

Annex III

Identification and legal consequences of obligations *erga omnes* in international law

New Topic proposed by Masahiko Asada

I. Introduction

1. It is proposed that the topic “Identification and Legal Consequences of Obligations *Erga Omnes*¹ in International Law” be included in the International Law Commission’s (“Commission” or “ILC”) long-term programme of work.
2. Alongside other developments in the international community, two notions have emerged: fundamental values which cannot be derogated from by agreement between States, and common interests of the international community as a whole. As a result, peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* respectively were discussed and codified as concepts under international law.
3. Peremptory norms of general international law (*jus cogens*) are referred to in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. These articles provide for the nullity of a treaty in conflict with a peremptory norm of general international law and the termination of any existing treaty in conflict with a newly emerged peremptory norm. Moreover, although not a treaty, Article 41 of the Commission’s “Articles on Responsibility of States for Internationally Wrongful Acts” (“Articles on State Responsibility”) of 2001 covers particular consequences of a serious breach of an obligation arising under a peremptory norm. The Commission in 2022 also adopted the “Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*)” (“Draft Conclusions on Peremptory Norms”).
4. With respect to judicial decisions, a finding that a rule is a peremptory norm has been made in a number of cases, including by the International Court of Justice (“Court” or

¹ In this proposal, the term “obligations *erga omnes*” is used to cover both obligations *erga omnes* (*stricto sensu*) and obligations *erga omnes partes* unless otherwise indicated.

“ICJ”).² However, there have been few cases³ declaring that a given treaty is void due to its conflict with a peremptory norm.⁴

5. By contrast, obligations *erga omnes* have not been explicitly referenced in any treaty of universal character. However, the concept has been incorporated in other instruments, such as Article 48(1) of the Articles on State Responsibility⁵ and Article 49(1) and (2) of the Articles on the Responsibility of International Organizations. The concept is also explicitly mentioned in Conclusion 17(1) of the Draft Conclusions on Peremptory Norms.

6. With regard to judicial decisions, the finding that certain obligations are of an *erga omnes* character has been made in a number of judgments and advisory opinions, including by the ICJ starting with its *Barcelona Traction* case in 1970.⁶

7. The recognition of standing (*locus standi*) for States other than the injured State (“non-injured States”) has been pointed out as one of the most important legal consequences

² Cases in which a rule is acknowledged by the ICJ as a peremptory norm of international law include *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (*DRC v. Rwanda (New Application)*, Jurisdiction and Admissibility) (genocide), ICJ Reports 2006, para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (*Bosnia Genocide*) (genocide), ICJ Reports 2007, para. 161; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment (*Belgium v. Senegal*) (torture), ICJ Reports 2012, para. 99; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment (*Croatia Genocide*) (genocide), ICJ Reports 2015, para. 87; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion (*Occupied Palestinian Territory*) (self-determination in cases of foreign occupation), ICJ Reports 2024, para. 233.

In the International Criminal Tribunal for the former Yugoslavia (ICTY), ICTY (Trial Chamber), *Prosecutor v. Anto Furundzija*, Judgment (*Furundzija*) (Case No. IT-95-17/1-T) (torture), 10 December 1998, para. 153.

In the European Court of Justice (ECJ), ECJ (Court of First Instance), *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment (universal protection of human rights), 21 September 2005, para. 231.

In the European Court of Human Rights (ECtHR), ECtHR, *Al-Adsani v. the United Kingdom*, Judgment (Application No. 35763/97) (torture), 21 November 2001, para. 61.

In the Inter-American Court of Human Rights (IACtHR), IACtHR, *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Judgment (slavery), 10 September 1993, para. 57; *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations and Costs, Judgment (extra-legal executions, torture, etc.), 8 July 2004, paras. 76, 112, 128; *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgment (forced disappearance, torture, etc.), 22 September 2006, paras. 84, 93, 128, 131.

³ There are cases in which the voidness of a treaty was argued on a hypothetical basis in a judgment. See IACtHR, *Aloeboetoe et al. v. Suriname*, Reparations and Costs, para. 57. There are also cases where an invalidity claim was made based on a conflict with peremptory norms. See Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, 2005), pp. 142–143, n. 113.

⁴ For possible reasons for this, see Erika de Wet, “*Jus Cogens* and Obligations *Erga Omnes*”, in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP, 2013), p. 548.

⁵ Article 48(1) of the Articles on State Responsibility provides: “Any State other than an injured State” is entitled to invoke the responsibility of another State if “(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole”.

⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment (*Barcelona Traction*), ICJ Reports 1970, para. 33. In addition to the cases in which standing is recognized for non-injured States (see below), cases in which a rule is acknowledged by the ICJ as an obligation *erga omnes*, albeit in *obiter dicta*, include *Barcelona Traction* (aggression, genocide, slavery and racial discrimination), ICJ Reports 1970, paras. 33–34; *East Timor (Portugal v. Australia)*, Judgment (*East Timor*) (self-determination, as a right *erga omnes*, though jurisdiction was denied as a result of the application of the *Monetary Gold* principle), ICJ Reports 1995, para. 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment (*Bosnia Genocide*, Preliminary Objections) (genocide, as rights and obligations *erga omnes*), ICJ Reports 1996, para. 31; *DRC v. Rwanda (New Application)*, Jurisdiction and Admissibility (genocide, as rights and

of obligations *erga omnes*. Such standing for non-injured States has in fact been accepted by the ICJ in the *Belgium v. Senegal* and *The Gambia v. Myanmar (Rohingya)* cases in 2012 and in 2022 respectively.⁷ More recently, additional cases have been filed with the ICJ by non-injured States alleging breaches of obligations *erga omnes*.⁸ In some of them, standing was, *prima facie*, recognized by the Court.⁹ In this sense, from a practical point of view, it

obligations *erga omnes*, though jurisdiction was denied for lack of consent to jurisdiction), ICJ Reports 2006, para. 64; *Croatia Genocide* (genocide), ICJ Reports 2015, para. 87.

In the Advisory proceedings, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (*Wall*) (self-determination and certain international humanitarian law obligations), ICJ Reports 2004, paras. 155-157; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (*Chagos*) (self-determination), ICJ Reports 2019, para. 180; *Occupied Palestinian Territory* (self-determination, use of force to acquire territory, certain international humanitarian law obligations, certain international human rights law obligations), ICJ Reports 2024, paras. 96, 232, 274.

In the ICTY, ICTY (Trial Chamber), *Furundzija* (torture), para. 151; ICTY (Appeals Chamber), *Prosecutor v. Tihomir Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (*Blaskic*) (Case No. IT-95-14-AR108bis) (co-operation and judicial assistance), 29 October 1997, para. 26.

In the International Criminal Tribunal for Rwanda (ICTR), ICTR (Trial Chamber I), *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza*, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana (*Nahimana*) (Case No. ICTR-99-52-T) (cooperation and judicial assistance), 5 June 2003, para. 9; ICTR (Trial Chamber III), *Prosecutor v. Callixte Nzabonimana*, Decision on Defence Motion to Reconsider Prior Trial Chamber Decisions on France's Cooperation with the Tribunal (*Nzabonimana*) (Case No. ICTR-98-44D-T) (cooperation and judicial assistance), 4 March 2010, para. 29.

In the International Criminal Court (ICC), ICC (Appeals Chamber), *Jordan Referral re Al-Bashir Appeal*, Judgment (*Jordan Referral*) (Case No. ICC-02/05-01/09 OA2) (obligation to prevent, investigate and punish the relevant crimes), 6 May 2019, para. 123.

In the Special Court for Sierra Leone (SCSL), SCSL (Appeals Chamber), *Morris Kallon and Brima Bazzy Kamara* (Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (obligation to protect human dignity), 13 March 2004, para. 71.

In the International Tribunal for the Law of the Sea (ITLOS), ITLOS (Seabed Disputes Chamber), *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion (*Activities in the Area*) (preservation of environment), ITLOS Reports 2011, para. 180.

In the ECJ, ECJ (Grand Chamber), *Council of the European Union v. Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)*, Judgment (Case C-104/16 P) (self-determination as a right *erga omnes*), 21 December 2016, para. 88.

⁷ *Belgium v. Senegal* (Articles 6(2) and 7(1) of the Convention against Torture), ICJ Reports 2012, paras. 68-70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment (*Rohingya*) (genocide), ICJ Reports 2022, para. 108. The *Whaling in the Antarctic* judgment of 2014 may be seen as another example. See below.

⁸ *Canada and the Netherlands v. Syria (Syria Torture)* in 2023; *South Africa v. Israel (Gaza)* in 2023; *Nicaragua v. Germany* in 2024. Additionally, Australia, Canada, Germany and the Netherlands have announced their intention to file a case with the ICJ against Afghanistan based on the alleged breaches of the Convention on the Elimination of All Forms of Discrimination against Women. Kyra Wigard, "A Groundbreaking Move: Challenging Gender Persecution in Afghanistan at the ICJ", *EJIL Talk!*, 30 September 2024. The *Nuclear Disarmament Obligation* cases filed by the Marshall Islands (dismissed due to the absence of dispute) may appear similar to cases brought by non-injured States. However, according to Article 42(b)(ii) of the Articles on State Responsibility and commentary thereto, disarmament obligations under a disarmament treaty are classified as interdependent obligations whose breach would make all the other States Parties to it "injured States" (Articles on State Responsibility (ASR), Article 42, Commentary, para. 13). The Marshall Islands itself brought the cases to the ICJ as both an injured and non-injured State. *Nuclear Disarmament Obligations (Marshall Islands v. United Kingdom)*, Memorial of the Marshall Islands, 16 March 2015, paras. 103-110.

⁹ *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Provisional Measures, Order (*Syria Torture*), ICJ Reports 2023, paras. 48-51; *Application of the Convention on the Prevention and*

may even be said that the need for clarification on the concept and legal consequences is greater for obligations *erga omnes* than for peremptory norms.

8. Despite the significance of obligations *erga omnes*, many questions remain unanswered, such as: which obligations are of an *erga omnes* character; what the criteria are for identification; how to identify them; how they relate to peremptory norms; what legal consequences can result from a breach of an obligation *erga omnes*; and what are the “rights” *erga omnes* that are sometimes mentioned alongside obligations *erga omnes* in ICJ jurisprudence. As some commentators put it, “[t]he notion of *erga omnes* effects is mysterious, but significant”.¹⁰

9. Even with this uncertainty, there has been a great deal of discussion on the concept in the Commission, at the ICJ and other international judicial and quasi-judicial institutions, as well as in the academic literature more broadly. As a result, the work of clarifying, codifying and progressively developing international law in this field is not only necessary but also currently ripe for exploration by the Commission.

10. Work on this topic would also extend and further develop the previous work of the Commission, including Article 48 of the Articles on State Responsibility and Article 49 of the Articles on the Responsibility of International Organizations as well as some conclusions of the Draft Conclusions on Peremptory Norms.

II. Potential Issues to be Addressed

11. The specific issues to be addressed in this topic can be divided into two groups of questions. First, the clarification of the concept of obligations *erga omnes*, including the methods and criteria for their identification; and second, the question of legal consequences of a breach of such an obligation.

A. Clarification of the concept

12. There is general consensus that obligations *erga omnes* (literally meaning obligations towards all) are “the obligations of a State towards the international community as a whole” and that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.¹¹ Beyond these statements, uncertainty remains as to the scope of these obligations.

(1) Relationship with peremptory norms

13. As noted above, the concept of obligations *erga omnes* has arisen with values and interests similar to those of peremptory norms, but the relationship between these two kinds of obligations and norms is not always clear.¹²

14. The close relationship between the two can be seen in the drafting history of Articles 40 and 41 of the Articles on State Responsibility.¹³ The history shows that the original concept of an “international crime”, which was defined as a breach of an obligation

Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order (26 January 2024) (*Gaza*), ICJ Reports 2024, paras. 33–34.

¹⁰ Christian J. Tams and Alexandre Belle, “Erga Omnes Effects of Judicial Decisions: International Adjudication”, in *Max Planck Encyclopedias of International Law* (Oxford Public International Law, 2021), para. 1, available at <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3733.013.3733/law-mpeipro-e3733?rskey=TsLXWO&result=4&prd=OPIL&print>>.

¹¹ *Barcelona Traction*, ICJ Reports 1970, para. 33. See also, e.g., *Belgium v. Senegal*, ICJ Reports 2012, para. 68; *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 107; ASR, Article 48(1); Draft Conclusions on Peremptory Norms, Conclusion 17(1).

¹² See, e.g., de Wet, “*Jus Cogens* and Obligations *Erga Omnes*”, pp. 541–561; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997), pp. 189–214.

¹³ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002), pp. 35–38.

“essential for the protection of fundamental interests of the international community”¹⁴ and for which “all other States” were injured States¹⁵ (a notion consonant to an obligation *erga omnes*) on first reading in 1996, changed to the concept of “a serious breach of an obligation owed to the international community as a whole”¹⁶ (the same concept as that of obligations *erga omnes*) on second reading in 2000, and ultimately resulted in the provisions of a serious breach of an obligation arising under a “peremptory norm” in Articles 40 and 41 in 2001.

15. Moreover, the Commentaries to the Articles on State Responsibility (Part Two, Chapter III, which includes Articles 40 and 41) state as follows:

“Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least *substantial overlap* between them”¹⁷ (emphasis added).

16. Then they add:

“But there is at least 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”¹⁸ (emphasis added).

17. While both of the above-quoted passages are subtle in their expressions, they could be read as stating that peremptory norms and obligations *erga omnes* are just two sides of the same coin, but they do not say so categorically.¹⁹

18. On the other hand, the Draft Conclusions on Peremptory Norms state in the Commentary to Conclusion 17²⁰ that:

“Although all peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes*, it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*)”.²¹

Thus, they acknowledge the existence of obligations *erga omnes* that are not peremptory norms, and cite as examples certain rules relating to common heritage regimes.²² An

¹⁴ ASR (first reading), Article 19 (2).

¹⁵ ASR (first reading), Article 40 (3). See also Article 53, which provided:

“An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as lawful the situation created by the crime;
 (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
 (c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
 (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.”

¹⁶ “State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading”, *Yearbook of the International Law Commission, 2000*, Vol. II, Pt. 2, p. 69, Articles 41, 42.

¹⁷ ASR, Part Two, Chapter III, Commentary, para. 7. It continues to state: “The examples which ICJ 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 1969 Vienna Convention involve obligations to the international community as a whole”.

¹⁸ ASR, Part Two, Chapter III, Commentary, para. 7.

¹⁹ However, it seems that during the debate on the draft articles on State responsibility, the Commission reached “general agreement” that the scope of *jus cogens* is narrower than that of *erga omnes* obligations. *Yearbook of the International Law Commission, 1998*, Vol. II, Pt. 2, p. 76, para. 326.

²⁰ Conclusion 17(1) provides: “Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest”.

²¹ Draft Conclusions on Peremptory Norms, Conclusion 17, Commentary, para. 3.

²² *Ibid.*, para. 3.

analogous understanding can be found in the Report of the ILC's Study Group on the Fragmentation of International Law.²³

19. There are similar differences of opinion in the academic literature,²⁴ and it is important to clarify the relationship between the two concepts.

(2) Relationship with interdependent obligations

20. In the Articles on State Responsibility, Article 42 addresses the invocation of responsibility by the “injured State” in relation to a breach of obligations *in general*, while Article 48 covers the invocation of responsibility by “non-injured States” in relation to a breach of “obligations *erga omnes*”. However, it is not always clear what the relationship is between obligations set out in Article 42 and Article 48, and in particular between so-called interdependent obligations set out in Article 42(b)(ii)²⁵ and obligations *erga omnes* in Article 48(1).

21. One of the difficulties is that the Commentaries to the Articles on State Responsibility list the same type of obligations as examples for both of these provisions. For example, they mention obligations contained in nuclear-free zone treaties both in relation to Article 42(b)(ii)²⁶ and in relation to Article 48(1)(a).²⁷ Hence, some commentators have even

²³ *Yearbook of the International Law Commission, 2006*, Vol. II, Pt. 2, p. 183, para. 251(38). See also UN. Doc. A/CN.4/L.682 and Add.1, 13 April 2006, para. 404.

²⁴ Bruno Simma, “From Bilateralism to Community Interest in International Law”, *Recueil des Cours*, Vol. 250 (1994), p. 300, paras. 59–60 (“do all obligations *erga omnes* flow from rules *jus cogens*? In my view, this is not necessary the case. ... In practice, however, it is hard to think of an example of an obligation *erga omnes* which is not at the same time to be considered to derive from *jus cogens*. ... Therefore, *jus cogens* and obligations *erga omnes* are but two sides of one and the same coin”); Antonio Cassese, “The Character of the Violated Obligation”, in James Crawford et al. (eds.), *The Law of International Responsibility* (OUP, 2010), p. 417 (“the two categories inextricably coincide: every peremptory norm imposes obligation *erga omnes* and, vice-versa, every obligation *erga omnes* proper is laid down in a peremptory norm”).

On the other hand, others argue that there can be obligations *erga omnes* that are not peremptory norms. See, e.g., Linos-Alexander Sicilianos, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility”, *European Journal of International Law*, Vol. 13 No. 5 (2002), p. 1137 (“it may be hard to admit ... that all obligations *erga omnes* result from *jus cogens* norms. ... Obligations *erga omnes* and those resulting from peremptory norms form two concentric circles, the first of which is larger than the second.”); Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Presses universitaires de France, 2005), pp. 106–107 (“L'image désormais classique employée pour décrire la relation entre les obligations *erga omnes* et le *jus cogens* est celle de deux cercles concentriques: la catégorie des normes imposant des obligations *erga omnes* constituerait un ensemble plus grand qui contiendrait toutes les normes impératives mais ne se réduirait pas à elles.”); Yuji Iwasawa, *International Law* (in Japanese), 2nd ed. (University of Tokyo Press, 2023), p. 21. Within the framework of the Institut de droit international (IDI), Gaja proposed a provision stating that “[w]hile peremptory norms always impose obligation *erga omnes*, these obligations are not necessarily established by peremptory norms” (Article C). *Institut de droit international (IDI), Annuaire*, Vol. 71, Pt. II (2005), pp. 84, 86 (Article C); *ibid.*, Vol. 71, Pt. I (2005), p. 192 (Proposition C). See also Paolo Picone, “The Distinction between *Jus Cogens* and Obligations *Erga Omnes*”, in Enzo Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (OUP, 2011), pp. 414–416.

²⁵ Article 42(b)(ii) provides: “A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to ... (b) a group of States including that State, or the international community as a whole, and the breach of the obligation ... (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”.

²⁶ ASR, Article 42, Commentary, para. 13.

²⁷ ASR, Article 48, Commentary, para. 7. The Special Rapporteur's (James Crawford) original idea concerning the relationship between interdependent and *erga omnes* obligations is found in his Third Report. See *Yearbook of the International Law Commission, 2000*, Vol. II, Pt. 1, pp. 34–35, para. 106, esp. n. 199 (“Integral [i.e., interdependent] obligations, as defined in article 60, paragraph 2(c) of the 1969 Vienna Convention, are a subcategory of obligations *erga omnes partes*. In the case of an integral obligation any breach undermines the position of all the other States parties, to an extent that justifies treating each State party as individually injured.”).

suggested that the Commentaries are incorrect because Article 42(b)(ii) and Article 48(1) deal with different kinds of obligations as noted above.²⁸ Others have countered that disarmament obligations, which are typical of interdependent obligations, can also be classified as obligations *erga omnes*.²⁹

22. In view of the differences between the legal consequences of breaches of interdependent obligations and obligations *erga omnes*,³⁰ it is imperative to elucidate the relationship between the two.³¹

(3) Identification of obligations *erga omnes*

23. The foregoing is a relatively abstract discussion on the scope and meaning of obligations *erga omnes* at a conceptual level. From a practical point of view, it may be sufficient if one can identify specifically which obligations are of an *erga omnes* character.

24. However, while the *definitions* of obligations *erga omnes* can be found in Article 48(1) of the Articles on State Responsibility or in Conclusion 17(1) of the Draft Conclusions on Peremptory Norms, in addition to the ICJ's dictum in the *Barcelona Traction* case, these definitions alone do not elicit specifically which obligations are of an *erga omnes* character.

25. As will be discussed below, the legal consequences of a breach of an obligation *erga omnes* can be wide-ranging and profound (it may lead to a public interest litigation or countermeasures by any State³²). International relations could even destabilize if it remains unclear which obligations are those that can have such legal consequences.

26. Therefore, it is imperative to discuss the methods and criteria for identifying obligations *erga omnes*, i.e., what aspects to look into and how to determine whether a certain obligation is of an *erga omnes* character in accordance with some criteria.

27. One methodology could include the extraction of commonalities from a series of examples of such obligations mentioned by the ICJ and other international judicial and quasi-judicial institutions as well as the Commission.³³ On the other hand, any list attempting to exhaustively specify which obligations are of an *erga omnes* character would be difficult. Such a catalogue should eventually be developed based on State practice and in light of the decisions of international courts and tribunals.

28. There are obligations that have been identified by the ICJ and other international courts and tribunals as obligations *erga omnes* (e.g., prohibition of aggression, prohibition of genocide, prohibition of slavery, prohibition of racial discrimination, prohibition of torture, obligation to respect the right to self-determination, and certain obligations³⁴ under international humanitarian and human rights law, as well as some related procedural

²⁸ Iwasawa, *International Law* (in Japanese), 2nd ed., pp. 19–20.

²⁹ See, e.g., Masahiko Asada, "Legal Justification of UN and Non-UN Sanctions: Supremacy of UN Obligations and Countermeasures against Breaches of Interdependent or *Erga Omnes* Obligations", in Chia-Jui Cheng (ed.), *New Trends in International Law: Festschrift in Honour of Judge Hisashi Owada* (Brill, 2024), pp. 88-89; Pierre d'Argent, "Obligations internationales", *Recueil des Cours*, Vol. 417 (2021), pp. 85-87; Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?", *European Journal of International Law*, Vol. 14, No. 5 (2003), p. 923.

³⁰ The fact that Article 42(b)(ii) on interdependent obligations provides for the invocation of responsibility by an "injured State", while Article 48 on obligations *erga omnes* provides for the invocation of responsibility by a "State other than an injured State", as well as the fact that Article 49 provides that "[a]n injured State" may take countermeasures, suggest that there are differences between the two types of obligations and the legal consequences of their breaches.

³¹ See, generally, Priya Urs, "The Elusiveness of 'Interdependent Obligations' and the Invocation of Responsibility for Their Breach", *British Yearbook of International Law*, forthcoming.

³² As will be discussed below, it is unclear whether every State can resort to countermeasures in cases of a breach of an obligation *erga omnes*.

³³ It may also be worth examining whether the criteria and methodologies could be different for obligations *erga omnes* (*stricto sensu*) and obligations *erga omnes partes*.

³⁴ It is important to know which specific obligations fall under this category of obligations.

obligations³⁵³⁶. However, producing a list solely comprising those obligations may lead to an erroneous perception that there are no other obligations *erga omnes*. Conversely, expanding the list to obligations not adequately recognized as such could also lead to adverse results. It would be more important to present criteria and methodologies for identifying obligations *erga omnes* than to produce an incomplete list of relevant obligations.

B. Clarification of legal consequences

29. The second set of questions to be addressed in this topic concerns the legal consequences of breaches of obligations *erga omnes*: more specifically, what actions or measures a State may take in response to such breaches.

30. Since obligations *erga omnes* are owed to the international community as a whole and for which all States have a legal interest in compliance, a logical consequence is that all States other than the wrongdoing State may address any breach of such an obligation and invoke the responsibility of the latter State.³⁷

31. The question, therefore, is what *actions or measures* can be taken by any other State and what are the *conditions* for taking such actions or measures. In light of the doctrine and State practice, the actions and measures that could be considered in this respect include the invocation of responsibility³⁸ such as through judicial proceedings, and countermeasures to be taken against the responsible State.³⁹

(1) Invocation of responsibility

(a) Standing (*locus standi*)

32. The first question to be addressed in the event of a breach of an obligation *erga omnes* is whether any State can bring the case to a competent international court, such as the ICJ, as a means to invoke responsibility of the defaulting State.⁴⁰ In other words, the question is

³⁵ In the *Belgium v. Senegal* case, the ICJ found an *erga omnes partes* character in the obligations to make a preliminary inquiry into the facts (Article 6(2)) and to extradite or prosecute (Article 7(1)) as set out in the Convention against Torture. ICJ Reports 2012, para. 69.

Also, in the *Blaskic* case, the ICTY held that Article 29 of the ICTY Statute (obligation to co-operate with the Tribunal in the investigation and prosecution of the accused persons) imposes an obligation *erga omnes partes*. ICTY (Appeals Chamber), *Blaskic*, para. 26.

In the *Nzabonimana* case, the ICTR in referring to Article 28 of the ICTR Statute (obligation to cooperate with the Tribunal in the investigation and prosecution of the accused persons) recalled that the ICTY in the *Blaskic* case held as above concerning Article 29 of the ICTY Statute. ICTR (Trial Chamber III), *Nzabonimana*, para. 29. Cf. ICTR (Trial Chamber I), *Nahimana*, para. 9 (though the understanding of the concept obligations *erga omnes* is somewhat different).

Furthermore, the ICC in the *Jordan Referral* case held that the obligation to cooperate with the Court reinforces the “obligation *erga omnes* to prevent, investigate and punish crimes” under its jurisdiction. ICC (Appeals Chamber), *Jordan Referral*, para. 123.

³⁶ In light of the ICJ’s hearings in the *Whaling in the Antarctic* case held in 2013, it can also be said that certain obligations to protect environment may be viewed as being of an *erga omnes* character. See ICJ, Verbatim Record CR 2013/13, 3 July 2013, p. 73 (Judge Bhandari); CR 2013/18, 9 July 2013, p. 28, para. 19 (Mr. Burmester of Australia), pp. 33–34, paras. 19–20 (Mme Boisson de Chazournes).

³⁷ ASR, Article 48(1).

³⁸ In the Articles on State Responsibility, the term “invocation” of responsibility means taking measures such as the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. ASR, Article 42, Commentary, para. 2.

³⁹ See, e.g., Tams, *Enforcing Obligations Erga Omnes in International Law*, pp. 5–12, 19; Yoshifumi Tanaka, “The Legal Consequences of Obligations *Erga Omnes* in International Law”, *Netherlands International Law Review*, Vol. 68, No. 1 (2021), pp. 16–28.

⁴⁰ It is said that in the *Barcelona Traction* case, where the concept of obligations *erga omnes* was first literally pronounced, the Court did not specifically touch on the question of standing. *Gaza*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2024, para. 4. See also *Belgium v. Senegal*, Dissenting Opinion of Judge Xue, ICJ Reports 2012, paras. 15, 16; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Declaration of Judge Xue, ICJ Reports 2016, para. 8;

whether all other States have standing (*locus standi*)⁴¹ to be a litigant in a court for a breach of an obligation *erga omnes*, irrespective of the existence of individual and special injury.

33. While there still exists an argument drawing a distinction between the right to invoke responsibility and standing before the ICJ, meaning that only specially affected States (i.e., “injured” States)⁴² would have standing to bring a claim,⁴³ this point seems to have already been clarified to the contrary in practice. At least as far as the breach of obligations *erga omnes partes* is concerned, public interest litigation seems to be allowed under international law, due to developments since the ICJ’s rejection of an “*actio popularis*”⁴⁴ under international law in the *South West Africa* cases (second phase) of 1966⁴⁵ and, in particular, more recent developments in ICJ jurisprudence.⁴⁶ They can be considered as an application of Article 48 of the Articles on State Responsibility,⁴⁷ although no explicit reference has been

Rohingya, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 33. See, however, *Barcelona Traction*, ICJ Reports 1970, para. 91.

- ⁴¹ The term “standing” (sometimes referred to as “standing to sue”) means a party’s right to make a legal claim or seek judicial enforcement of a duty or right. *Black’s Law Dictionary*, 11th ed. (Thomson Reuters, 2019), p. 1695. However, the same term has sometimes been used also to signify the general capacity to appear before the court as an applicant or a respondent. See, e.g., UN Doc. [A/CN.4/766](#), 1 March 2024, paras. 90, 91, 97, 133, 219. This proposal uses the term in the former sense. For a broader notion of standing, covering both judicial proceedings and countermeasures, as well as the difference between “rights” and “legal interest”, see Tams, *Enforcing Obligations Erga Omnes in International Law*, pp. 25–40.
- ⁴² Precisely speaking, it may be debatable if an “injured State” and a “specially affected State” are synonyms, considering that injured States in the case of a breach of interdependent obligations may not be specially affected.
- ⁴³ Myanmar’s argument in *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 94. Cf. Senegal’s argument in *Belgium v. Senegal*, ICJ Reports 2012, para. 64. See also dissenting opinions or declarations of Judge Xue in several cases (e.g., *Belgium v. Senegal*, Dissenting Opinion of Judge Xue, ICJ Reports 2012, paras. 17–18; *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 38; *Syria Torture*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2023, para. 5). Judge Xue’s dissenting opinions include an argument to the effect that the permissibility of reservations to the compromissory clauses of the Torture and of the Genocide Conventions means that there is no universal standing arising from a breach of an obligation *erga omnes* (*Belgium v. Senegal*, Dissenting Opinion of Judge Xue, ICJ Reports 2012, paras. 22–23; *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 29). However, this point seems to have already been addressed by the Court in the *East Timor* judgment. In relation to the provisional measures order in the *Gaza* case, the same judge accepted the standing of a non-injured State. *Gaza*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2024, para. 4. For an argument somewhat similar to that of Judge Xue in the *Belgium v. Senegal* case, see *Belgium v. Senegal*, Dissenting Opinion of Judge *ad hoc* Sur, ICJ Reports 2012, paras. 26–46.
- ⁴⁴ For a critical view against the use of this term, see Tams, *Enforcing Obligations Erga Omnes in International Law*, pp. 161–162; Giorgio Gaja, “The Protection of General Interests in the International Community”, *Recueil des Cours*, Vol. 364 (2012), pp. 110–112.
- ⁴⁵ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, ICJ Reports 1966, para. 88.
- ⁴⁶ See *Belgium v. Senegal*, ICJ Reports 2012, paras. 68–70; *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 108. At the Provisional Measures stage, the ICJ also recognized prima facie jurisdiction and standing in the following cases. *Syria Torture*, ICJ Reports 2023, paras. 48–51; *Gaza*, ICJ Reports 2024, paras. 33–34. While the Articles on State Responsibility do not explicitly address the issue of standing in Article 48, the IDI Resolution of 2005 entitled “Obligations *Erga Omnes* in International Law” (“IDI Resolution of 2005”) does so in Article 3 (“In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligations is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation”). *IDI, Annuaire*, Vol. 71, Pt. II (2005), pp. 286–289.
- ⁴⁷ See James Crawford, “Overview of Part Three of the Articles on State Responsibility”, in Crawford et al. (eds.), *The Law of International Responsibility*, p.934; idem, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts”, in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011), p. 227.

made to that Article by the Court.⁴⁸ It should also be noted that invocation of responsibility for a breach of obligations *erga omnes (partes)* has been made in other international courts and tribunals.⁴⁹

34. A connected question is the relationship between standing of a non-injured State and its jurisdictional basis to refer a case to the ICJ. As jurisdictional questions arise before admissibility questions, standing, which is an admissibility question, would be granted only if the existence of a jurisdictional basis is confirmed in a given case. Thus, the ICJ cannot act without a jurisdictional basis even if the allegation concerns a breach of an obligation *erga omnes*.⁵⁰ The Court confirmed this understanding in the *East Timor* case of 1995,⁵¹ the *Democratic Republic of the Congo (DRC) v. Rwanda (New Application)* case (jurisdiction and admissibility) of 2006⁵² and the *Azerbaijan v. Armenia* case (preliminary objections) of 2024.⁵³

(b) Parallel or successive proceedings and scope of claims

35. Assuming that non-injured States are entitled to standing before the Court or other judicial institutions in accordance with Article 48(1) of the Articles on State Responsibility, the question remains what *conditions and procedures* should dictate States' claims to standing, as it is envisaged that more than one States, whether injured or non-injured, may institute proceedings before such institutions.

36. In this regard, it is convenient to distinguish between cases where there is an injured State and cases where there is no such State. If there *exists* an injured State in the breach of an obligation *erga omnes* (e.g., aggression), the question would be whether any other State can invoke responsibility even if the injured State has made it clear that it will *not* invoke the responsibility of the wrongdoing State⁵⁴ or has lost its right to invoke responsibility by waiver⁵⁵; conversely, whether other States can invoke responsibility only when the injured State, while entitled, is not in a position to do so for jurisdictional or other reasons⁵⁶; and, furthermore, whether any other State can invoke responsibility even after the injured State has invoked responsibility (and received a satisfactory remedy from the wrongdoing State or

⁴⁸ On the other hand, the ITLOS in its Advisory Opinion in the *Activities in the Area* case recognizes the possibility for each State Party to the UNCLOS to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area, and in that context explicitly refers to Article 48 of the Articles on State Responsibility (para. 180).

⁴⁹ See, e.g., UNCLOS Annex VII Arbitral Tribunal, *The Arctic Sunrise Arbitration (The Netherlands v. Russia)*, Award on the Merits (PCA Case No. 2014-02), 14 August 2015, paras. 157(iv), 180–186. The Netherlands' standing was recognized on different grounds.

⁵⁰ Similar issues may arise in relation to the declaration of, or application for, intervention by a State in a case involving alleged violations of obligations *erga omnes* where the intervening State has made a reservation to the compromissory clause of the relevant treaty. See United States, Declaration of Intervention, 2022, para. 9; United States, Observations on the Admissibility of the US Declaration of Intervention, 2023, paras. 22–28; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Admissibility of the Declarations of Intervention, Order, ICJ Reports 2023, paras. 90–98.

⁵¹ ICJ Reports 1995, para. 29.

⁵² ICJ Reports 2006, paras. 64, 125.

⁵³ ICJ Reports 2024, paras. 41, 48.

⁵⁴ There were some related discussions on this question in *Rohingya*, Preliminary Objections, ICJ Reports 2022, paras. 105, 113. See also *ibid.*, Declaration of Judge *ad hoc* Kress, paras. 26–30.

⁵⁵ See ASR, Article 45.

⁵⁶ Such a situation may arise when the injured State has made a reservation to the compromissory clause of the relevant treaty. There is a converse argument to the effect that if the injured State does not have the right to litigate because of its reservation to the compromissory clause, “non-injured” State would also be barred from bringing a case before the Court. See *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 99. For a similar argument, see Jan-Phillip Graf, “Erga Omnes Partes Standing and Procedural Issues in South Africa v. Israel”, *EJIL Talk!*, 1 February 2024.

failed to secure some or all of the remedies sought⁵⁷). In general, the question is whether the right of non-injured State is subsidiary to, or independent from, the right of the injured State.⁵⁸

37. In the *absence* of an injured State, a separate question would arise as to whether a second State can further invoke the responsibility following the invocation by an initial State.⁵⁹ The joint application by Canada and the Netherlands against Syria concerning the alleged breaches by the latter of the Convention against Torture suggests this possibility as they may have been able to institute proceedings separately and successively rather than jointly.⁶⁰ In such a case, a question may arise on the applicability (or not) of the principle of *res judicata* where the same remedies are sought by *different* States in successive cases.⁶¹ This issue may also arise in cases where there exists an injured State.

38. A further complication may arise from the consideration of different forms of invocation of responsibility (i.e., contents of claims). Under Article 48(2) of the Articles on State Responsibility, it may be necessary to distinguish between claims for cessation of the internationally wrongful acts and assurances of non-repetition on the one hand and those for performance of the obligation of reparation on the other.⁶² For example, complications may arise from questions such as: if the first State to invoke the responsibility only claims cessation,⁶³ can another State subsequently claim restitution as a form of reparation?⁶⁴ If the first State only seeks cessation of the breach and restitution, can another State subsequently claim compensation, and so on? This issue may also arise in cases where there exists an injured State.

39. More generally, it may be important to consider whether Article 48(2) of the Articles on State Responsibility, providing for the scope of claims to be made by non-injured States, is now reflective of customary international law.⁶⁵ It may also be important to prescribe how the non-injured State litigant should deal with any compensation it obtains as a result of litigation (e.g., providing it to the injured State or the beneficiaries of the obligation breached), which is not clearly provided for in Article 48(2) or the commentary thereto.⁶⁶

(c) Third-party intervention

40. In a similar vein,⁶⁷ a breach of an obligation *erga omnes* may also give rise to the question of third-party intervention in proceedings as a way of invoking responsibility under

⁵⁷ The principle of *res judicata* might come into play, even if the parties are different.

⁵⁸ See Priya Urs, "Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice", *Leiden Journal of International Law*, Vol. 34, No. 2 (2021), pp. 520–522. See also *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 139 and n. 66.

⁵⁹ A related issue was raised by Judge Xue in the *Rohingya* case in relation to the finality in adjudication of disputes. *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 11.

⁶⁰ In the *South West Africa* cases, the two separately instituted proceedings by Ethiopia and Liberia were joined by the Court. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 321.

⁶¹ See *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, para. 54; Niccolò Ridi, "Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf Case*", *Leiden Journal of International Law*, Vol. 31, No. 2 (2018), pp. 385–386; Urs, "Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice", p. 522.

⁶² See *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 139.

⁶³ See ASR, Article 48(2)(a).

⁶⁴ See ASR, Article 48(2)(b).

⁶⁵ The Commentary to Article 48(2)(b) states that it involves a measure of progressive development of international law. ASR, Article 48, Commentary, para. 12. Of the two kinds of claims listed in Article 48(2)(a), the IDI Resolution of 2005 refers only to cessation of the international wrongful act (Art. 2(a)).

⁶⁶ This is a consideration similar to what is provided for in Article 19(c) of the Articles on Diplomatic Protection of 2006. The ICJ seems to have had this provision in mind in delivering the *Diallo* judgment (compensation). See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, para. 57.

⁶⁷ The IDI Resolution of 2005 also deals with this question alongside that of standing in its Articles 3 and 4. *IDI, Annuaire*, Vol. 71, Pt. II (2005), pp. 288, 289. It is sometimes also said that "third party

Article 48(1) of the Articles on State Responsibility.⁶⁸ Of the two types of intervention in proceedings before the ICJ, the one at issue here is Article 62 of the ICJ Statute:⁶⁹ a State considering that “it has an *interest of a legal nature* which may be affected by the decision in the case” (emphasis added) may submit a request to the Court to be permitted to intervene. Thus, for one thing,⁷⁰ whether the “interest of a legal nature” in Article 62 includes the “legal interest” that all States have in compliance with an obligation *erga omnes*⁷¹ will determine the admissibility of Article 62 intervention in cases of a breach of such an obligation. To date, the ICJ has not clarified this point, nor has it granted this form of intervention in any case.

41. Furthermore, academic opinion is divided on this topic.⁷² Some scholars argue that “[w]hatever ‘interest of a legal nature’ is required in Article 62 of the [ICJ] Statute, it cannot be higher than the one that justifies bringing a claim before the Court”.⁷³ Others counterargue that there is “no clear basis to analogize between customary requirements for the admissibility of applications instituting proceedings and statutory requirements for the admissibility of incidental proceedings, such as non-party intervention”.⁷⁴ There is a need to clarify this point.⁷⁵

42. In practice, the Court recently received a few submissions requesting intervention in different proceedings under Article 62 of the ICJ Statute.⁷⁶ They are all based on an alleged

intervention is a logical extension of ... Article 48 of [the Articles on State Responsibility]”. Craig Eggett and Sarah Thin, “Third-Party Intervention before the International Court of Justice: A Tool for Litigation in the Public Interest?”, in Justine Bendel and Yusra Suedi (eds.), *Public Interest Litigation in International Law* (Routledge, 2024), p. 87.

- ⁶⁸ For previous examples of application for and admission of intervention under Article 62 of the Statute, see Robert Kolb, *The International Court of Justice* (Hart, 2013), pp. 703-730; Alina Miron and Christine Chinkin, “Article 62”, in Andreas Zimmermann and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (OUP, 2019), pp. 1691-1693.
- ⁶⁹ To date, there are only three cases in which the Court permitted intervention under Article 62: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* in 1990, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* in 1999, and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* in 2011. In none of them was the intervening State permitted to intervene as a party.
- ⁷⁰ This is one of the requirements for an Article 62 intervention to be admitted. Another is whether such an interest “may be affected by the decision in the case”. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)* Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports 2011, paras. 26, 67.
- ⁷¹ See, e.g., *Belgium v. Senegal*, ICJ Reports 2012, para. 68 (“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”); *Rohingya*, Preliminary Objections, ICJ Reports 2022, para. 107. See also ASR, Part Two, Chapter III, Commentary, para. 7 (“the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance”).
- ⁷² Benjamin Salas Kantor and Massimo Lando, “Intervention and Obligations *Erga Omnes* at the International Court of Justice”, NUS Centre for International Law, 20 April 2023.
- ⁷³ Gaja, “The Protection of General Interests in the International Community”, p. 119; Palestine, Request for Intervention and Declaration of Intervention, 2024, para. 25; Poland, Application for Intervention, 2024, para. 14. See also Dai Tamada, “War in Ukraine and the International Court of Justice: Provisional Measures and the Third-Party Right to Intervene in Proceedings”, *International Community Law Review*, Vol. 26, Nos. 1-2 (2024), pp. 55-56.
- ⁷⁴ Brian McGarry, “Mass Intervention?: The Joint Statement of 41 States on Ukraine v. Russia”, *EJIL Talk!*, 30 May 2022; idem, “Obligations *Erga Omnes (Partes)* and the Participation of the Third States in Inter-State Litigation”, *The Law and Practice of International Courts and Tribunals*, Vol. 22, No. 2 (2023), pp. 282, 298-299. See also Matina Papadaki, “Substantive and Procedural Rules in International Adjudication: Exploring their Interaction in Intervention before the International Court of Justice”, in Hélène Ruiz Fabri (ed.), *International Law and Litigation: A Look into Procedure* (Nomos, 2019), pp. 61-63.
- ⁷⁵ The IDI Resolution of 2005 in Article 4 provides: “The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation”. See also Gaja, *The Protection of General Interests in the International Community*, pp. 121-122.
- ⁷⁶ In January 2024, Nicaragua submitted a request for intervention *as a party* under Article 62 in the *Gaza* case. Nicaragua, Application for Intervention, 2024, paras. 21, 22, 25. It stated that South Africa

breach of obligations *erga omnes partes* in the respective cases.⁷⁷ Among these submissions, it may be important to distinguish between interventions as a party and interventions as a non-party. From the perspective of invoking responsibility, the more relevant mode of interventions would be those as a party under Article 62.

(d) Inter-State communications to human rights treaty bodies

43. Apart from judicial courts and tribunals, various human rights treaties provide for an inter-State communications mechanism to examine whether there has been a breach of treaty obligations, at least some of which are likely of an *erga omnes* character.⁷⁸ Here, too, the possibility of referral by “non-injured States” to the treaty bodies needs to be considered, similar to the filing of a case with the ICJ by a non-injured State.

44. In fact, inter-State communications systems under UN human rights treaties do not rule out the possibility of communications by non-injured States.⁷⁹ However, there have been no cases so far where this has occurred, in part due to the dearth of inter-State communications generally.⁸⁰

45. The situation appears somewhat different in regional human rights treaties. While the number is limited, a few examples of inter-State referrals by non-injured States can be found in relation to the European Convention on Human Rights.⁸¹ No comparable cases seem to be

is not acting as the sole representative of the international community, and its Application has not excluded the intervention of other parties to the Genocide Convention. *Ibid.*, para. 17. Nicaragua, however, withdrew this application for intervention in April 2025. ICJ, Press Release, No. 2025/15, 3 April 2025.

In May 2024, the State of Palestine, along with a declaration accepting the competence of the ICJ, submitted a request for intervention under Articles 62 (presumably *as a non-party*) and 63 in the *Gaza* case. Palestine, Request for Intervention and Declaration of Intervention, 2024, paras. 1–2, 27–28. This represents an unprecedented situation where the specially affected State (the injured State) requested a permission to intervene in the proceedings instituted by a non-injured State. *Ibid.*, para. 31.

In July 2024, Poland submitted a request for intervention under Articles 62 (*as a non-party*) and 63 in the *Allegations of Genocide* case. Poland, Application for Intervention, 2024, para. 45; *idem*, Declaration of Intervention, 2024, para. 57.

In January 2025, Belize submitted a request for intervention under Articles 62 (*as a non-party*) and 63 in the *Gaza* case. Belize, Application for Intervention and Declaration of Intervention, 2025, paras. 34–38, 43, 92.

⁷⁷ Nicaragua, Application for Intervention, paras. 18, 21(d); Palestine, Request for Intervention and Declaration of Intervention, paras. 24–25; Poland, Application for Intervention, para. 16; Belize, Application for Intervention and Declaration of Intervention, paras. 34–38, 92.

⁷⁸ The ICJ in the *Barcelona Traction* case referred to “the principles and rules concerning the basic rights of the human person” as examples of contemporary international law from which obligations *erga omnes* derive. ICJ Reports 1970, para. 34. See also IDI, “Resolution: The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States”, Saint Jacques de Compostelle, 1989, Article 1.

⁷⁹ See, e.g., Human Rights Committee, General Comment No. 31, para. 2.

⁸⁰ A few UN human rights treaties include provisions for an “inquiry” procedure, allowing the relevant treaty body to be informed of serious or systematic violations of the convention in a State party. While the entities eligible to submit such information are not explicitly defined, non-governmental organizations (NGOs) are primarily expected to do so. To date, no State party has ever made such a submission.

⁸¹ Most typical such cases can be found in the filing of multiple applications against Greece in the 1960s and against Turkey in the 1980s. European Commission of Human Rights, Decision of the Commission as to the Admissibility of Application No. 3321/67 (*Denmark v. Greece*), No. 3322/67 (*Norway v. Greece*), No. 3323/67 (*Sweden v. Greece*), No. 3344/67 (*The Netherlands v. Greece*), 24 January 1968, *Yearbook of the European Convention on Human Rights*, Vol. 11 (1968), p. 690; European Commission of Human Rights, Decision of the Commission as to the Admissibility of Application No. 9940/82 (*France v. Turkey*), No. 9941/82 (*Norway v. Turkey*), No. 9942/82 (*Denmark v. Turkey*), No. 9943/82 (*Sweden v. Turkey*), and No. 9944/82 (*The Netherlands v. Turkey*), 6 December 1983, *Yearbook of the European Convention on Human Rights*, Vol. 26 (1983), p. 1. Other cases are not necessarily genuine examples of States acting in the interest of a collective

found in relation to other regional treaties, including the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. The advisory proceedings of the Inter-American Court of Human Rights are sometimes utilized as a substitute for inter-State communications. But they have not been initiated by non-injured States or States without direct interest.

46. Quite separate from the issues of a referral by a non-injured State, a further point that has been discussed in relation to obligations *erga omnes* in an inter-State communication is whether the *erga omnes* character of the obligation involved can trump the lack of treaty relations (a question somewhat similar to the one discussed in relation to the lack of jurisdictional basis above). This question was dealt with in the Committee on the Elimination of Racial Discrimination (CERD) established under the International Convention on the Elimination of All Forms of Racial Discrimination.

47. In an inter-State communication submitted by Palestine against Israel to the CERD, Israel contended that because it had objected to the accession of Palestine to the Convention, no treaty relations existed between Israel and Palestine in the context of the Convention. Consequently, Israel argued that the Committee lacked jurisdiction.⁸² In response, the Committee confirmed that it had jurisdiction to hear the communication because of the non-synallagmatic character of the obligations of the Convention and the *erga omnes* nature of its core provisions.⁸³ It is worth noting that the UN Office of Legal Affairs (OLA) had offered a different view in response to the request for advice from the CERD.⁸⁴

48. Another question having arisen in the above case was whether the *erga omnes* character of the obligation involved justifies the extension of the temporal scope of jurisdiction in the inter-State communication. The CERD found that the inter-State mechanism is not limited to breaches that have occurred after the ratification of the Convention by the initiating State.⁸⁵ On the other hand, the ICJ in a different case did not accept a similar contention employing the above CERD finding by pointing out the difference in nature between the inter-State communications procedure and the judicial mechanism in the ICJ.⁸⁶

49. Other conceivable fields of international law, which may be deemed to provide for obligations *erga omnes* and may also offer suggestions concerning their legal consequences,⁸⁷ include those covering the environment and WTO. In both fields, the relevant treaties are equipped with quasi-judicial mechanisms supervising the compliance with the obligations by the States Parties. However, they seem to offer few cases worth examining from our perspective.

(2) Countermeasures

50. The second issue concerning the legal consequences of obligations *erga omnes* is whether, in the event of a breach of such obligations, a State other than the injured State can take countermeasures to ensure cessation of the breach and full reparation for the injury. This is a question commonly referred to as third-party countermeasures.⁸⁸

interest. See William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2015), p. 725.

⁸² CERD/C/100/3 (12 December 2019), para. 31.

⁸³ CERD/C/100/5 (12 December 2019), para. 67.

⁸⁴ It stated that (whatever the nature of the core provisions of the Convention may be) the lack of treaty relations which can be effected by a unilateral statement to that effect could be an obstacle to the activation of the inter-State communication mechanism under the Convention. "Transmission of the content of OLA Memorandum at the request of the Committee on the Elimination of Racial Discrimination", Treaty Bodies Secretariat, 23 August 2019, para. 69.

⁸⁵ CERD/C/100/3, para. 14.

⁸⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Preliminary Objections, Judgment, ICJ Reports 2024, paras. 53–54.

⁸⁷ Meaning the fields which are equipped with certain inter-State mechanisms to invoke the responsibility of defaulting States.

⁸⁸ Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP, 2017).

51. This extremely contentious issue was “resolved” in an ambiguous manner in the Articles on State Responsibility in 2001. In Article 54 thereof, it is provided that:

“This chapter [on countermeasures] does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take *lawful measures* against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached” (emphasis added).

52. The commentary to the same article states that “the current state of international law on countermeasures taken in the general or collective interest is uncertain”.⁸⁹ As it specifies, “[a]t present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest”.⁹⁰ Consequently, “chapter II includes a saving clause [i.e., Article 54] which reserves the position and leaves the resolution of the matter to the further development of international law”.⁹¹

53. While relevant State practice continues to accumulate, it is controversial. Moreover, the question of its legality is increasingly assuming a political dimension. It would therefore be prudent to exclude this issue from the scope of the topic.

(3) Other legal consequences

54. The Draft Conclusions on Peremptory Norms contain a number of provisions on the legal consequences of international legal acts in conflict with peremptory norms.⁹²

55. Since “[p]eremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*)” (Conclusion 17(1)), the relevant conclusions naturally apply to obligations *erga omnes* which are peremptory norms, *as peremptory norms*. Therefore, the issue here is the legal consequence of a breach of obligations *erga omnes* which do *not* have the character of peremptory norms.

56. Most of the conclusions of the Draft Conclusions on Peremptory Norms are directly related to the hierarchical nature of the peremptory norms, and obligations *erga omnes* in and of themselves do not give rise to similar legal consequences from the very fact that they are obligations *erga omnes*.

57. However, the provisions on “[p]articular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)” in Conclusion 19, including non-recognition of the unlawful situation and non-provision of aid or assistance, merit examination for their potential applicability to obligations *erga omnes*.⁹³ Conclusion 19 is almost a verbatim recapitulation of Article 41 of the Articles on State Responsibility concerning the particular consequences of a serious breach of a peremptory norm – an article closely tied to obligations *erga omnes* as discussed earlier.⁹⁴

⁸⁹ ASR, Article 54, Commentary, para. 6.

⁹⁰ *Ibid.*, para. 6.

⁹¹ *Ibid.*, para. 6. The ILC’s Draft Articles on the Responsibility of International Organizations (DARIO) of 2011 contains a similar provision for similar reasons. DARIO, Article 57, Commentary, para. 2.

⁹² They include those on treaties conflicting with a peremptory norm (Conclusions 10–12), customary international law conflicting with a peremptory norm (Conclusion 14), unilateral acts of States conflicting with a peremptory norm (Conclusion 15), resolutions of international organizations conflicting with a peremptory norm (Conclusion 16), reservations to treaty provisions reflecting peremptory norms (Conclusion 13), peremptory norms and circumstances precluding wrongfulness (Conclusion 18), and on particular consequences of serious breaches of peremptory norms (Conclusion 19).

⁹³ This does not necessarily rule out the possibility of examining other provisions of the Draft Conclusions on Peremptory Norms. Conclusions 13 and 18 might also be candidates. See d’Argent, “Obligations internationales”, p. 89; Pok Yin S. Chow, “On Obligations *Erga Omnes Partes*”, *Georgetown Journal of International Law*, Vol. 52, No. 2 (2021), p. 497.

⁹⁴ See Section II.A.(1) of this proposal. The IDI Resolution of 2005 also contains a similar provision. Article 5(b) provides: “Should a widely acknowledged grave breach of an *erga omnes* obligation

58. Thus, it is necessary to consider whether similar consequences could arise in the case of “serious breaches of obligations *erga omnes*”. This is a question on which the ICJ and the ILC seem to have different views⁹⁵ and on which clarification is required. The ICJ’s recent Advisory Opinion on the *Occupied Palestinian Territory*, along with some minority opinions of individual judges, further attests to this necessity.⁹⁶ It is also to be noted that the above consequences are qualitatively different from other consequences discussed earlier (actions and measures that may be *taken by other States*) in that they involve obligations to be *imposed on other States*.

III. Relations with the Commission’s Previous Work and Consideration of the Topic by Other Bodies

A. Relations with the Commission’s previous work

59. As noted above, the topic “obligations *erga omnes*” is related to some of the previous work of the Commission. In particular, it is an extension of an important part of the Articles on State Responsibility and a clarification of unresolved issues remaining therein.

60. Obligations *erga omnes* are very closely related to peremptory norms. Concerning the latter norms, the Commission adopted the Draft Conclusions on Peremptory Norms in 2022. Therefore, work on obligations *erga omnes* as a concept closely related to peremptory norms would contribute to the continuity of the Commission’s work. Additionally, the Draft Conclusions on Peremptory Norms and the process of their drafting could in many respects also serve as a useful reference in the preparation of an outcome document for the proposed topic.⁹⁷

B. Consideration of the topic by other bodies

61. The academic literature on obligations *erga omnes* is vast (see Select Bibliography), but one of the most important among them is the work of the *Institut de droit international* (IDI). The consideration by the IDI of the topic of “Obligations and Rights *Erga Omnes* in International Law”, the rapporteur of which was Giorgio Gaja who was also a member of the

occur, all the States to which the obligation is owed ... (b) shall not recognize as lawful a situation created by the breach”.

⁹⁵ As the next footnote shows, the ICJ refers to similar consequences in the context of breaches of obligations *erga omnes*.

⁹⁶ In that Opinion, the ICJ, after observing that “the obligations violated by Israel include certain obligations *erga omnes*”, stated that all States are under obligations not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and not to render aid or assistance in maintaining such a situation. *Occupied Palestinian Territory*, ICJ Reports 2024, paras. 274, 278–279. These stated obligations hint at a virtual application of Article 41 of the Articles on State Responsibility, which provides for particular consequences of a serious breach of an obligation arising under a peremptory norm of general international law. Judge Tladi criticized the Opinion as “based on a complete miscomprehension of the relationship between peremptory norms and *erga omnes* obligations”. Declaration of Judge Tladi, ICJ Reports 2024, paras. 28–32, esp. para. 30. See also Separate Opinion of Judge Gómez Robledo, ICJ Reports 2024, para. 22.

Similar divergence of views can be found in relation to the *Wall* and *Chagos* cases. For the *Wall* case, see ICJ Reports 2004, para. 159 (referring to the obligations of all States “not to recognize the illegal situation resulting from the construction of the wall” and “not to render aid or assistance in maintaining the situation created by such construction”); Separate Opinion of Judge Higgins, paras. 37–38; Separate Opinion of Judge Kooijmans, paras. 40–45. For the *Chagos* case, see ICJ Reports 2019, paras. 180, 183(5) (referring to the obligation of all Member States to “co-operate with the United Nations in order to complete the decolonization of Mauritius”); Separate Opinion of Judge Robinson, para. 89. Cf. Separate Opinion of Judge Cañado Trindade, para. 200. See also UN Doc. [A/RES/73/295](#), 22 May 2019, para. 2(e).

⁹⁷ Dire Tladi, *The International Law Commission’s Draft Conclusions on Peremptory Norms* (OUP, 2024).

Commission at the time, culminated in the Resolution entitled “Obligations *Erga Omnes* in International Law” at its Krakow Session in 2005 (“IDI Resolution of 2005”).

62. Composed of six articles, the Resolution provides for definition (Article 1), breach and invocation of responsibility (Article 2), standing before the ICJ or other international judicial institution (Article 3), participation in proceedings before the ICJ or other international judicial institution (Article 4), cessation of the breach, non-recognition of the situation created by the breach, and countermeasures (Article 5) and a without prejudice clause (Article 6).⁹⁸ Not only the Resolution itself but also the discussions in the IDI leading up to the Resolution are highly instructive.

IV. ILC’s Criteria for Selecting New Topics

63. Regarding the topic selection, the Commission noted in 1997 the following criteria for the selection of topics for the Commission:

- “(a) The topic should reflect the needs of States in respect of the progressive development and codification of international law;
- (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;
- (c) The topic is concrete and feasible for progressive development and codification”.

Furthermore, it was stated that in the selection of new topics, “the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole”⁹⁹ (this recommendation is referred to as “(d)” below).

64. The proposed topic of “obligations *erga omnes*” meets all of the above criteria as follows (letters at the end of each sentence correspond to the relevant criterion described above):

- Half a century has passed since the appearance of the concept of obligations *erga omnes* at the ICJ in 1970 (one may even state that a century has passed since the *S.S. Wimbledon* case of 1923), during which time it has gained wide acceptance in State practice, international jurisprudence and academic literature = (b);
- Reference to obligations *erga omnes* (or concepts associated with them) is not limited to the ICJ but rather found in a variety of international judicial and quasi-judicial institutions, including in the ICTY (e.g., *Furundzija*; *Blaskic*), the ICTR (e.g., *Nahimana*; *Nzabonimana*), the ICC (e.g., *Jordan Referral*), the SCSL (e.g., *Kallon and Kamara*), the ITLOS (e.g., *Activities in the Area*), the ECJ (e.g., *Council v. Front Polisario*), the CERD (e.g., *Palestine v. Israel*), the European Commission of Human Rights (e.g., *Austria v. Italy*; *Denmark v. Greece*; *Norway v. Greece*; *Sweden v. Greece*; *The Netherlands v. Greece*¹⁰⁰), and the Inter-American Commission on Human Rights (*Nicaragua v. Costa Rica*¹⁰¹) = (b);
- Litigation by non-injured States concerning breaches of obligations *erga omnes* at the ICJ began some 10 years ago in 2012, but similar litigation (filing) has been rapidly

⁹⁸ IDI Resolution of 2005.

⁹⁹ *Yearbook of the International Law Commission, 1997*, Vol. II, Pt. 2, pp. 71–72, para. 238.

¹⁰⁰ In these cases, obligations *erga omnes* as such were not mentioned, but the concept of “international protection” or “collective guarantee” of human rights was mentioned as something associated with such obligations. See, e.g., European Commission of Human Rights, Decision of the Commission as to the Admissibility of Application No. 788/60 (*Austria v. Italy*), 11 January 1961, *Yearbook of the European Convention on Human Rights*, Vol. 4 (1961), pp. 140, 148, 150.

¹⁰¹ The Commission did not mention obligations *erga omnes* as such but referred to the Convention system as “a genuine regional public order the preservation of which is in the interests of each and every state party” (para. 197).

increasing and may well increase further in the future,¹⁰² thus sufficient practice in this regard is increasingly accumulating = (b) and (d);

- To the extent that the obligations determined by the ICJ and other international judicial and quasi-judicial institutions to have an *erga omnes* character are relatively limited so far, it is not known until a case is filed whether the alleged breach of the particular obligation can be subject to international litigation by any State; and thus, there should be an interest and need among States for clarification in this regard = (a);
- Draft Conclusions on Peremptory Norms were prepared by the Commission, and it should be sufficiently concrete and feasible to prepare a similar document in relation to the adjacent concept of obligations *erga omnes* = (c);
- The proposed topic has the aspects of clarification of significant uncertainties in the Articles on State Responsibility, also prepared by the Commission = (a);
- A resolution on obligations *erga omnes* has been adopted by the IDI = (c); and
- The concept of obligations *erga omnes* and the legal issues surrounding such obligations reflect relatively new developments in international law for the protection of the common interests of the international community as a whole, especially within the framework of the ICJ = (d).

V. Scope of the Proposed Topic

A. The addressees of obligations *erga omnes* and the holders of the corresponding rights

65. The entities which are bound by an obligation *erga omnes* are not necessarily limited to States; obligations *erga omnes* can also be imposed on subjects other than States. For example, it is possible for a collective defense organization to violate the prohibition of aggression, an obligation *erga omnes*.

66. However, for the sake of simplicity and practicality, it would be appropriate to limit the consideration to situations involving States. In fact, the Commission dealt with the topic of international responsibility in separate documents between responsibility of States and that of international organizations. Also, while not expressly stated, the Draft Conclusions on Peremptory Norms have States primarily in mind for many of its conclusions.¹⁰³ The IDI Resolution of 2005 also limited its scope to obligations *erga omnes* incumbent upon States for reasons of simplicity.¹⁰⁴

67. Similarly, the holders of the rights corresponding to obligations *erga omnes* are not necessarily limited to States. Although obligations *erga omnes* are obligations to the international community as a whole, there is no international legal subject called the “international community”. It is basically individual States as members of the international community that have the rights corresponding to obligations *erga omnes*. While the international community is also constituted by entities other than States, not all of those entities have the (procedural) right to respond to the breach of obligations *erga omnes*.¹⁰⁵

¹⁰² President Donoghue of the ICJ stated at the Sixth Committee of the UN General Assembly in 2023 that: “It has been noted, sometimes with enthusiasm and sometimes with trepidation, that standing based on alleged violations of obligations *erga omnes partes* in certain treaties has the potential, in the future, to expand the range of cases brought before the Court”. UN Doc. [A/C.6/78/SR.26](#), 25 October 2023, para. 8.

¹⁰³ See Conclusions 17, 18, 19, 21.

¹⁰⁴ IDI Resolution of 2005, Article 1. See also *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 124.

¹⁰⁵ In the *Activities in the Area* opinion, the ITLOS referred to the International Seabed Authority as among possible subjects entitled to claim compensation in cases of damage to the Area. ITLOS Reports 2011, para. 179.

Here as well, for the sake of simplicity, it would be appropriate to limit the consideration to the cases where States respond to the breach of obligations *erga omnes*.¹⁰⁶

B. Obligations *erga omnes* and obligations *erga omnes partes*

68. Although we have discussed the relevant obligations without necessarily making a distinction among them, there are two types of obligations *erga omnes*. They are obligations *erga omnes (stricto sensu)* and obligations *erga omnes partes*. While the former refers to those owed to the international community as a whole, the latter is those owed to a group of States and established for the protection of a collective interest of the group (such as those contained in certain multilateral treaties).¹⁰⁷

69. As the ICJ's practice (judgments) to date has been only of the latter¹⁰⁸ (although there are several examples of the former in terms of the *filing* of a case¹⁰⁹ and in advisory proceedings¹¹⁰), it may be an option to limit the scope of the topic to the latter type of obligations.

70. However, there seems no compelling reason to do so because there is little difference between the two in terms of the basic "character" of the obligations concerned¹¹¹ (indeed, an obligation *erga omnes partes* may become an obligation *erga omnes (stricto sensu)* if the

¹⁰⁶ See Draft Conclusions on Peremptory Norms, Conclusions 17, 19, 21; IDI Resolution of 2005, Article 1. See also *IDI, Annuaire*, Vol. 71, Pt. I (2005), pp. 124–127.

¹⁰⁷ See ASR, Article 48(1)(a) and (b).

¹⁰⁸ Phoebe Okowa, "Issues of Admissibility and the Law on International Responsibility", in Malcolm D. Evans (ed.), *International Law*, 6th ed. (OUP, 2024), pp. 487–490. The ICJ introduced the concept "obligations *erga omnes partes*" in the *Belgium v. Senegal* case of 2012 for the first time, while in the ILC the Special Rapporteur (Gaetano Arangio-Ruiz) seems to have done so during the drafting of the Articles on State Responsibility (first reading). *Yearbook of the International Law Commission*, 1992, Vol. II, Pt. 1, p. 34, para. 92; *ibid.*, Vol. II, Pt. 2, p. 39, para. 269. Cf. ICTY, *Blaskic*, para. 26.

¹⁰⁹ While the ICJ confirmed its jurisdiction based on the Convention against Torture in the *Belgium v. Senegal* case, the Applicant (Belgium) also requested that the Court declare that Senegal breached an obligation under customary international law to bring criminal proceedings against Mr. Habré for crimes against humanity. However, the Court dismissed it for the reason of absence of dispute. ICJ Reports 2012, paras. 53–55. In the *East Timor* case, Portugal claimed that Australia failed to observe the obligation to respect the right of the people of East Timor to self-determination. However, the Court did not accept the application, based on the *Monetary Gold* principle. ICJ Reports 1995, para. 29. The *Nuclear Disarmament Obligations* case brought by the Marshall Islands against India was based on a claim that India violated its obligations of nuclear disarmament and cessation of the nuclear arms race under customary international law. Marshall Islands, Application (*Marshall Islands v. India*), 2014, paras. 41, 58–64. However, the Court declared the absence of dispute. ICJ Reports 2016, para. 56(1). The Gambia's Application in the *Rohingya* case explicitly referred to "the *erga omnes* and *erga omnes partes* character of the obligations ... under the Genocide Convention". The Gambia, Application, 2019, para. 15. The Court confirmed its jurisdiction based on Article IX of the Genocide Convention. ICJ Reports 2022, para. 115(5). Nicaragua's Application against Germany was based not only on Article IX of the Genocide Convention but also on the declarations accepting the Court's jurisdiction pursuant to Article 36(2) of the ICJ Statute. It stated that there is a dispute between the two States concerning the interpretation and application not only of the Genocide Convention, the Geneva Conventions of 1949 and their Additional Protocols of 1977, but also of "the principles and customary rules of international law", including international humanitarian law and peremptory norms of general international law. Nicaragua, Application, 2024, para. 31. The Court is still to decide on jurisdiction and admissibility in this case.

¹¹⁰ See the *Wall* case, ICJ Reports 2004, paras. 155 – 157; the *Chagos* case, ICJ Reports 2019, para. 180; and the *Occupied Palestinian Territory* case, paras. 96, 232, 274.

¹¹¹ In the *Barcelona Traction* judgment, the ICJ after referring to obligations *erga omnes* stated that "[s]ome of the corresponding rights of protection have entered into the body of *general international law* ...; others are conferred by *international instruments* of a universal or quasi-universal character" (emphasis added). It also referred to the European Convention on Human Rights in a similar context. ICJ Reports 1970, paras. 34, 91. For an argument to distinguish between obligations *erga omnes* and obligations *erga omnes partes*, see Sarah Thin, *Beyond Bilateralism: A Theory of State Responsibility for Breaches of Non-Bilateral Obligations* (Edward Elgar, 2024), pp. 119–120.

former enters into the body of customary international law¹¹² and, conversely, the former may incorporate the latter in drafting a regional convention¹¹³), and there seems little risk of complicating the Commission's work by covering both. There are also a number of cases (State practice) where the applicant State *invoked* responsibility of the respondent State for the latter's breach of obligations *erga omnes (stricto sensu)*. Additionally, limiting the scope only to obligations *erga omnes partes* looks a half measure. It would therefore be appropriate to consider both obligations *erga omnes (stricto sensu)* and obligations *erga omnes partes* in this topic.¹¹⁴ At the same time, it is important to recognize that these two types of obligations possess distinct features.

C. Obligations *erga omnes* and rights *erga omnes*

71. In ICJ jurisprudence, reference has sometimes been made to "rights" *erga omnes* in addition to "obligations" *erga omnes*. For instance, in the *East Timor* case, the Court described the Portuguese-claimed right of peoples to self-determination as a "right *erga omnes*",¹¹⁵ but did not elaborate on that concept further. Moreover, the term "rights and obligations *erga omnes*" is used in the *Bosnia Genocide* case (preliminary objections)¹¹⁶ and in the *DRC v. Rwanda (New Application)* case (jurisdiction and admissibility)¹¹⁷. However, its precise meaning was not clearly articulated in either case. It is thus said that the ICJ has never defined the concept of "rights *erga omnes*".¹¹⁸ Whether the consideration of the proposed topic should cover "rights" *erga omnes* in addition to "obligations" *erga omnes* depends on the content of the former and its relationship with the latter; the question will be decided upon once these points are clarified.¹¹⁹

VI. Possible Form of Output

72. Considering the previous work of the Commission pertaining to this area and bearing particularly in mind the most analogous work to the proposed topic in terms of the subject matter (i.e., the Draft Conclusions on Peremptory Norms), it seems appropriate for the outcome document of the proposed topic to take the form of draft conclusions. However, this issue could be revisited as the work on the topic progresses.

VII. Conclusion

73. The proposed topic "Identification and Legal Consequences of Obligations *Erga Omnes* in International Law" is a logical and necessary extension of the previous work of the Commission, including the Articles on State Responsibility of 2001 and the Draft Conclusions on Peremptory Norms of 2022.

¹¹² Cf. d'Argent, "Obligations internationales", p. 74. See also *ibid.*, p. 66.

¹¹³ Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility", p. 1136.

¹¹⁴ The IDI Resolution of 2005, whose scope had been intended to be limited to obligations *erga omnes (stricto sensu)* at the initial stage of consideration, was later extended to include obligations *erga omnes partes* (see IDI Resolution of 2005, Article 1) in response to various comments. At the initial stage, the Rapporteur (Gaja) had stated that the existence of special features in the relevant treaties suggests that it would be preferable to concentrate on the more homogenous group of obligations *erga omnes* existing under general international law. *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 123.

¹¹⁵ In the *East Timor* case, the Court stated: "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable" and then referred to it as a "right *erga omnes*". ICJ Reports 1995, para. 29.

¹¹⁶ ICJ Reports 1996, para. 31.

¹¹⁷ ICJ Reports 2006, para. 64.

¹¹⁸ *IDI, Annuaire*, Vol. 71, Pt. I (2005), p. 191.

¹¹⁹ The IDI Resolution of 2005 was initially entitled "Obligations and Rights *Erga Omnes* in International Law", but following various comments, the provision on rights *erga omnes* was deleted and the reference to such rights was eventually removed from the title of the Resolution.

74. It would clarify what was uncertain at the time of adopting these documents or what was not provided in detail in them because of the restraints in the topic concerned. It is important for the Commission to engage in this work to complete those missing points. Otherwise, the general topics of international responsibility and sources of international law will remain incomplete.¹²⁰

75. Moreover, as the number of cases involving obligations *erga omnes* continues to rise in the ICJ and other international judicial and quasi-judicial institutions, the international community seems to be grappling with significant but challenging questions. These include how to strike a balance¹²¹ between promoting the rule of law in the international community through the concept of obligations *erga omnes*, and ensuring the stability and predictability of international relations in the face of increasing proceedings brought by non-injured States.¹²² The outcome document of this topic would provide practical guidance and useful clarification to States in this respect.

76. Thus, there is not only sufficient practice on which to build such guidance and clarification but also an urgent and concrete need for States to have them. This topic meets the criteria for selecting new topics for the Commission in every respect, including the element that the topic should reflect new developments in international law.

77. As this topic is a subject of general international law and related to many aspects of international law, the Commission is a perfect place to address it as an organ composed of 34 international law experts from various regions with a variety of expertise.

¹²⁰ See UN Doc. [A/CN.4/679](#), 5 March 2015, para. 14.

¹²¹ Cf. *Yearbook of the International Law Commission, 2001*, Vol. II, Pt. 1, p. 11, para. 42 (Crawford's Fourth Report).

¹²² See, e.g., *Rohingya*, Preliminary Objections, Dissenting Opinion of Judge Xue, ICJ Reports 2022, para. 39; *Syria Torture*, Provisional Measures, Declaration of Judge Xue, ICJ Reports 2023, para. 5, referring to the risks of more States restricting or withdrawing acceptance of the Court's jurisdiction, and of more vague and insubstantial allegations. See also Oscar Schachter, *International Law in Theory and Practice* (Nijhoff, 1991), p. 212.

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