003); R. Kolb, *Théorie du Jus Cogens International* (Paris, Presses Universitaires de France, 2001); A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (München, C. H. Beck Verlag AG, 2001); M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Oxford University Press, 1997); J.A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *Recueil des Cours de l'Académie de Droit International* (1994), 345; B. Simma, 'From Bilateralism to Community Interest', 250 *Recueil des Cours* (1994), 217; D. Alland, *Justice privée et ordre juridique international* (Paris, A. Pedone, 1994); C. Tomuschat, 'Obligations Arising for States With or Without Their Will', 241 *Recueil des Cours* (1993) 185; S. Kadelbach, *Zwingendes Völkerrecht* (Berlin, Duncker & Humblot, 1992).

³ Articles 53, 64 VCLT. The examples are mentioned in the ILC's Commentary to Draft Article 50 (the precursor to Article 53 VCLT): see *Yearbook of the International Law Commission*, 1966, vol. II, at 248.

³ - Ardit Memeti, "The Concept of Erga Omnes Obligations in International Law," *New Balkan Politics, Journal of Politics* Issue 14(2013),.p.2.

⁴ - *Case concerning the Barcelona Traction, Light and Power Co Ltd (New Application: 1962) (Belgium v Spain) (Second Phase)*, ICJ Reports 1970, 3, at para. 33

protection from slavery and racial discrimination”, which were “the concern of all States.”¹ And further: “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*.”² In its dictum on the Barcelona Traction case, the ICJ, as the primary judicial organ of the UN, gave rise to the concept of *erga omnes* obligations in international law. In this judgment the Court drew a distinction between the *erga omnes* obligations that a state has towards the international community as a whole and in whose protection all states have a legal interest, and the obligations of a state vis-à-vis another state.

For many years, academic enthusiasm for the concepts of *jus cogens* and *erga omnes* met with a considerable degree of scepticism among those professing to concern themselves only with ‘real law’: theoretically interesting though they might have been, ‘real lawyers’ considered both concepts to be of very limited practical relevance at best. To mention just two prominent statements, Ian Brownlie at one point characterized *jus cogens* as a “vehicle that hardly leaves the garage”³ while Hugh Thirlway viewed obligations *erga omnes* as a “purely theoretical category”.⁴

Things have changed, though, and if anything, the problem today (even among courts or other players engaged in the business of the allegedly ‘real law’) is one of ‘over-use’ – of vehicles leaving garages all too often, as it were.⁵ Whereas Articles 53, 64 VCLT indeed have hardly been invoked in practice, ‘*Jus Cogens* Beyond the Vienna Convention ‘is of real relevance today: over the last decades, international and domestic courts have asserted an ever wider range of (often controversial) *jus cogens* effects, in fields as diverse as jurisdiction,⁶ immunities,¹ diplomatic protection,²

¹ - Ibid., paras. 33-34.

6- Ibid., para. 33.

³ - I. Brownlie and Commonwealth Secretariat, *The Human Right to Development: Study Prepared for the Commonwealth Secretariat* (Commonwealth Secretariat, 1989), p.108, 110

⁴ - H. Thirlway, ‘The Law and Procedure of the International Court of Justice – Part One’, *J. Crawford and V. Lowe, British Year Book of International Law 2008 (Oxford University Press, 2009)*: 1, at 102 (also describing it as ‘an empty gesture’ [p. 100]).

⁵ - H. Thirlway, ‘The Law and Procedure of the International Court of Justice – Part One’, *ibid.*: 1, at 102 (also describing it as ‘an empty gesture’ [p. 100]). With respect to *erga omnes*, see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136*, Sep. Op. Higgins, at para. 57: ‘The Court’s celebrated dictum in Barcelona Traction, Light and Power Company, Limited, Second Phase (Judgment, 1. C.J. Reports 1970, p. 32, para. 33) is frequently invoked for more than it can bear. [...] That dictum was directed to a very specific issue of jurisdictional locus standi. [...] It has nothing to do with imposing substantive obligations on third parties to a case.’

⁶ - There is considerable support for the proposition that all States are entitled to exercise universal jurisdiction over breaches of peremptory norms, see e.g. ICTY, Trial Chamber, *Prosecutor v. Furunzija*, Case IT-95-17/1-T (at para. 156); House of Lords, *Pinochet III*, [2000] 1 A.C. 198 (per Lord Browne-Wilkinson); *ibid.*, 275 (per Lord Millett); Brussels Court of First Instance, *Order In re Pinochet*, 119 ILR 356–357; US Court of Appeals (District of Columbia), *Princz v. Germany*, Diss.Op. Judge Wald, 103 ILR 618; ICJ, *Arrest Warrant case, ICJ Reports 2002, 3*, Diss.Op. van den Wyngaert (para. 45). As regards ‘European’ jurisprudence, see especially the Judgment of the Court of First Instance of 21 September 2005 — *Yusuf and Al Barakaat International Foundation v Council and Commission* (Case T-306/01), where the Court of First Instance declared that it was

reservations to treaties,³ prosecution of human rights abuses,⁴ or extradition.⁵ With respect to obligations *erga omnes*, a careful perusal of the ICJ's jurisprudence suggests that the concept has become a legal *vademecum* prescribed to produce a wide array of legal effects: not only (as in *Barcelona Traction*) in the field of law enforcement, but also justifying third-party effects of treaties or resolutions,⁶ an extensive understanding of the territorial scope of obligations,¹ and alleged duties

'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible' (at para. 226). The CFI found no violations of *jus cogens* to have occurred, with regards to the imposition of sanctions. In 2008, the judgment was reversed on the merits Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union and EC Commission*, 3 C.M.L.R. 41 (2008), with the Court however declaring that it had no power to review the lawfulness of resolutions of the Security Council adopted under Chapter VII, 'even if that review were to be limited to the examination of the compatibility of that resolution with *jus cogens*' (para. 287). All in all, a victory for fundamental rights protection, but a defeat for *jus cogens*.

¹- See e.g. the ICTY's *Furundzija* judgment (op.cit), at para. 156; Judge Wald's dissent in *Princz* (103 ILR 618); House of Lords, *Pinochet III*, [2000] 1 A.C. 278 (per Lord Millett) and 290 (per Lord Phillips); ICJ, *Arrest Warrant case*, *ICJ Reports 2002*, 3, Diss.Op. Al-Khasawneh (para. 7); Diss.Op. van den Wyngaert (para. 23) (all controversially holding that international law precludes the plea of immunity in case of *jus cogens* breaches).

²- See e.g. Dugard, *First Report on Diplomatic Protection*, *UN Doc. A/CN.4, 506 and Add. 1* (2000), at paras. 75– 93, especially draft article 4 (1) (proclaiming a duty of States to exercise diplomatic protection in case of violations of *jus cogens* norms). Cf. also the *Abbasi case* before the (English) Court of Appeal, [2002] EWCA Civ. 159, paras. 28, 41.

³- See e.g. UN Human Rights Committee, *General Comment No. 24 of 1994*, *UN Doc. CCPR/C/21/Rev.1/Add.6*; similarly the opinions of Judges Padillo Nervo and Tanaka and Judge ad hoc Sorensen in the *North Sea Continental Shelf case*, *ICJ Reports 1969*, 3, at 97, 182, and 248 respectively.

⁴- In its *Furundzija* judgment (op.cit.), a trial chamber of the ICTY e.g. took the view that '[i]t would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State . . . condoning torture or absolving its perpetrators through an amnesty law' (at para. 155). See further the *Pinochet* case before the Spanish National Criminal Court (Audencia Nacional), 119 ILR 344.

⁵- See e.g. Swiss Supreme Court (Tribunal Fédéral), *Bufano et al.*, *Recueil Officiel*, Vol. 108, I, 408–413 (para. 8a); Lynas, *ibid.*, Vol. 101, 541 (para. 7b); Sener, *ibid.*, Vol. 109, I, 72 (para. 6aa) (all holding that where an individuals faced violations of *jus cogens* rights abroad, he/she could not be extradited).

⁶- See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports 1971*, 56, at para. 126: "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law". This indeed is the traditional understanding of the term 'erga omnes', which had been common prior to the 1970 *Barcelona*

The new approach of ICJ, in its 2012 judgment in the Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) case, found that Belgium had *ius standi* to claim Senegal's responsibility for the alleged breach of its obligations under Articles 6(2) and 7(1) of the Convention Against Torture and that such claims were admissible. Also the *erga omnes partes obligation* has been innovated. Details of the points, shown in the judgment, prepared new field to speed up to perform some traditional theories and ideas.

The present paper assesses the Court's definition and use of the concept of 'obligations *erga omnes partes*' in light of public international law. The present paper's main contentions are three. First, titled "Traditional Doctrines in International Law on Erga Omnes" contains four parts. Totally, traditional theories and backgrounds about this scope would be veiwed. The characterisation of obligations in the performance of which all the states parties to a treaty have an 'interest' -arguably a 'common' one- as 'obligations *erga omne partes*' is unnecessary. Secondly, the age after 2012 the judgment of ICJ as titled "New Age" will be analyzed. Such obligations, as defined, by the Court, remain merely '*erga partes*', binding on the parties to the treaty constituting their source *qua* parties to the treaty and subject, as any other conventional obligation, to the rule *res inter alios acta* and to the rules on reservations, which may prevent an 'obligation *erga omnes partes*' from becoming binding on states that have made a reservation to the provision setting out the terms of the obligation and on those accepting such reservations. Thirdly, the legal consequences of the use of the concept give further indication of the redundancy of the concept.

2. Traditional Doctrines in International Law on Erga Omnes

A. Classical International Framework on Erga Omnes

Traditional international has a bilateral performance structure. The power of auto-interpretation (of the Charter and of general *international law*) and auto-determination (of the existence of a breach and the engagement of responsibility) of the State exemplifies itself much more forcefully in bilateral relations than in a multilateral or institutional setting.³ Rights and obligations under it arise between two specific states. This is even so when they derive from a multilateral treaty. Thus under the Vienna Convention on Diplomatic relations a specific receiving state is obliged to grant diplomatic immunity to the performance against that specific receiving state.⁴ In strictly bilateral legal relationships, when one state violates its obligations, the directly affected has a right to reparations (in its various forms) and may have recourse to countermeasures (as a means to include

Traction case: for details see Tams (2005/2010), 103-106.

¹ - See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 1996, 595, at 616 (para. 31), where the Court affirmed the *erga omnes* character of the 'the obligation each State ... to prevent and to punish the crime of genocide' and then noted that it was 'not territorially limited.'

² - *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136, at paras. 155-157.

³ - A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP Oxford, 2011), p.121.

⁴ - Karl Zemanek, *New trends in the Enforcement of Erga Omnes Obligations*, J.A. Frowein, R. Wolfrum, and C.E. Philipp, *Max Planck Yearbook of United Nations Law: (2000)* (Kluwer Law International, 1998), p.8.

compliance with the obligation by the state in breach) and diplomatic and judicial dispute settlement. Not only does the state have standing before the court in such cases, but it may also make legal claims through any venue available. Notwithstanding this, not all obligations today fit in this category, which was peculiar of classical international law. Obligations erga omnes do not share this quality. On the contrary when one State violates them, it is most difficult, if not impossible, to find a directly affected state with legal interest, or legal legitimacy (otherwise known as standing or *locus standi*) to make claim in this regard. Hence, in traditional view those objectively affected by those breaches (such as individuals whose human rights were violated) were left without remedy.¹

Recognition of international law itself as a valid corpus of rules has been a gradual process.² At a national level, the existence and therefore validity of the law is quite clear. Law is created and enforced by virtue of the power of the State exerted over its citizens (individuals). As has been stated, “[i]n systems of municipal law the concept of formal source [of law] refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law.”³ For this reason it is considered to be ‘valid.’ However, such a formal structure is absent in the international arena. International law has been described as “one of the possible sets of laws for ordering the world” being based “on the wills of all or many nations.”⁴ Largely as a result of its very nature (that is, the fact that it is comprised of many sovereign States co-existing) the international community is characterized by the absence of any defined sovereign or formal structure comparable to that present within national jurisdictions. It is however clear that States have become more and more dependent on each other, a phenomenon perhaps largely attributable to the growing ‘institutionalization’ of the international community.⁵ This so-called interdependence requires regulation. Although this is sometimes achieved by way of agreements reached between individual States the lacuna is also filled through the recognition by individual States of a so-called international ‘conscience’ which imposes legal regulation on the actions of States and in doing so ensures international respect for basic social values.⁶ Similarly, this is reflected in the so-called

¹ - Marcel Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case," *Revista dos Estudantes de Direito da UnB* 1, no. 11 (2014).,p.46.

² -See generally, L. Oppenheim, *Oppenheim's International Law*, (Ninth Edition, edited by Sir R. Jennings and Sir A. Watts, 1992), Vol. 1, pp. 3 *et seq*

³ - I. Brownlie, *Principles of Public International Law* (Clarendon Press, 1998).p. 1.

⁴ -O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2011)., p. 8. There are in modern analysis two opinions as to the validity of the law: (i) Kelsen was of the opinion that only norms and not facts could be valid, while (ii) other authors stated that there are principles which are valid *per se* and that thereafter it is possible through the will of States, to create positive law from them. See, *ibid.* p. 196 and V.F. Olea, *Ensayo Sobre La Soberania Del Estado* (Universidad nacional de Mexico, 1969)., p. 120 respectively.

⁵ -J. J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag, 1974)., pp. 35, 165. This interdependence of States also means that so-called freedom of action of States (which in any event has never been absolute) is even more curtailed today.

⁶ -Based on this ‘moral code’ international recognition and respect for certain basic social values can mean that particular agreements reached between a limited number of States become ‘valid’ for all. See C. de Visscher, *Théories et Réalités en Droit International Public* (Spanish Edition, 1962), pp.151 - 153.

international moral infrastructure which itself is subject to normative disciplines.¹ As a result of the regulation of States by international law, the concept of 'national sovereignty' has undergone an evolution and today States are regulated by both their own national rules together with the continually developing laws of the international community.² These laws develop or are created not by an international legislator or sovereign, but very generally through the consensus of States which have recognized that certain 'values' amount to valid legal norms which must be respected as between States.

Articles 55 and 56 of the charter proclaimed the promotion of universal respect for, and observance of, human rights and fundamental freedoms as a programme of the United Nations. By referring in Article 56 to the items of that programme as "purposes", the charter links them to Article 1 which lists the purposes of the organization, and among them, in para 3 the promotion and encouragement of respect for human rights and for fundamental freedoms for all. Until then international law had been focused on the sovereignty of states and deal with the relations between them. The charter now established the human person a second focal point, proposing to make in the subject of international rights and to impose on states corresponding obligations under international law for the benefit of persons under their jurisdiction. Whether the founders of the United Nations realized that they were profoundly changing the parameters of traditional international law with that programme. Hence it does not come as a surprise that they failed to prescribe the manner in which these new type of obligations should be fitted into the traditional framework of international law. Moreover, by listing the maintenance of international peace and security, sovereignty, justice, and respect for human rights as purposes and putting them on the same footing, without indicating which of them should prevail in case of conflict, the charter laid the foundation of a philosophical debate which is, until today, without issue.³

Besides, it is possible to talk of the 'validity' of international law.⁴ Having recognized the general validity of international law, before one can identify those norms which may be designated norms of overriding importance within this law, it is necessary to identify the sources from which they may be drawn. The sources of international law are generally regarded as having been exhaustively enumerated in Article 38(1) of the Statute of the International Court of Justice ("ICJ"):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :

- A. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- B. *international custom, as evidence of a general practice accepted as law;*
- C. *the general principles of law recognized by civilized nations;*

¹ -See also, Hauriou who stated that the best way an institution can express itself is not legal but moral and intellectual. F. Hauriou, *Aux Sources de Droit*, 23 Cahiers de la Nouvelle Journée, p. 117.

² -A. De Droit International De La Ha and H.A.I. Law, *Recueil Des Cours, Collected Courses 1928* (BRILL, 1981), pp. 5 *et seq.*

³ - Karl Zemanek, *New trends in the Enforcement of Erga Omnes Obligations*, Max Planck Yearbook of United Nations Law: (2000), Frowein, Wolfrum, and Philipp, *Max Planck Yearbook of United Nations Law: (2000)*, p.3

⁴ - A. Cassese and L.C. Vohrah, *Man's Inhumanity to Man: Essays on International Law in Honour Honour of Antonio Cassese* (Kluwer Law International, 2003), p.2

D. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

It is immediately noteworthy that norms of *jus cogens* are not included specifically as being a 'formal' source of international law. Before these norms can be properly placed among the 'formal' sources one must identify both its evolution as a legal concept and the extent of international recognition of its existence. The obligation *Erga Omnes* are non-derogable in times of war as well as peace¹ and are binding as such on all members of the international community.² Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite³ the non-applicability of statutes of limitation for such crimes⁴ and universality of jurisdiction⁵ over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the obligation *erga omnes* not to grant impunity to the violators of such crimes. Positive ICL does not contain such an explicit norm as to the effect of characterizing a certain crime as part of *jus cogens*. Furthermore, the practice of states does not conform to the scholarly writings that espouse these views. The practice of the state's evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations.⁶ In such situation, standard-setting conventions have a different performance structure.⁷ They prescribe a conduct which is unrelated to any specific right of the other contracting parties under the convention. That has recognized by the ICJ in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, when it stated:

In such a convention the contracting states do not have an interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison detre of the convention. Consequently, in a convention of this type on cannot speak of

¹ - See, e.g., C. Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (M. Nijhoff Publishers, 2008), p.125.

² - C. Murungu and J. Biegon, *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011), p.3.

³ -C. Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (M. Nijhoff, 1995)..

⁴ - See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 18.

⁵ -See generally R. Law, *Terrorism: A History* (Wiley, 2009).; and L. Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2004)..

⁶ - M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes* (Law & Contemp, 1996), p.266.

⁷ - Karl Zemanek, *New trends in the Enforcement of Erga Omnes Obligations*, Max Planck Yearbook of United Nations Law: (2000), Volume 4 of Max Planck Yearbook of United Nations Law Series, Martinus Nijhoff Publishers, 1998, p.9.

*individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between the rights and duties*¹.

Thus, a standard-setting convention creates only the right of a contracting party to request fulfillment of its *commitments* by all other contracting parties. A party does not have substantive rights under the Vienna Convention on Diplomatic Relations or under Vienna Convention on the Law of Treaties. The obligation of a party to conduct itself in accordance with the prescribed standard exists towards all other contracting parties, and is, therefore, an obligation *erga omnes*.² Consequently, in this age, multilateral treaties have been used in other fields for creating general standards of conduct in the achievement of a common purpose. (Which some of them titled as *Erga Omnes Obligations*)

B. Traditional International Court of Justice Doctrine

The term *erga omnes* means “flowing to all,” and so obligations deriving from *jus cogens* are presumably *erga omnes*. Indeed, legal logic supports the proposition that what is “compelling law” must necessarily engender an obligation “flowing to all.” The problem with such a simplistic formulation is that it is circular. What “flows to all” is “compelling,” and if what is “compelling” “flows to all,” it is difficult to distinguish between what constitutes a “general principle” creating an obligation so self-evident as to be “compelling” and so “compelling” as to be “flowing to all,” that is, binding on all states.³ The concept of *erga omnes* appears in international law for the first time in two paragraphs of the judgment in the *Barcelona Traction Case* (Second Phase), Belgium v. Spain which the I.C.J. delivered on February 5, 1970. In this case, the ICJ indicated a number of obligations are held as possessing this *erga omnes* character. Those were the obligation outlawing acts of aggression and genocide and the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁴ Relying heavily on the ICJ's statement in the *Barcelona Traction* case that obligations *erga omnes* may derive from the 'principles and rules concerning the basic rights of the human person', Ragazzi focuses on human rights as the most likely source of new obligations. He also considered the law of development and international environmental law, but considers human rights law the “privileged domain for the

¹ - ICJ Reports 1951, 15 et seq., (23).

² - Cf. O. Corten, *Droit d'ingérence ou obligation de réaction? Les possibilités d'action visant à assurer le respect des droits de la personne face au principe de non-intervention*, 1992,; and H.-J. Blanke, *"Menschenrechte als volker-rechtlicher Interventionstitel"*, AVR 36 (1998), 257 et seq.

³ - In an important study bearing on the *erga omnes* and *jus cogens* relationship, Professor Randall notes that “traditionally international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines.” Randall, *supra* note 7, at 830. However, he, too, seems to accept the *sine qua non* relatively. *Jus cogens* means compelling law. [The *jus cogens* concept refers to] peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or *Jus cogens* means compelling law. [The *jus cogens* concept refers to] peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms. *Id.*

⁴ - INTERNATIONAL COURT OF JUSTICE, (1970; PARAGRAPH 34).

evolution of the concept of obligation Erga Omnes”.¹ On the other hand, the court has been reluctant to acknowledge further obligations *erga omnes*, as it has been in regard to *jus cogens* norms.² In an of-cited paragraph, the majority of the judges stated that:

*[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.*³

The relevant text of the paragraphs 33 and 34 follow:

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-a 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.*

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 human person, including protection from slavery and racial discrimination.*⁴

Since 1995 the Court has made several more deliberate pronouncements about obligations erga omnes in cases where the topic had greater direct relevance than it seemingly had in Barcelona Traction.⁵ This was a groundbreaking new idea for a court that had rejected any hint of community interest under international law just a few years before.⁶ The *Barcelona Traction dictum* however has been followed up by further references to the *erga omnes* concept, which to date has been mentioned in no less than eight other proceedings, namely in the orders or judgments in the *Namibia*, *Nuclear Tests*, *Nicaragua*, *East Timor*, *Genocide*, *Gabc̣i'kovo*, *Armed Activities (Congo-Rwanda)*, and *Israeli Wall* cases. To these, a considerable number of separate and dissenting opinions has to be added.⁷ Thus, criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, “the obligations of a state towards the international Community as a whole.”⁸

¹ - K.K. Mwenda, *Public International Law and the Regulation of Diplomatic Immunity in the Fight against Corruption* (Pretoria University Law Press (PULP), 2011), p.70

² - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.", p.47.

³ - Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

⁴ - I I.C.J. Reports, 1970, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (1962–1970), Second Phase, Judgment, I.C.J Reports 1970, paras. 33–34. Available at: <http://www.icj-cij.org/icjwww/idecisions.htm>. The authoritative text is in French.

⁵ - C.G. Weeramantry, A. Anghie, and G. Sturgess, *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International, 1998), p.510

⁶ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.", p.45.

⁷ - C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005), p.97.

⁸ - *Id.*

While the ICJ goes on to give examples of such obligations in *Barcelona Traction*,¹ it does not define precisely what meaning it attaches to the phrase “obligations of a state towards the international community as a whole.”²

The facts of the *Barcelona Traction* Case do not give grounds for a pronouncement as the one that the court made on the *erga omnes* obligations and the impact it produced. This actually is the main basis for criticism and calls for a brief summary of the case and a comprehensive analysis on the significance of the pronouncement. The case arose out of the adjudication in a *bankruptcy* case by a Spanish court of the Barcelona Traction Light and Power Company, Limited, a Canadian company. Belgium filed an application seeking reparation for damages sustained by Belgium nationals, shareholders in the company, as a result of acts contrary to international law committed by organs of the Spanish state. The Spanish Government raised four preliminary objections to the application.³ The court rejected the first and the second objections concerning the jurisdiction of the court and ruled on the merits of the third and the fourth objections. The third objection of the Spanish Government was that the Belgium Government lacked capacity to submit any claim for wrongs done to a Canadian company even if the shareholders were Belgian. On the third preliminary question, the court reasoned that an injury to the shareholder’s interests did not confer rights on the shareholder’s national state to exercise diplomatic protection for the purposes of seeking redress. That right is conferred on the national state of the company alone. No international law rule expressly confers such a right on the shareholder’s national state. The possession by the Belgian Government of a right of protection was a prerequisite for examination, and since no *jus standi* before the Court had been established, it was not for the Court to pronounce upon any other aspect of the case. As seen above, since the Court dealt with Belgium’s right to *jus standi* in seeking compensation for Belgian shareholders, the *erga omnes* obligations pronouncement is not strongly related to the merits of the case.⁴ *Erga omnes*, as stated above, however, is a consequence of a given international crime having risen to the level of *jus cogens*.⁵ It is not, therefore, a cause of or a condition for a crime’s inclusion in the category of *jus cogens*.

In the second phase of the *South West Africa* cases⁶ in 1966, in a very close vote (ultimately decided by the tie-breaking opinion of President Percy Spender), the ICJ explicitly denied the existence of any form of *international action popularis*.⁷ The position adopted by the former Government of South Africa on the question of what was once known as *South- West Africa* is the

¹ - *Id.* The court further stated in the ensuing paragraph: Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character.

² - *Barcelona Traction*, 1970 I.C.J. at 32.

³ - M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 2000), p.3

⁴ - I.C.J. Reports 1996 (Bosnia and Herzegovina v. Serbia and Montenegro).

⁵ - MERON, *supra* note 12, at 188-97.

⁶ - (Preliminary Objections) (*Ethiopia v. South Africa; Liberia v. South Africa*), 1963 ICJ REP. 319 (Dec. 21); *see* Christenson, *supra* note 54.

⁷ - INTERNATIONAL COURT OF JUSTICE, (1996; paragraph 88).

most prominent example of this, but not the only one. There lies the dilemma to which the late Sir Hersch Lauterpacht has pointed, when he drew attention to the difficulty of characterizing precisely in legal terms a situation in which that Government was declining to act on an advisory opinion that "it was not legally bound to accept but which gave expression to the legal position as ascertained by the Court and as accepted by the General Assembly.¹ However, care is needed to overcome the unexpected type of jurisdictional issue that frustrated the *south case west of Africa* by a clear statement of it into just *standi ratione personae* and *jus standi ratione materiae* is unsound and unacceptable.²

The contemporary genesis of the concept *obligatio erga omnes* for *jus cogens* crimes is found in the ICJ's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*.³ The concept also finds support both in the ICJ's *South West Africa* cases as well as from the *Barcelona Traction*⁴ case. However, it should be noted that the *South West Africa* cases dealt *inter alia* with human rights violations and not with international crimes *stricto sensu*⁵ and that the *Barcelona Traction* case concerned an issue of civil law.⁶ Now it seemed to have adopted a diametrically opposite position, advocating that certain obligations are of such importance for the international community that all States could be deemed to have a legal interest in their protection and compliance.⁷ However, this was not the first time that the ICJ invoked such a concept. In its early days, in the reservations to the genocide Convention advisory opinion, it had also noted that "[...] *in such a convention, the contracting states do not have interest, namely the accomplishment of those high purposes which are the raison d e tre of the convention*."⁸ The court also added to the roster in the *Application of the Genocide Convention* (Bosnia and Herzegovina v. Serbia and Montenegro) and *Armed Activities on the Territory of the Congo* (New Application: 2002) (DRC v. Rwanda) (the obligations enshrined in the Genocide Convention are *erga omnes*), but without further inquiring into the legal effects of such findings.⁹

After the pronouncement, references to the concept of obligations *erga omnes* have occurred both in the judgments and advisory opinions rendered by the International Court, some of

¹ - Murungu and Biegon, *Prosecuting International Crimes in Africa*, p.51.

² - S. Mcinerney-Lankford, M. Darrow, and L. Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank, 2011), p.119.

³ -1951 ICJ REP. 15 (May 28); see Gordon Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93 (1987).

⁴ - *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5); see Christenson, *supra* note 54.

⁵ - Lech Gardocki, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 91 (1989); Otto Triffterer, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 31 (1989).

⁶ - M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: JUS COGENS AND OBLIGATIO ERGA OMNES, BASS2.FMT, 04/03/98, pp.72-74.

⁷ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.", p.45.

⁸ - INTERNATIONAL COURT OF JUSTICE, (1951; p.23).

⁹ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.", p.48.

which will also be addressed in the following pages. In his dissenting opinion on the *East Timor* case (where references to *erga omnes* obligations were also made), Judge Weeramantry listed the following cases as those in which the International Court dealt with the question of obligations *erga omnes*: *Northern Cameroon, South West Africa, Nuclear Tests, Hostages, and Border and Transborder Armed Actions (Nicaragua v. Honduras)*. However, the most important evolution beyond the Barcelona Traction Case was the emergence of the *erga omnes* obligation to respect the right to self-determination in the *East Timor* case and in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and the *erga omnes* obligation on the prohibition of torture recognized by the ICTY in the *Furundzija* case.² As an aside, the jurisprudence of the ICJ is open to critics in what touches upon obligation *erga omnes*, as it is marred by definitional confusions. Besides the obiter dictum in the *East Timor* case, the court in the *Israel Wall* advisory opinion also identified as *erga omnes* a number of obligations pertaining to international human rights law and international humanitarian law violated by Israel in the construction of the wall in Palestine, concluding that as a consequence, all states had a duty not to recognize or assist the resulting situation.³

In the *East Timor* case, the court dealt with the application of Portugal against Australia, according to which Australia had by its conduct failed to observe the obligation to respect the duties and powers of Portugal as the administering power and the right of the people to self-determination and related rights.⁴ The *East Timor Case* In the *East Timor case*, 23 at the core of the Portuguese claim against Australia was the question of validity of the Gap Treaty, 1989 entered into between Australia and Indonesia, on the delamination of the opposite continental shelves, in view of the rights of the people of East Timor under the principle of self-determination and the rights of Portugal as the administering power in respect of East Timor.⁵ Relevant to our case is the pronouncement in regard to the right of self-determination. In the Court's view, the right of peoples to self-determination is irreproachable, since it evolved from the Charter and from United Nations practice, and has an *erga omnes* character. It is significant, it should be noted, that the Court did not say "*erga omnes obligations*" but rather "*erga omnes character*". However, paragraph 155 of the I.C.J. advisory opinion requested by the General Assembly on the "*Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*" states that obligations *erga omnes* are the obligation to respect the right to self-determination and certain obligations under international humanitarian law.⁶ Obviously, the court expressly states the "*erga omnes obligation*" to respect the right to self-determination and also refers to the *East Timor* case as a source on the same line of reasoning.⁷ On the other hand, it did so expressly in

¹ - I.C.J. Reports, 1995 (Portugal v. Australia).

² - Prosecutor v. Anto Furundzija, Decision of December 1998, para. 151

³ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.", p.48.

⁴ - I.C.J. Reports, 1995 (Portugal v. Australia), para. 1.

⁵ - Weeramantry, Anghie, and Sturgess, *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, p.539.

⁶ - I.C.J. Reports, 2003 (Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory), para.155

⁷ - I.C.J. Reports, 2003 (Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory), paras. 88 & 156.

this case, in which it said that “the right of peoples to self-determination¹ (...) has an erga omnes character.”²

Since the right to self-determination, according to some scholars, is a *jus cogens* norm³ and since the I.C.J. has clearly referred to it as an *erga omnes* obligation, by drawing an analogy with the other *erga omnes* obligations in the *Barcelona Traction* case deriving from *jus cogens* norms, it is safe to regard the obligation to respect the right to self-determination as an *erga omnes* obligation.⁴ Furthermore, in the *Furundzija* case, the International Criminal Tribunal for Yugoslavia in paragraph 151 held that:

Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.”

The Trial Chamber in *Furundzija*, held that “any form of captivity vitiates consent.”⁵ The Tribunal clearly refers to the prohibition of torture as an *erga omnes* obligation. Furthermore, the prohibition of torture is also frequently referred to as a *jus cogens* norm (a norm of a peremptory character) in international law. Again, by drawing analogy with the obligations specified in the *Barcelona* case, it is safe to add the *erga omnes* obligation of the prohibition of torture to the group of well-established *erga omnes* obligations in international law to date.⁶

This comment, however, only identifies part of the problem. It is difficult to disagree with the factual assessment – as will be shown in subsequent chapters, obligations erga omnes often have yet to enter ‘the world of the “is”’.⁷ On the other hand, the observation seems to suggest that, as a matter of law, the *erga omnes* concept was fully developed, and that all that remained to be done was to implement it in practice. If this assessment were correct, further legal analysis would be unnecessary, and should be substituted by political pledges and action. Of course, however, it is not correct.⁸ A difficulty with the *erga omnes* concept cannot be reduced to problems of

¹ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.",p.47.

² - INTERNATIONAL COURT OF JUSTICE, (1995; paragraph 29).

³ - R. Brownlie, *A Fatherly Eye: Indian Agents, Government Power, and Aboriginal Resistance in Ontario, 1918-1939* (Oxford University Press, 2003),p.489.

⁴ - H.R. Watch, *Policy Paralysis: A Call for Action in Hiv/Aids-Related Human Rights Abuses against Women and Gird in Africa* (Human Rights Watch),p.69.

⁵ - A. Klip and G. Sluiter, *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia, 2001-2002* (Intersentia, 1999),p.751.

⁶ - United Nations, United Nations Publications, and United Nations. General Assembly, *Report of the International Law Commission* (United Nations Publications, 2006),p.421.

⁷ - A. Watts et al., *The International Law Commission 1999-2009: Volume Iv: Treaties, Final Draft Articles, and Other Materials* (OUP Oxford, 2010),P.624.

⁸ - J.L. Zemanek, *John Fletchall (1800-1884): A Tribute to His Birth 200 Years Ago* (J.L. Zemanek, 2000),p.10 ('The Tortuous Implementation of the Idea in Practice').

implementation, or differences between is and ought, *Sein* and *Sollen*. Despite the wealth of analysis and the host of solemnly-worded statements, commentators continue to disagree about even the most fundamental issues. Having reviewed the ICJ's jurisprudence, Thirlway doubts whether the Barcelona Traction dictum is 'little more than an empty gesture'.¹ On the basis of a rather summary reference to international practice, Rubin arrives at the same result.² More specifically, there is no agreement about the scope of the erga omnes concept, and the legal consequences flowing from that status remain unclear.³ A brief glance at the jurisprudence of the ICJ and the many academic works addressing obligations erga omnes shows that the concept has become a sort of legal panacea; it is said to affect the legal regime of law enforcement, but also the *pacta tertiis* principle, the question of persistent objection, the territorial and temporal application of obligations, etc.⁴ Thirty-five years after the Barcelona Traction judgment (and quite apart from problems of implementation), there is thus very often no agreed ought and basic aspects of the legal regime of obligations erga omnes remain 'very mysterious indeed'.⁵ Given these controversies, it may be no coincidence that its implementation has proven tortuous.⁶ Of course, the erga omnes concept has been the subject of a number of earlier studies, many of which focus on the decentralized enforcement of obligations erga omnes. In view of the continuing interest in it, and the remaining controversies, a reassessment nevertheless seems justified;⁷ this in particular because more recent developments have helped clarify some of the underlying issues.⁸ The ICJ and its members have pronounced on specific features of obligations *erga omnes* in the *East Timor*, *Genocide*, *Gabc'ı'kovo* cases⁹, as well as, most recently, the *Israeli Wall* case.¹⁰ Consequently, they are usually created by custom, which is universal (even if one can imagine an *erga omnes* obligation established by a treaty of universal ratification, one wonders if it would not be better seen as an *erga omnes* obligation).¹¹ On the other hand, obligation *erga omnes partes* (as mention below in ILC articles) exist as between certain states only; they are predominantly created by treaty, although it is equally possible for a legal or

¹ - Simma's own work, which discusses many aspects of the legal regime of obligations erga omnes and is frequently referred to in subsequent chapters, testifies to this.

² -Mwenda, *Public International Law and the Regulation of Diplomatic Immunity in the Fight against Corruption*.,p.100.

³ - A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* (OUP Oxford, 2012),.p.863.

⁴ - A.P. Rubin, *The Law of Piracy* (University Press of the Pacific, 2006),.p.172.

⁵ - Brownlie and Secretariat, *The Human Right to Development: Study Prepared for the Commonwealth Secretariat*.,p.71.

⁶ - CHRISTIAN J. TAMS, *Enforcing Obligations Erga Omnes in International Law*,p4.

⁷ - Tams, *Enforcing Obligations Erga Omnes in International Law*.,p.12.

⁸ - *ibid.*.p.13.

⁹ - S. Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford University Press, 2001),.p.56.

¹⁰ - See ICJ Reports 1995, 90 (East Timor); 1996, 595 (Genocide); 1997, 7 (Gabc'ı'kovo), and 43 ILM (2004), 1009 (Israeli Wall) respectively. The text of the Israeli Wall opinion is also available at www.icj-cij.org.

¹¹ - P. Mojzes, *Balkan Genocides: Holocaust and Ethnic Cleansing in the Twentieth Century* (Rowman & Littlefield, 2011),.p.19.

non-universal custom to create such obligations.¹ Besides, the general approach of the ICJ in Barcelona Traction and this period has a distinction can be made between Obligation Erga Omnes which seek to protect the interests of other states and obligations erga omnes which seek to protect human beings directly.²

C. International Law Commission Doctrine

In the three-and-a-half decades that have passed since 5 February 1970, this passage (which will be referred to as the Barcelona Traction dictum) has puzzled courts and commentators, including, at times, the ICJ itself.³ On its basis, international lawyers have begun to discuss the concept of obligations erga omnes, or obligations owed to the international community as a whole.⁴ The importance of this category of obligations, at least from a conceptual point of view, is widely acknowledged today. To answer, the question, what exactly is meant by legal interest in the 1970 obiter dictum, broadly put, legal interest is a necessary condition for any international legal subject to make claims on international plane, as part of the international claims process in the law of international responsibility. The legal rules governing most aspects of international responsibility were codified or progressively developed by the ILC in its 2001 Articles and their accompanying commentary.⁵ Perhaps more importantly, as has been stated already, the ILC's Articles on State Responsibility, completed in 2001, recognize the pivotal role of the erga omnes concept.⁶ Part Three of the ILC's text constitutes the most comprehensive attempt to date to spell out the legal consequences flowing from erga omnes breaches and to define the position of States affected by such breaches.⁷ The present study will take into account these more recent developments, which so far have hardly been discussed in detail.⁸

It is brought out with particular clarity in the International Law Commission's Articles on State Responsibility, adopted in 2001, which recognize its impact on the rules governing the

¹ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.",p.47.

² - H.M. Haugen, *The Right to Food and the Trips Agreement: With a Particular Emphasis on Developing Countries' Measures for Food Production and Distribution* (Martinus Nijhoff Publishers, 2007),p.352.

³ - United Nations and United Nations International Law Commiss, *Yearbook of the International Law Commission* (United Nations Publications, 2008),p.82.

⁴ - Although not identical in meaning, both expressions are generally treated as synonyms. The present study employs the former expression, as it is the more common. For a different approach see e.g. article 48 (1)(b) ASR and para. 9 of the ILC's commentary.

⁵ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case.",p.46.

⁶ - M. Karavias, *Corporate Obligations under International Law* (OUP Oxford, 2013),p.56.

⁷ - C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (OUP Oxford, 2012),p.258.

⁸ - Cf., however, the study by Empell (2003), published after the completion of the Articles on State Responsibility. For general assessments of the ILC's work see Crawford (2002a); Dupuy (2003), 305; Dupuy (2002b), 354–398; Tams (2002a), 759; as well as the various contributions to symposia organised by the American Society of International Law and the European University Institute, published in 96 AJIL (2002), 773–889; 13 EJIL (2002), 1053–1255, respectively.

invocation of responsibility,¹ and expressly cite Para 33 of the Barcelona Traction judgment as evidence of a modern approach, pursuant to which State responsibility can no longer be reduced to bilateral relations between pairs of States.² Many commentators are prepared to go beyond that. To them, the emergence of obligations erga omnes marks no less than a paradigm shift in international law. Delbrück sees it as part of ‘the ongoing process of the constitutionalization of international law’;³ to many others, obligations erga omnes (together with the related concept of peremptory norms) reflect ‘a common core of norms essential for the protection of communal values and interests’, which transcend the bilateralism and parochial State concerns dominating traditional international law.⁴ The Latin phrase ‘erga omnes’ thus has become one of the rallying cries of those sharing a belief in the emergence of a value-based international public order based on law.⁵ Indeed, such is the degree of fascination that even sceptical commentators like Prosper Weil (whose earlier work is widely regarded as a highly influential critique) acknowledge that the concept is one of the ‘*pièces maîtresses de l’arsenal conceptuel du droit international d’aujourd’hui*.’⁶ As often, the reality is neither so clear nor so bright. One problem is readily admitted by commentators: whatever the relevance of obligations erga omnes as a legal concept, its full potential remains to be realized in practice.⁷ The international community’s failure effectively to react against humanitarian catastrophes, for example in Pol Pot’s Cambodia or during the 1994 Rwandan genocide, makes solemn proclamations of a core of fundamental values ring hollow.¹⁰ Bruno Simma’s much-quoted observation encapsulates this feeling of disappointment: ‘Viewed realistically, the world of obligations erga omnes is still the world of the “ought” rather than of the “is”’.⁸

—The first concerns our understanding of the term ‘international responsibility’. As will become clear from the subsequent assessment, *erga omnes* do not alter the fundamentals of that regime. They modify relevant aspects, and occasionally do so in important ways; yet they operate *within the parameters* of the regime of international responsibility shaped by the work of the International Law Commission, international practice and jurisprudence. In other words, neither concept affects the three basic propositions upon which the contemporary doctrine of responsibility rests: namely that

¹ - See article 48 (1)(b) ASR and paras. 2, 8–10 of the ILC’s commentary to that provision. See further para. 2 of the introductory commentary to Part Three, Chapter I, and para. 2–3 and 7 of the introductory commentary to Part Two, Chapter III.

² - See commentary to article 1 ASR, para. 4.

³ - *Molecular Models of Life: Philosophical Papers on Molecular Biology*, (MIT Press), 35.

⁴ - See ILC Study Group (2000), para. 105. For similar statements or approaches see e.g. Ragazzi (1997) (stressing the moral foundations of the erga omnes concept and its relevance for the quest ‘for peace and justice among States through the promotion of their common good’ (218)); Tomuschat (1995), 15; Fassbender (1998), 75–85 and 126–128; Fassbender (2003), 5–7; Karl (2002), 277.

⁵ - U.N.S.I.L. Commission, *Yearbook of the International Law Commission 1998: Summary Records* (United Nations Publications, 2000), p.106.

⁶ - A. Weil, *The Apprenticeship of a Mathematician* (Birkhäuser Basel, 1992), p. 286 and 287 respectively. Weil’s criticism seems to have become mollified over time: contrast Weil (1983), 430–433, and *ibid.*, 284–291.

⁷ - Tams, *Enforcing Obligations Erga Omnes in International Law*, pp. 3–4

⁸ - See also Zemanek, *John Fletchall (1800-1884): A Tribute to His Birth 200 Years Ago*, p.10 (‘The Tortuous Implementation of the Idea in Practice’).

(i) responsibility of States and international organizations (such as the EU) under international law is ‘breach-based’, i.e. triggered by attributable conduct violating international obligations;¹ (ii) that it is ‘objective’, i.e. not generally dependent on damage, or fault;² and (iii) that it gives rise to ensuing duties of cessation and reparation (plus, exceptionally, a duty to provide for guarantees and assurances of non-repetition)³. What is more, the three effects assessed in the following have no direct impact on what seems to be – and certainly from the EU’s perspective⁴ – the most controversial aspect of the 2011 Draft Articles, namely the delimitation between State and organizational responsibility in the context of joint activity.⁵

It is within the basic parameters of the contemporary responsibility doctrine – as laid down in the ILC’s texts of 2001 and 2011 – that the concepts of *jus cogens* and *erga omnes* entail modifications. Put differently, they might be said to ‘fine-tune’ the application of international responsibility in instances involving particularly grave breaches of international law. The subsequent sections will assess three such instances of fine-tuning by inquiring whether they widen the potential for ‘public interest enforcement’ by the European Union (and other actors), they impose upon the EU and other actors a special regime of aggravated responsibility that would be triggered by breaches of fundamental interest obligations, and they affect the principles of international immunity that have long been perceived as obstacles to the invocation of responsibility. It should nevertheless be noted at the outset that, important though it is, the ILC’s text has not settled matters. There is little doubt that the Commission’s work has shaped, and continues to shape, the modern law of State responsibility.⁶ It has brought about an objective understanding, pursuant to which a State incurs responsibility whenever it fails to comply with its international obligations, irrespective of factors such as damage or fault, thus freeing the law of responsibility from fruitless doctrinal controversies about the definition of damage and fault, and the restrictive focus on the reparation of material wrongs.⁷

¹ - See Article 2 ASR and Article 4 DARIO. For comment on alternative approaches – e.g. explored under WTO law or in the field of liability – see C. Tams, ‘Unity and Diversity in the Law of State Responsibility’, in A. Zimmermann (ed.), *Unity and Diversity in International Law* (Berlin, Duncker & Humblot, 2006), 437, at 443- 445.

² - Article 2 ARS and Article 4 DARIO. For brief comment see para. 9-10 of the ILC’s commentary to Article 2, in YbILC 2001, vol. II, at 36.

³ - Article 30, 31 ARS and Article 30, 31 DARIO.

⁴ - S. Sheeran and N. Rodley, *Routledge Handbook of Human Rights Law* (Taylor & Francis, 2014), p.778.

⁵ - Cf. Part Five DARIO, notably Article 62. For details see note to editors: pls add cross-references to other chapters of the book.

⁶ - Tams, *Enforcing Obligations Erga Omnes in International Law*, p.13

⁷ - See article 2 ASR. On the implications of this reorientation see I. Nations. United, *Yearbook of the International Law Commission 1996* (United Nations Publications, 1999), pp. 10–13; *Yearbook of the International Law Commission 2000*, (UN, 2005), pp.289–291 Tams, *Enforcing Obligations Erga Omnes in International Law*, pp. 765–766. For attempts to retain notions of damage, while at the same time coming to terms with responsibility relationships transcending bilateral contexts see G. Den Dekker, *The Law of Arms Control: International Supervision and Enforcement* (Martinus Nijhoff Publishers, 2001), pp. 21–39.

The Commission's work will not be treated as 'the law'. The Commission is not (and does not claim to be) infallible. Unless States should decide to conclude a Convention on State Responsibility,¹ its text is not an independent source of the law, but is influential if, and to the extent that, it reflects international practice and jurisprudence. Whether it does needs to be assessed, and commentators seeking to do so are more than glossators explaining the meaning of legal rules. In the light of these considerations, the present study intends to be more than a guide to the ILC's work. Where relevant – for example in the sections addressing countermeasures² – the Commission's work will be duly taken into account. However, its evaluation cannot replace the assessment of international jurisprudence and practice relating to obligations erga omnes.³

More specifically as regards the question of so-called 'collective' countermeasures, i.e. countermeasures adopted by states not individually injured by a serious breach of international law, the text adopted on second reading in 2001 is every bit as ambiguous as the first version of 1996. The latter was far from being clear on this point. Certainly, Article 40(3) stipulated that, if the internationally wrongful act constituted an international crime, the expression 'injured State' would designate 'all other States'. However, between acceptance of the idea that every state was injured by an international crime and recognition of the entitlement of any state to respond with countermeasures, there was a step that certain ILC members were not ready to take. Articles 51–53, concerning the specific consequences of 'international crimes', were no more explicit. To be sure, Article 51 stated that '[a]n international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Articles 52 and 53'. One might accordingly deduce that, since the countermeasures constituted a legal consequence of the 'delicts', Article 51 a fortiori recognized the power of any state 'injured' by a crime to have recourse to countermeasures. The commentary to Article 51, however, carefully avoided referring to countermeasures.⁴ Similar observations apply mutatis mutandis to Article 53, which stated that '[a]n international crime committed by a State entails an obligation for every other State: .. (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime'. The very brief commentary to this provision referred in particular to the cooperation of states in implementing sanctions adopted by the Security Council. It added, however, that, 'apart from any collective response of States through the organized international To what form of 'minimum response' was the ILC alluding? One might think of protests, diplomatic pressure and retorsions, but also of countermeasures. It should also be recalled that countermeasures are analyzed as legal entitlements, not obligations. But Article 53 laid down 'obligations' of states, not mere

¹ - Although this question is still under consideration, it seems unlikely that States should convene a conference on State responsibility with a view to concluding a treaty. In its Report to the General Assembly, the ILC had proposed that the Assembly should 'take note' of the ILC's text. This it has done in GA Res. 56/83 and again in GA Res. 59/35. For a brief summary of the debate cf. N. Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge University Press, 2002), pp. 58–60.

² - See below, Chapter 6. While elaborating a regime of countermeasures, the Commission did not have a mandate to define the conditions governing the making of claims before international judicial bodies, such as the ICJ. These depend on the constitutional documents of the relevant institution, as interpreted in the institution's subsequent jurisprudence.

³ - Tams, *Enforcing Obligations Erga Omnes in International Law*, p.14

⁴ - ILC Report, supra note 2, at 165 et seq

entitlements. In short, the whole set of relevant provisions in the version of the Draft adopted in 1996 contained allusions that might, as the case required, be interpreted as allowing the adoption of countermeasures by states not individually affected by a ‘crime’, while remaining evasive, and in the final analysis inconclusive, on the point.¹ community, the Commission believes that a certain minimum response to a crime is called for on the part of all States’.²

The various sorts of obligations *erga omnes partes* must also be distinguished from obligations *erga omnes*. At first sight this distinction seems clear: the former are owed to a group of states parties to a specific legal regime such as a regional convention for the protection of human rights. The latter are by contrast owed to the international community as a whole. It may, however, be that there is an overlap between these two categories of obligations to the extent that the regional instrument takes up an obligation under general international law owed to the international community as a whole. In such an eventuality — frequent particularly in the area of human rights — the states parties to the regional instrument can assert the legal consequences that result from it, as well as (where appropriate) the consequences in general international law. The other states in the international community for their part will invoke the responsibility of the defaulting state and the consequences provided by general international law. It is thus important to stress that the distinction between obligations *erga omnes partes* and obligations *erga omnes*, while clear in abstracto, may become blurred in concreto, in the sense that obligations with the same content may simultaneously come within both categories.

We must now consider the ILC’s approach, which consists of identifying with each other, or nearly so, obligations *erga omnes* and obligations arising from peremptory norms. According to the commentary:

*The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole.*³

In other words, obligations *erga omnes* and obligations resulting from peremptory norms would be two faces of the same coin. The only distinction between these two categories of obligations would be a ‘difference in emphasis’:

*While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e. . . . in being entitled to invoke the responsibility of any State in breach.*⁴

Hence the reference to ‘serious breaches of obligations under peremptory norms of general international law’ in the chapter concerning the specific consequences of these breaches, and the use

¹ - Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility," *EJIL* Vol. 13 No. 5(2002), p. 1142

² - *Ibid*, at 170.

³ - UN Doc. A/56/10, Introduction to the Commentary on Articles 40 and 41, 281, para. 7.

⁴ - *Ibid*.

of the notion of 'obligations owed to the international community as a whole' in Article 48, devoted to the 'invocation of responsibility by a State other than an injured State'.¹

By way of illustration of the problem, in the celebrated passage in the Barcelona Traction judgment, the ICJ noted that obligations erga omnes result inter alia 'from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.² The word 'including' clearly suggests there are several other principles and rules relating to human rights that give rise to obligations erga omnes. It is, moreover, significant that the Institute of International Law has not hesitated to generalize the ICJ's dictum by stating without further ado that the international obligation of states to ensure the observance of human rights, 'as expressed by the International Court of Justice, is erga omnes'.³ Yet the obligation in question is much broader than the obligations resulting from norms of jus cogens in the area of human rights. These chiefly concern the irreducible core of human rights, that is, those rights which are non-derogable even 'in time of war or other public emergency threatening the life of the nation'.⁴ Obligations erga omnes and those resulting from peremptory norms form two concentric circles, the first of which is larger than the second. Trying to identify them is a problematic approach which blurs the conceptual clarity of the whole system of 'serious' breaches of international law. Thus the preferred text is that presented in the ILC's report for 2000, which refers only to obligations erga omnes.⁵

Consequently, the ILC foresaw the right to reparation of the invoking third state. Such reparation could only be claimed on behalf and in the interest state. The ILC admitted that this specific aspect involved a measure of progressive development⁶, and this status as custom is doubtful.⁷ The ILC divided the obligations erga omnes into two different categories: (*general*) obligations erga omnes and obligations erga omnes partes. The former are those obligations in the strict sense put forward by the ICJ in the Barcelona Traction case, creating a legal interest for the whole international community in their compliance.⁸

The classification in question could have been more refined had the distinction between interdependent obligations and those protecting extra-state interests been more clearly established, on the one hand, and had obligations deriving from peremptory norms and obligations erga omnes not been essentially equated. Despite these ambiguities, the classification of international obligations elaborated by the ILC makes much more comprehensible the gradual enlargement of the circle of states affected by a breach, while at the same time enabling the legal position of states individually

Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility." p. 1137

² - ICJ Reports (1970) 3, at para. 34.

³ - Resolution on the protection of human rights and the principle of non-intervention in the internal affairs of states, 13 September 1989, Yearbook of the Institute of International Law, vol. 63-II (1990) 341.

⁴ - In the terms of Article 15 of the European Convention on Human Rights.

⁵ - Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility." p. 1137.

⁶ - INTERNATIONAL LAW COMMISSION, (2001b; commentary to Article 48, paragraph 12).

⁷ - Kamiyama, "Obligations Erga Omnes and International Public Order after the Decision in the Belgium V. Senegal Case." p.55.

⁸ - *ibid.*, p.47.

injured or not to be distinguished. It is nonetheless the case that the provisions governing the regime of 'serious' breaches of international law continue to present certain ambivalences, especially as regards 'collective' countermeasures.¹

D. Erga Omnes in International Criminal Law Doctrine

International law has dealt with both concepts *erga omnes* and *jus cogens*, but mostly in contexts that do not include International Criminal Law ("ICL").² The national criminal law of the world's major legal systems and ICL doctrine have, however scantily, dealt with each of the two concepts.³

¹ - Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility.", p. 1145

² - See, e.g., Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27. See also G.C. ROZANKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976); ANDRÉ DE HOOGH, OBLIGATION ERGA OMNES AND INTERNATIONAL CRIMES (1996) (embodying the author's doctoral dissertation, which is rich in public international law material and mostly based on the work of the ILC, but poor on ICL).

³ - See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987) [hereinafter BASSIOUNI, DRAFT CODE]; M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 *Revue Internationale De Droit Pénal* 405 (1974); See, E.G., M. Cherif Bassiouni, *International Criminal Law* (Vols. I, II & III, 1986-1997 And 2d. Rev. Ed. 1997); *International Criminal Law: A Collection Of International And European Documents* (Christine Van Den Wyngaert Ed., 1996); Andre Huet & Renee Koering-Joulin, *Droit Pénal International* (1994); M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (1992); Haidong Li, *Die Prinzipien Des Internationalen Strafrechts* (1991); M. Cherif Bassiouni, *International Crimes Digest/Index* (1985); Claude Lombois, *Droit Pénal International* (2d. Rev. Ed. 1979); Mohammed Hassanein Ebeid, *Al-Jarima Al-Dawlia* (1979); Stefan Glaser, *Droit International Pénal Conventionnel* (Vol. 1 1971 & Vol. 2 1978); Guillermo J. Fierro, *La Ley Pénal Y El Derecho Internacional* (1977); Bart Deschutter, *La Beligique Et Le Droit International Pénal* (1975); 1 & 2 *A Treatise On International Criminal Law* (M. Cherif Bassiouni & Ved P. Nanda Eds., 1973) [Hereinafter 1 *Treatise*]; Dietrich Oehler, *Internationales Strafrecht* (1973); A.H.J. Swart, *Internationaal Strafrecht* (1973); Stanislaw Plawski, *Étude Des Principes Fondamentaux Du Droit International Pénal* (1972); *Aktuelle Probleme Des Internationalen Strafrechts* (Dietrich Oehler & Paul G. Potz Eds., 1970); Otto Triffterer, *Dogmatische Untersuchungen Zur Entwicklung Des Materiellen Völkerstrafrechts Seit Nurnberg* (1966); *International Criminal Law* (G.O.W. Mueller & Edward M. Wise Eds., 1965); Antonio Quintano-Ripoles, *Tratado De Derecho Pénal Internacional Y Pénal Internacional Pénal* (1957); Stefan Glaser, *Infracciones Internacionales* (1957); George Dahm, *Zur Problematik Des Völkerstrafrechts* (1956); Stefan Glaser, *Introduction A L'étude Du Droit International Pénal* (1954); Hans-Heinrich Jescheck, *Die Verantwortlichkeit Der Staatsorgane Nach Völkerstrafrechts* (1952); Joseph B. Keenan & Brendan F. Brown, *Crimes Against International Law* (1950); Nino Levi, *Diretto Pénale Internazionale* (1949); Albert De La Pradelle, *Une Revolution Dans Le Droit Pénal International* (1946); Rolando Quadri, *Diritto Pénale Internazionale* (1944); Francesco Cosentini, *Essai D'un Code Pénal International Dressé Sur La Base Comparative Des Projets & Textes Recents Des Codes Pénaux* (1937); Hellmuth Von Weber, *Internationale Strafgerichtsbarkeit* (1934); Carlos Alcorta, *Principios De Derecho Pénal Internacional* (1931); Emil S. Rappaport, *Le Problème Du Droit Pénal Inter Étatique* (1930); HENRI Volume-II, Issue-II

Furthermore, the positions of publicists and panelists on this question diverge significantly. The main divisions concern how a given international crime achieves the status of *jus cogens* and the manner in which such crimes satisfy the requirements of the “principles of legality.”¹ Under international law, states have an *erga omnes* obligation—in other words a duty owed to the whole *international* community—to investigate and prosecute *crimes* against humanity, genocide and torture even if this means that amnesty laws are in effect annulled. This means that, for example, Sierra Leone has an obligation under international law to prosecute those who committed crimes against humanity and torture, irrespective of the *Lome Ammensty* and the setting up of the SCSL. Other states also have an obligation to prosecute these crimes based on the principle of universal jurisdiction. Crimes committed in the *post-Lome* period fall outside the amnesty and can be prosecuted under domestic law.²

Donnedieu De Vabres, *Les Principes Modernes Du Droit Pénal International* (1928); Vespasian V. Pella, *La Criminalité Collective Des États Et Le Droit Pénal De L’avenir* (1925); Henri F. Donnedieu De Vabres, *Introduction A L’étude Du Droit Pénal International* (1922); Maurice Travers, *Le Droit Pénal International Et Sa Mise En Oeuvre En Temps De Paix Et En Temps De Guerre* (1922); Josef Kohler, *Internationales Strafrecht* (1917); Salvatore Adinolfi, *Diritto Internazionale Penale* (1913); Friedrich Meili, *Lehrbuch Des Internationalen Strafrechts Und Strafprozessrechts* (1910); *see also, e.g.,* M.Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT’L L. 27 (1983); Robert Friedlander, *The Foundations of International Criminal Law: A Present Day Inquiry*, 15 CASE W. RES. J. INT’L L. 13 (1983); Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983); Farooq Hassan, *The Theoretical Basis of Punishment in International Criminal Law*, 15 CASE W. RES. J. INT’L L. 39 (1983); G.O.W. Mueller, *International Criminal Law: Civitas Maxima*, 15 CASE W. RES. J. INT’L L. 1 (1983); M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights*, 8 YALE J. WORLD PUB. ORD. 193 (1982); Leslie C. Green, *New Trends in International Criminal Law*, 11 ISR. Y.B. H.R. 9 (1981); Hans-Heirich Jescheck, *Development, Present State and Future Prospects of International Criminal Law*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 337 (1981); Leslie C. Green, *International Crime and the Legal Process*, 29 INT’L & COMP. L.Q. 567 (1980); Leslie C. Green, *An International Criminal Code—Now?*, 3 DALHOUSIE L.J. 560 (1976); Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. H.R. 55 (1975); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VA. J. INT’L L. 561 (1975); M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405 (1974); Robert Legros, *Droit Pénal International 1967*, 48 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 259 (1968); Hans-Heinrich Jescheck, *État Actuel et Perspectives d’Avenir des Projets dans le Domaine du Droit International Pénal*, 35 REVUE INTERNATIONALE DE DROIT PÉNAL 83 (1964); W.J. Ganshof van der Meersch, *Justice et Droit International Pénal*, 42 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 3 (1961); Leslie C. Green, *New Approach to International Criminal Law*, 28 SOLIC. 106 (1961); Jean Y.

¹ - C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011), p.87.

² - Human Rights Watch, *Sierra Leone: "We'll Kill You If You Cry" : Sexual Violence in the Sierra Leone Conflict* (Human Rights Watch, 2003), p.61.

It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*. These *erga omnes* duties are legally enforceable, at least in theory, are non-derogable and are binding as such on all members of the international community.¹ The establishment of a permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.² For instance, the norm against torture, moreover, is undoubtedly one of the “basic rights of the human person” that partake of an *erga omnes* character, that is, it is one in which all states have a legal interest in ensuring its protection.³ In addition, the Security Council referred the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the *International Criminal Court* (ICC), urging even non-State parties to the ICC to cooperate fully with the Court. Arguably, in these circumstances, all States would be under an obligation to cooperate with the ICC under Article 41 of the Articles on States Responsibility. Responsibility to protect (RtoP) at least asserts moral pressure on States, all of whom are affected by a serious breach of a peremptory norm in view of its *erga omnes* character, to take any necessary lawful measures to induce a State to comply with its obligation of cessation.⁴

With respect to the consequences of recognizing an international crime as *jus cogens*, the threshold question is whether such a status places obligations *erga omnes* upon states or merely gives them certain rights to proceed against perpetrators of such crimes. The obligation to prosecute and punish international crime once a crime has been identified as having *jus cogens* status, it inevitably imposes obligations *erga omnes*, or obligations owed to all mankind.⁵ This threshold question of whether *obligatio erga omnes* carries with it the full implications of the Latin word *obligatio*, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine.⁶ To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace.⁷ Thus, recognizing certain international crimes as *jus cogens* & *erga omnes* carries with it the duty to prosecute or extradite,⁸ the non-applicability of statutes of limitation for such crimes,¹ and

¹ - Murungu and Biegon, *Prosecuting International Crimes in Africa*.,p.14.

² - On the establishment of the permanent international criminal court, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR 51st Sess., Supp No. 22, U.N. Doc A/51/22 (1996); 13 NOUVELLES ÉTUDES PÉNALES (1997).

³ - J. Hall and Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture* (Human Rights Watch, 2005).,p.13.

⁴ - J. Hoffmann, A. Nollkaemper, and I. Swerissen, *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, 2012).,p.136.

⁵ - Murungu and Biegon, *Prosecuting International Crimes in Africa*.,p.14.

⁶ - Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*., pp.63.

⁷ - See, e.g., C. Bassiouni and M.H. Morris, *Accountability for International Crimes and Serious Violations of Fundamental Human Rights* (Duke University, School of Law, 1996).,p.156.

⁸ - See Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*..

universality of jurisdiction² over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.³ Many of the most serious human rights violations, including most acts that breach “elementary considerations of humanity”, would also constitute a criminal offence under national criminal law. International criminal law plays a role when the acts committed are particularly grave. Some acts are so heinous that they amount to a crime under international law; regardless of whether they are also criminalized in particular countries.⁴

Positive ICL does not contain such an explicit norm as to the effect of characterizing a certain crime as part of *jus cogens & erga omnes*. Furthermore, the practice of states does not conform to the scholarly writings that espouse these views. The practice of the state’s evidences that, more often than not, impunity has been allowed for *jus cogens or erga omnes* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations. There is also much question as to whether the duty to prosecute or extradite is in the disjunctive or in the

¹ - See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970); INTERNATIONAL CRIMINAL LAW (Christine Van den Wyngaert ed., 1996).

² - . See Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*.

³ - See, e.g., E.H. GUISSÉ & L. JOINET, PROGRESS REPORT ON THE QUESTION OF IMPUNITY OF PERPETRATORS OF HUMAN RIGHTS VIOLATION, U.N. Commission on Human Rights, Sub-Commission on the Prevention and Protection of All Minorities, 45th Sess., Item 10(a), U.N. Doc. E/CN.4/Sub.2/1993/6 (1993)(prepared pursuant to Sub-Commission Res. 1992/23); L. JOINET, QUESTION OF THE IMPUNITY OF PERPETRATORS OF VIOLATIONS OF HUMAN RIGHTS (CIVIL AND POLITICAL RIGHTS): FINAL REPORT, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session, Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996)(prepared pursuant to Sub-Commission Resolution 1995/35); NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 14 (1995); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (1994); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); Stephen P. Marks, *Forgetting the Policies and Practices of the Past: Impunity in Cambodia*, 17 FLETCHER F. 18 (1994); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 475 n.137 (1990); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L. J. 1, 4 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY’S L. J. 857, 867 (1995).

⁴ - International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy, 2002), p.63.

conjunctive, which of the two has priority over the other and under what circumstances, and, finally, whether implicit conditions of effectiveness and fairness exist with respect to the duty to prosecute and with respect to extradition leading to prosecution.¹

The gap between legal expectations and legal reality is therefore quite wide. It may be bridged by certain international pronouncements² and scholarly writings,³ but the question remains whether such a bridge can be solid enough to allow for the passage of these concepts from a *desideratum* to enforceable legal obligations under ICL, creating state responsibility in case of non-compliance.⁴ It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*. The establishment of a permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.⁵

As a result, there are both gaps and weaknesses in the various sources of ICL norms and enforcement modalities. The work of the ILC in formulating the 1996 Draft Code of Crimes is insufficient. A comprehensive international codification would obviate these problems, but this is not forthcoming. Existing state practices are also few and far between and are insufficient to establish a solid legal basis to argue that the obligations deriving from *jus cogens* and *erga omnes* crimes are in fact carried out as established by law, or at least as perceived in the writings of progressive jurists. Thus, it is important to motivate governments to incorporate the obligations described into their national laws as well as to urge their expanded use in the practice of states. Jurists have, therefore, an important task in advancing the application of these ICL norms, which are an indispensable element in the protection of human rights and in the preservation of peace.⁶ Moreover, the designation of international crimes and *obligations erga omnes* does not involve a purported new source of law: crimes are created and defined through the conclusion of treaties; *obligations erga omnes* through treaty and customary international law. Secondly, it appears logical that all international crimes are *obligations erga omnes* because the international community as a whole identifies and may prosecute and punish the commission of such crimes. The reverse is not the case, however. Not all *obligations erga omnes* have been designated as international crimes. Racial discrimination, for example, is cited as an *obligation erga omnes*, but is not included among international crimes except in its most extreme forms (*genocide* and *apartheid*). Among those acts

¹ - See Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*.

² - See, e.g., *Question of the Punishment of War Criminals and of Persons Who have Committed Crimes Against Humanity*, G.A. Res. 2840, U.N. GAOR 3d Comm., 26th Sess., Supp. No. 29 at 88,

³ - See, e.g., THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989); see also A. De Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International, 1996), p.131; T. Meron, *On a Hierarchy of International Human Rights* (American Society of International Law, 1986).

⁴ - See I. Brownlie, *State Responsibility* (Clarendon Press, 1983).

⁵ - On the establishment of the permanent international criminal court, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR 51st Sess., Supp No. 22, U.N. Doc A/51/22 (1996); 13 NOUVELLES ÉTUDES PÉNALES (1997).

⁶ - Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*. pp.74.

designated as international crimes, there appears to be no hierarchy.¹ As a conclusion, at least fundamental human rights such as the rights to life, freedom from torture and cruel, inhuman or degrading treatment and punishment, freedom from slavery and racial discrimination, and freedom from retroactive application of criminal law are non-derogable and recognized by the international community as a whole. The *erga omnes* character of those norms can hardly be contrasted. Breaches of these obligations are viewed as gross violations of human rights rendering the on a case-by-case basis. Once it is established that there is an overwhelming opinion *juris* that all states are legally bound by the norm in question, it can be treated as having an *erga omnes* character.²

E. Fundamental Interest obligations Doctrine

Another preliminary remark is in the form of a caveat. For reasons of convenience, the subsequent sections treat *jus cogens* and *erga omnes* as sub-categories of a broader notion of norms protecting ‘fundamental interest of the international community’, which we will refer to as ‘fundamental interest obligations (*fundamental interests of the international community* must be “strengthened” more than others)³ In treating them as part of a broader notion, we acknowledge the close nexus between the two concepts, which since the late 1960s, have largely developed ‘in tandem’ and which both describe categories of particularly important values.⁴ Given the increasing prominence of attempts to merge obligations *erga omnes* and *jus cogens* into a joint category, we would however stress at the outset that there are sound reasons, both conceptual and pragmatic, to maintain the distinction between obligations *erga omnes* and norms of *jus cogens*. Notably, whereas *jus cogens* norms are characterized by their elevated hierarchical status, obligations *erga omnes* can well operate on an ‘ordinary’ hierarchical level. (A norm to a hierarchically superior level remains controversial)⁵ Whereas *jus cogens* status affects the validity of conflicting norms, *erga omnes* status affects the position of third States vis-à-vis the obligation.(not necessarily the parent State)⁶ *Jus cogens* and obligations *erga omnes* – at least in their current ‘incarnation’ (A norm could be *erga omnes* in the sense that any state could invoke its breach, and yet it not separately constitute a crime; however, few crimes will not simultaneously incarnate *erga omnes obligations*)⁷– thus may have entered the international legal discourse almost simultaneously, but follow different rationales. On that basis, they should not be merged; and decision to deal with them ‘en bloc’ in the following sections should not be read as an attempt to support such a reading.

The obvious impact concerns the legal rules governing the implementation of international responsibility. In essence, international law permits States and international organizations to invoke the responsibility of another State or international organization for breaches of fundamental interest

¹ - D.L. Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar Publishing Limited, 2014).,p.89.

² - J. Petman and M. Koskeniemi, *Finnish Yearbook of International Law, 1999* (BRILL, 2002).,p.199.

³ - Commission, *Yearbook of the International Law Commission 1998: Summary Records*.,p.106.

⁴ - C.D. Gray, *International Law and the Use of Force* (Oxford University Press, 2008).,p.196.

⁵ - K. Ambos and O.A. Maunganidze, *Pouvoir Et Poursuite* (Univ.-Verlag, 2012).,p.190.

⁶ - D. Rai*c, *Statehood and the Law of Self-Determination* (Kluwer Law International, 2002).,p.145.

⁷ - S.B. Jodoin and M.C.C. Segger, *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press, 2013).,p.64.

obligations even if they themselves have not been specially affected by the breach. Their entitlement should be admitted because an action on their part can contribute to enhance the protection of *fundamental interests* of the international community.¹ This is the key aspect of the *erga omnes* concept, which following the *Barcelona Traction case*, has been understood primarily as a law enforcement concept permitting States to respond against breaches of obligations owed to the international community as a whole. Within the framework of international responsibility, this impact concerns the ‘enforceability’ of international law – rather than the conditions under which responsibility is incurred, or the consequences of responsibility. In 2001, the International Law Commission sought to ‘operationalize’ the *erga omnes* concept in Part Three of its Articles on the Responsibility of States for Internationally Wrongful Acts (‘ARS’), notably Articles 42, 48 and 54. The 2011 Draft Articles on the Responsibility of International Organizations adapt these provisions with only minor modifications in Articles 43, 49, and 57. The Commission has since begun a separate consideration of the topic Responsibility of international organizations.² On the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. Thus it offers little clarity on the issue of possible reactions by third states to the violation of such *erga omnes* obligations, the enforceability of which all states have a legal interest in.³

Notwithstanding the ILC’s work, the idea that international law should accept, within narrow boundaries, some form of ‘public interest enforcement’ continues to meet with occasional resistance. Perhaps this resistance is best explained as a ‘rearguard action’ by States and commentators clinging to the fiction of a system of international law based on synallagmatic pairs of reciprocal rights and duties running between pairs of States – or States and international organizations, for that matter. However, such rearguard actions belie the fact that international law has moved on to embrace multilateralism and global public interests: “community interest is permeating the body of international law much more thoroughly than ever before”, and the ILC’s attempt, in its work on responsibility, to spell out a regime of public interest enforcement reflects that fact.⁴

At least with respect to measures taken against *States*, practice suggests a more liberal approach. Since 1970, States and international organizations have taken countermeasures in response to grave and systematic breaches of fundamental interest obligations in a surprisingly large number of instances. They have not usually made express reference to the *erga omnes* character of the breach in question; but by and large seem to have responded against breaches of obligations that (like those

¹ - E. Cannizzaro and Università di Macerata. Istituto di diritto internazionale e dell’Unione europea, *The European Union as an Actor in International Relations* (Kluwer Law International, 2002), p.223.

² - Watts et al., *The International Law Commission 1999-2009: Volume Iv: Treaties, Final Draft Articles, and Other Materials*, p.131.

³ - P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (Taylor & Francis, 2002), p.59.

⁴ - The ILC made the point very clearly when in para. 4 of its commentary to Article 1 ARS, it cited the ICJ’s *Barcelona Traction* dictum on obligations *erga omnes*, and went on to note: “The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.” (Yearbook ILC 2001, vol. II, at p. 33).

protecting fundamental human rights or outlawing the use of force) are generally considered to be owed to the internationally community as a whole. In most instances, these assertions of a right to defend public interests of the international community have involved coercion of a limited degree – typically breaches of bilateral treaties of limited relevance; often political symbolism rather than actual pressure of relevance. Still, international practice – to be illustrated below – suggests that, when seeking to respond against grave breaches of fundamental interest obligations, States and international organizations have been prepared to act as ‘guardians’ of community values and in that context asserted a right to violate international law in order to ‘induce the wrongdoing State to comply with its obligations under international law’.¹

At a functional level, obligation erga omnes play a potentially significant role in relaxing the restrictive rules of standing before international tribunals, given the interest of all States in ensuring compliance. Brinie and Boyle suggest that the significance of erga omnes obligations goes further still, providing a normative framework and method for international community to hold individual States accountable before the institutions created by treaty regimes.² The codification of the rules governing the responsibility of States for internationally wrongful acts was one of the first topics on the agenda of the ILC when it commenced its work in 1948. A hierarchical system of legal obligation has been introduced into international law under the cover of jus cogens (fundamental rules of customary international law that cannot be set aside by treaty) and obligations erga omnes (which are owed all States and all States have a legal interest in their protection). This is reflected in the rules on State responsibility and the rules being drafted on the responsibility of international organizations. Responsibility in this context is a mechanism by which States and international organizations may be called to account for breaches of the substantive rules on international law. The goal is to provide a “reparative response” so that the international legal order which has been upset by the breach can be restored.³

3. Erga Omnes in Modern Age

The International Court of Justice, in its 2012 judgment in the Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) case, found that Belgium had *ius standi* to claim Senegal’s responsibility for the alleged breach of its obligations under Articles 6(2) and 7(1) of the Convention Against Torture and that such claims were admissible. Also, it concluded that it was not necessary to determine whether Belgium was ‘specially affected’ or ‘injured’. The Court based these findings on the concept of ‘obligations erga omnes partes’, which it defined as obligations in the compliance of which states have an ‘interest’, which, in the case of the above provisions is a ‘common interest’. Several members of the Court rejected the above findings as inconsistent with the law of international responsibility, and state practice and, for other reasons, ill-grounded. The concept of a duty *erga omnes inter partes*, or a duty owed to all parties to a treaty, was first announced by the ICJ in 1970 as part of some *obiter dicta* about the nature of international obligations. This is the idea that all States have a “*legal interest*” in compliance with norm in question. The exact nature of that legal interest remained undefined as the case did not involve an

¹ - The following draws heavily on Tams (note 1), 198-251.

² - Mcinerney-Lankford, Darrow, and Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions*.,p.24

³ Hoffmann, Nollkaemper, and Swerissen, *Responsibility to Protect: From Principle to Practice*.,pp.126-7

application of the rule. It remained an open question whether or not a State needed to be somehow specifically interested in the alleged breach of the international norm to have standing to bring an action before the ICJ.

The Cort heard arguments from March 12 to 21, 2012 in “Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)” over the fate of the former dictator of Chad, Hissène Habré. Habré is accused of responsibility for thousands of political killings and systematic torture when he ruled Chad, from 1982 to 1990, before fleeing to Senegal. Seven of Habré’s victims filed a criminal complaint in Senegal in January 2000, accusing him of torture, barbaric acts, and crimes against humanity. A Senegalese judge indicted Habré on those charges but, after political interference by the Senegalese government, which was denounced by two UN human rights rapporteurs, appellate courts dismissed the case on the grounds that Senegalese courts lacked jurisdiction to try crimes committed abroad. Other victims, including three Belgian citizens, then filed a case in Belgium. In September 2005, after four years of investigation, a Belgian judge indicted Habré and Belgium requested his extradition. A Senegalese court ruled that it lacked jurisdiction to decide on the extradition request, and the Senegalese government referred the Habré case to the African Union (AU) for a decision on how Habré should be tried. The AU created a Committee of Eminent African Jurists and, on its recommendation, asked Senegal in July 2006 to prosecute Habré “on behalf of Africa.” Senegal accepted the AU mandate and amended its legislation to give its courts extraterritorial jurisdiction over international crimes but for years raised obstacle after obstacle to Habré’s trial. Belgium filed an application against Senegal at the International Court of Justice (ICJ) in February 2009 after Senegal failed to extradite Habré and continued to stall on his trial. Belgium has submitted three subsequent extradition requests. Two were rejected on technical grounds as the Senegalese government apparently did not transmit the Belgian legal papers intact to the court, and the third is still pending. In 2011 Senegal announced and then retracted a decision to expel Habré back to Chad.

The Judgment in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) is the first in the history of the International Court of Justice (“ICJ”) in which it found that a State had standing based on obligations *erga omnes partes*. Before that, the PCIJ had only once to pronounce on this question in the 1928 *Wimbledon* case. In para. 68 of its judgment the Court stated, *inter alia*, that:

The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33). These obligations may be defined as “obligations erga omnes partes” in the sense that each State party has an interest in compliance with them in any given case.

The Court's reference in the judgment to the *Barcelona Traction* case may create confusion as to the difference between obligations *erga omnes partes* (Article 48(1)(a) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)) "owed to a group" of States and *erga omnes* obligations (*per se*) which are "owed to the international community as a whole" (Article 48(1)(b)). The ARSIWA Commentary clarifies that the name "owed to the international community as a whole" was preferred over *erga omnes* in order to avoid confusion "with obligations owed to all the parties to a treaty." The better view seems, therefore, to be that obligations *erga omnes partes* exist in the case of treaties such as the CAT or the Genocide convention, while obligations *erga omnes* form part of customary law. Article 48 ARSIWA represents progressive development, but the Court in *East Timor* did not rule out standing deriving from obligations *erga omnes* either. It merely stated that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things." (para. 29) In that case the Court lacked jurisdiction based on the *Monetary Gold* principle. It remains to be seen whether *erga omnes* skeptics are to be proven right or wrong. The *Belgium v. Senegal* case is interesting also in that the Court decided to deal with the question of Belgium's standing under the heading of admissibility. The problem with this approach is that the Court may act *proprio motu* on issues relating to its *jurisdiction* (Article 36(6) of its Statute). On the other hand, issues of *admissibility* (such as the exhaustion of local remedies, nationality of claims, *etc.*) cannot be dealt with *proprio motu* but depend on an objection being raised by the party concerned. The importance of *jus standi* is such that it must fall for consideration *sua sponte*. (Matscher, F., *Standing before International Courts and Tribunals* in Bernhardt (ed.), *Encyclopedia of Public International Law* (1981) p. 195). Paragraph 68 of *Belgium v. Senegal* must be contrasted with paragraph 91 of the *Barcelona Traction* case, holding that "the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality." Obviously, *erga omnes partes* obligations will not always operate to provide any State party with standing. In the case under comment, Belgium based its claims not only on its status as a party to the CAT, but primarily on its "special interest" which distinguished it from the other parties. By finding that it had standing as a State party, the Court disposed of the need to deal with Belgium's "special interest" which, as noted by Judge Skotnikov in his Separate opinion, "allows it to avoid dealing... with the question as to whether Belgium has established its jurisdiction in respect of Mr. Habré in accordance with Article 5, paragraph 1, of the Convention."

Judge *ad hoc* Sur terms the Court's finding of standing *erga omnes partes* "a rabbit out of a magic hat" since the CAT permits reservations which are, in principle, impermissible in respect of obligations *erga omnes partes* (Argument from *Reservations to the Genocide Convention* Advisory Opinion, I.C.J. Reports 1951, p. 24) and secondly, the mechanism established in Article 22 CAT is optional. It could be maintained that had the drafters of the CAT intended to entitle any State Party to ensure compliance with the Convention, this mechanism should have been mandatory. Some would say that standing as a mere party may lead to "total judicial chaos" (to borrow the phrase from President Guillaume's Separate opinion in the *Arrest Warrant* case.) Despite such criticism and with a view to the object and purpose of the CAT, the Judgment has much to commend itself. The reason is best expressed in paragraph 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." Notably, paragraph 120 of the Judgment adds that "the State in whose territory

the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is *to a State which has jurisdiction* in some capacity, *pursuant to Article 5 of the Convention*, to prosecute and try him” thus leaving open the question whether Belgium is such a State. For instance, Belgium may have asserted jurisdiction based on the passive personality principle, however its nationality was only subsequently conferred, and only 1 of the 18 complainants of Chadian origin had Belgian nationality.

This case put the question to rest by finding that an obligation *erga omnes* grants standing to any State that is a party to the instrument in question. The Court held:

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

As a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal’s compliance with the relevant provisions of the Convention in the case of Mr. Habré.

Therefore, in case Senegal opts to extradite Mr. Habré it remains questionable whether Belgium is a State “which has jurisdiction... pursuant to Article 5” and, consequently, whether Senegal is obliged to extradite him to Belgium. *Erga omnes partes* standing also has bearing on the issue of remedies, since a “State other than an injured State” (to use the language of Article 48 ARSIWA) may claim reparation only in the interest of the injured State. One might thus question whether the Court’s judgment in fact resolved the entire dispute between the two parties. As a result, In the above judgment, the Court found, in essence, that: (a) a party to a treaty creating obligations in the compliance of which all the parties to the treaty have a ‘common interest’, which are characterised as ‘obligations *erga omnes partes*’, has standing for the purposes of bringing claims arising out of the breach of such obligations, including, most prominently, an entitlement to invoke international responsibility; and (b) such claims are admissible, even in the absence of a special interest on the part of the party bringing the claim, which the Court needs not determine.¹

Obligations *erga omnes (partes)* are transforming an otherwise bilateral(isable) international legal order, which has traditionally been based on reciprocity² and individualism, into something much more close to the idea of a community, wherein all states are entitled – *but not obliged* – to protect what constitutes interests and values that are common to everyone. They have entered positive international law in a rather unexpected way, through a revolutionary *obiter dictum* by the

¹ - Diego Germán Mejía-Lemos, A Commentar y on the Judgment of 20 July 2012 of the International Court of Justice in the Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal case), National University of Singapore, Singapore, 2014,p.182.

² - On reciprocity *see* the very pertinent contribution by A. Paulus, ‘Whether Universal Values can Prevail over Bilateralism and Reciprocity’, in Cassese (ed.) *supra* n. 2, at 91 *et seq.*

ICJ;¹ yet, *erga omnes* came to stay. They found their place in the law of international responsibility and, as a result, all states, even if not directly³¹ affected by wrongfulness, are entitled to react against it and invoke the responsibility of the offender.² This is how a system moves beyond reciprocity and merely synallagmatic relationships³ and recognizes the legitimate interest, translated into a proper legal right that each and every state has to be actively engaged in the protection of collective interests. A traditionally sovereigns legal order based upon the premises of reciprocity and self-protection⁴ allows its community to protect its shared interests and values in a collective way. This is the reality of obligations *erga omnes* – or this is *erga omnes* as a reality of positive international law.⁵

The legal consequences of the Court's use of the characterization of an obligation as an 'obligation *erga omnes partes*' are twofold, in the context of the judgment in the case at hand.

(a) First, the right to bring claims on the basis of the breach of an 'obligation *erga omnes partes*' is predicated of any state party to the treaty, which implies that no other requirements must be fulfilled. This latter aspect, in particular, has two related; yet separate, implications, as follows:

(i) As for the invocation of responsibility, any state party to the treaty which constitutes the source of an 'obligation *erga omnes partes*' is entitled to invoke responsibility. This right to invoke responsibility encompasses, but is not exclusively, confined to, the right to bring a claim on the basis of the breach of such obligation before a given international court or tribunal.

(ii) As for the *ius standi* to bring a claim in which responsibility is invoked for the breach of an 'obligation *erga omnes partes*', any state party to the treaty which constitutes the source of an 'obligation *erga omnes partes*' has *ius standi*.

(b) Secondly, a claim arising from the breach of an 'obligation *erga omnes partes*' is admissible in relation to any party to the treaty, regardless of whether it was 'specially affected' or 'injured'. To the extent that issues of *ius standi* and admissibility of claims, leaving aside specificities governed by the applicable procedural rules, depend on the finding as to whether there is (1) a legal interest, or, in the Court's terms, 'an interest', in the performance of an obligation and (2) a right to invoke responsibility, this part will be confined to the study of these two latter elements. The right to react

¹ - *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Second Phase, Judgment, ICJ Reports 1970, p. 3 at 32, para. 34.

² - The ILC opts for the term not injured states. (*ILC Articles on the Responsibility of States supra n. 21* at 116). The terms non-directly

affected, indirectly affected and not injured state, are used in the paper interchangeably.

³ - *ILC Articles on the Responsibility of States*, Art. 48. See also the critical remarks by P.M. Dupuy on Art. 48. '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 Cassese, *supra n. 2* at 210.

⁴ - See the brief but apt comments by Judge Simma on the occasion of the *exceptio non adimpleti contractus* in his separate opinion in *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, ICJ Judgment of 5 December 2011 <www.icj-cij.org/docket/files/142/16827.pdf>, paras 10 *et seq.*

⁵ - Vassilis P. Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential*, ELR June 2013, No. 1, p.62.

against breaches of treaty obligations is regarded by some commentators as arising from the respective treaty, not from the nature of the obligation breached, particularly its alleged character as an ‘obligation *erga omnes partes*’.¹²

This would be illustrated, as noted by some of the judges sitting in the Bench for the case in their statements, analysed above, by the lack of relevant state practice in the field of, for instance, inter-state proceedings before the Human Rights Committee, as states need not demonstrate that their obligation is an ‘obligation *erga omnes partes*’, but simply that the treaty allows them to institute such proceedings.³ Indeed, some commentators have expressed that the question of identifying an ‘obligation *erga omnes partes*’ and distinguishing it from ‘obligations *erga omnes*’ is irrelevant, insofar as ‘a treaty expressly recognizes a general legal interest or confers specific rights of protection’.⁴ In this connection, Judge Tomka, in his previous capacity as member of the ILC, pointed out that “*the existence of a legal interest would be a question of the interpretation or application of the relevant primary rules*”.⁵

4. Conclusion

The present paper has sought to demonstrate that the concept of ‘obligations *erga omnes partes*’, which it analyzed in terms of its definition, nature, sources and legal consequences of characterizations of an obligation as such, is, at best, redundant. In this sense, the present writer concurs with Judge Higgins’ observation that “[t]he Court’s celebrated dictum in *Barcelona Traction* ... is frequently invoked for more than it can bear”.⁶ Indeed, ‘obligations *erga omnes partes*’ are only of significance if they are ‘obligations *erga omnes*’ proper, primarily in the form of customary obligations under general rules of customary international law, binding on the parties to the treaty *qua* custom and regardless of any reservation, in addition to being binding on non-parties to the respective treaty to which the customary rule is opposable. Therefore, while the concept of obligation *erga omnes* proper, as set out in the dictum of the Court’s judgment in the *Barcelona*

¹ - C.J. and Tzanakopoulos Tams, A, "Barcelona Traction at the ICJ as an Agent of Legal Development," *Leiden Journal of International Law* Vol. 23 No. 4(2010), p. 125.

² - Diego Germán Mejía-Lemos, A Commentar y on the Judgment of 20 July 2012 of the International Court of Justice in the Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal case), National University of Singapore, Singapore, 2014, p.206.

³ - *Ibid.*, p. 125, stating: “*Their right to react against treaty breaches exists because the respective treaties say so, not because of some special status of the obligation breached*” (footnotes in the original omitted).

⁴ - *Ibid.*, p. 125.

⁵ - United Nations International Law Commission, *Summary record of the 2622nd meeting*, para. 50

⁶ - Cited in United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, para. 398, footnote 559. It has been suggested that the concept of ‘obligations *erga omnes partes*’ is, in a way, the outcome of a commonly held view whereby obligations *erga omnes* are regarded as unique in nature, leading to the extension of their apparently unique quality of empowering ‘States to vindicate general interests’ to other areas. Tams, "Barcelona Traction at the ICJ as an Agent of Legal Development.", p. 308, referring to the above explanation for the use of the concept as ‘the myth of uniqueness’.

Traction case is predicable of obligation in the performance of which all the states have a common interest, the existence of a ‘common interest’ in relation to conventional obligations, particularly those of a multilateral character may lead to the same consequences to which the existence of an obligation *erga omnes* proper leads, particularly as to *ius standi* and admissibility of claims, yet does not turn the respective obligation into a new form of obligation *erga omnes*, nor is it the legal basis for findings as to *ius standi* and admissibility of claims, which remain to find their legal basis on the existence of a common interest in accordance with the provisions of the treaty.¹ Indeed, should such a legal basis exist under the treaty, the use of the concept of ‘obligation *erga omnes partes*’ is devoid of purpose, as the rationale for the use of the concept of *erga omnes* was to “close an enforcement gap”, which “is hardly necessary where a treaty expressly provides for standing in the public interest”². Hence, the question is not whether an obligation is ‘*erga omnes partes*’, which is likely to remain merely binding ‘*erga partes*’, or properly *erga omnes*, in which case there is no any need for a further characterization, but whether the treaty, in practice always multilateral, although the Court did not expressly rule out bilateral treaties from its definition, as noted above, accords the “each” and, in addition to the Court’s definition, “every”, state party a legally protected interest in the performance by each and every other state party of obligations under the treaty.

It is the potential this special type of international obligations has that mainly interests this article. The argument here is that obligations *erga omnes* may have far-reaching implications, allowing for change in a number of areas of international law. They are opening the way to further objectification and do have the potential to fertilize the legal order with a series of innovative elements that affect the very essence of its systemic structure. The derivatives of that change vary. To name but a few of them, these would concern several domains of general international law, such as the informal hierarchy (of rules), jurisdiction, the obligation to execute and to comply with international judgments, etc. One would need a monograph to introduce in detail the idea of the *ergaomnisation* of international law, but the bottom line of the argument could be summarized in the following way. The first step of the syllogism would be to recognize the link between the material importance of certain rules and the named class of obligations. Although the formal hierarchy (of sources) is foreign to international law,³ this does not mean that some rules are not created for – that is, their *ratio legis*, their purpose or *raison d’être* is – the protection of certain interests and ideals that are thought to be of higher value,⁴ that is, more important⁵ than other ones. This leads to a first set of conclusions. First, ideology is indeed of pertinence. It may be that legal positivism prefers it to be hidden behind the veil of the formal method that generates the rule, but,

¹ - Diego Germán Mejía-Lemos, A Commentary on the Judgment of 20 July 2012 of the International Court of Justice in the Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal case), National University of Singapore, Singapore, 2014, p.211.

² - Tams, "Barcelona Traction at the ICJ as an Agent of Legal Development.", p.794.

³ - D. Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP Oxford, 2011). at 142-143.

⁴ - Cf. the critical comments by J. d’Aspremont, calling scholarship to put emphasis on common interests, rather than to values. J. d’Aspremont, ‘The Foundations of the International Legal Order’, 18 *Finnish Yearbook of International Law* 219 (2007).

⁵ - Tams, *Enforcing Obligations Erga Omnes in International Law.*, at 136 *et seq.* See also A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006). at 49: who discusses the links between morality and *jus cogens* norms.

indeed, what always feeds the rule is its underlying material. This refers to the commonplace distinction between formal and material sources in law making. Thus, outside state interests (and the *will* to protect them),¹ the material source of international law may also be – for some rules – the idea of social values (and the *necessity* to protect them).² Second, the ‘box’ within which rules that seek to protect values, such as human rights, or common interests, like the protection of the environment, are placed is not irrelevant to the characteristics and the architecture of the system within which those rules were born, as well as aimed to produce effects. International law is decentralized. For it to maintain that very nature, but also be able to accommodate areas such as the protection of human rights, cultural heritage or the environment, it needed to create a special type of rules that would enable each and every member of the community to be (if they wish) involved in the protection of these, common to all, values and interests. The reason *erga omnes* rules are receiving that special treatment within international law is of course their material content. However, the protection of their material content needed to be reconciled with (the preservation of) decentralization. The outcome of that combination is a category of obligations owed *erga omnes* that recognize each and every state’s faculty to actively protect the values that are common to them. Thereby, all states within the decentralized order have their share in the protection. Third, *erga omnes* is contributing a communitarian tone in a society of individual sovereigns. Non-directly affected states are not (re)acting to the breach of an *erga omnes* obligation with an aim to protect individual interests that are exclusive to them, but interests and values that are common to their ensemble, that is, to the international community as a whole. This is how *erga omnes* is making possible the passage from a society of individuals into an – always decentralized – community of ‘stakeholders’. And this is how reciprocity cedes its place to collective enforcement. In that respect, *erga omnes* could be metaphorically understood as a special ‘capsule’ within which the system is placing only those rules that are of significant material importance. This very ‘capsule’ acts in the same time as a ‘vehicle’, introducing – through the ‘backdoor’ – the idea of community within a decentralized order of sovereign individuals. What will be the content of that ‘capsule’, that is to say what are the rules that will be given the special effect of *erga omnes*, is a question that goes beyond the article’s scope. Questions such as what shapes trans-societal consensus, what is societal consensus, if this is universal or not, how can this be evidenced in a decentralized order and which are the philosophical foundations of the material content of these special rules escape the article, if not legal positivism as such. In simple words, and, although one cannot overlook the fact that *erga omnes* are closely linked to human rights, for the article, it is not the content of the ‘capsule’ that counts, but the ‘capsule’ as such. It is the systemic tool that has been designed to encapsulate what, in the eyes of the society (of a given society, at a given time), is seen as important and worthy to be protected by each and every state acting in the name of all. With no regard to the specific content of the ‘capsule’, everything classified as *erga omnes* bears a special weight, which, in less fragmented and more integrated societies, is called public order. The specialty, finally, of that effect depends on the characteristics of the system – which in the case of international law happens to be decentralized. This has two main consequences that are closely linked to the examples that were given earlier and which also explain why the article sees obligations *erga omnes* as an opportunity for profound, structural humanization of the international legal system.³

¹ - Referring to the voluntarist view of international legal positivism.

² - Referring to the sociological objectivist view of international legal positivism.

³ - Vassilis P. Tzevelekos, "Revisiting the Humanization of International Law: Limits and Potential," *ELR* No. 1(2013)., pp.66-67

identifying and highlighting obligations *erga omnes* (*partes*) and the principle of due diligence as two 'systemic' tools, that are central to the humanization of international law.¹ Both these tools form part of modern positive law, but may also make a positive contribution towards the direction of deeper humanization in international law, having the potential, *inter alia*, to limit state will, establish occasional material normative hierarchy consisting in conditional priority in the fulfilment of human rights, give a communitarian tone to international law and invite states to be pro-active in the collective protection of their common interests and values.

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¹ - *ibid.*,p.62.

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