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ORIGINAL ARTICLE

INTERNATIONAL COURT OF JUSTICE

Obligations *erga omnes* and the question of standing before the International Court of Justice

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Abstract

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

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

1. Introduction

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

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[1] *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, at 23 (hereafter '*Reservations*').

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

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

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

The enforcement of obligations *erga omnes* requires a reappraisal of the means by which, and conditions under which, the responsibility of a breaching state might be invoked. Among the various routes available to a state seeking to invoke responsibility for a breach of international law are resort to countermeasures and the adjudication of the dispute.[8] In both cases, what is necessary is that the state seeking to invoke responsibility for the breach, as well as remedies, has 'a specific right to do so'.[9] Such a right may derive, for example, from the terms of a multilateral treaty or from the fact that the state has been demonstrably injured by the breach. Broadly construed, standing or *locus standi* is thus 'the requirement that a State seeking to enforce the law establishes a sufficient link between itself and the legal rule that forms the subject matter of the enforcement action'.[10] When standing is addressed, as it is here, in relation to a state's entitlement to bring a dispute before the ICJ, the relevant question is whether such a link may exist even in the absence of a right of standing conferred under a multilateral treaty or as a result of injury. Is there, in other words, a right of standing that derives exclusively from the collective nature of certain obligations? If so, what are the implications of its inclusion for the adjudication of disputes before the Court?

The debates that have taken place have tended to address the significant contribution of the International Law Commission (ILC) in its 2001 Articles on the Responsibility of States for

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

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

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

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

[8]ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 YILC, vol. II (Part Two), at 117 (hereafter 'Commentary'). The focus of the article being the adjudication of disputes at the ICJ, other means of dispute settlement are not addressed. For an overview see S. Scott, 'Litigation versus Dispute Resolution through Political Processes', in N. Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (2014), 24. The question of the interaction between countermeasures and adjudication also arises. As stated in Art. 52(3)(a) of the ARSIWA, countermeasures are excluded while a dispute is pending adjudication. See also J. D. Bederman, 'Counterintuiting Countermeasures', (2002) 96 AJIL 817, at 826; J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 AJIL 874, at 883–4.

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

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

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

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

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

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

Before assessing the practice of the ICJ, it is necessary to briefly address the contribution of the ILC through its 2001 Articles on the Responsibility of States for Internationally Wrongful Acts. The Articles – some of which codify existing rules of international law, others of which seek progressively to develop the law – not only reflect the views of the ICJ in its case law prior to 2001 but also serve as a benchmark against which to assess its subsequent decisions.[14]

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

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

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

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

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The Articles are tailored to address a variety of primary obligations, which 'may be owed to another State, to several States, or to the international community as a whole'.[15] Within which of these categories a particular obligation falls, and whether it gives rise to a right *erga omnes* to invoke responsibility for its breach, depends on the interpretation of the relevant rule.[16] Discarding an earlier preference for a broad definition of 'injury', which would have provided a unified basis for the invocation of responsibility, the question of a state's right to invoke the responsibility of a breaching state eventually took the form of Articles 42 and 48 of the ARSIWA.[17] Article 42[18] defines an 'injured state' as a state to which the obligation breached is owed, either individually, in accordance with Article 42(a), or as part of a group of states or of 'the international community as a whole', in accordance with Article 42(b), which entitles a state to invoke the responsibility of the breaching state if the breach 'specially affects' it[19] or 'is of such a character as radically to change the position of all the other States to which the obligation is owed'.[20] Critically, an injured state is entitled not only to invoke the responsibility of another state for its breach of a primary obligation but also to resort to a variety of countermeasures.[21]

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

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
(b) the obligation breached is owed to the international community as a whole.[22]

While a state acting under Article 48(1)(a) does so 'in its capacity as a member of a group of States to which the obligation is owed', addressing the breach of obligations *erga omnes partes*,[23] a state acting under Article 48(1)(b) does so 'as a member of the international community as a whole', addressing the breach of obligations *erga omnes*.[24] Conceptually, there is no distinction between the two categories.[25] Article 48 being complementary to Article 42, the Commission did not rule out the possibility of an injured state invoking responsibility for the breach of an obligation *erga omnes* or *erga omnes partes*.[26] The inclusion of Article 48 – a progressive development of the law[27] – was intended mainly to address those obligations in respect of which there may be no injured state to invoke responsibility for a breach. For the Commission, it was 'highly desirable'

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

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

[17]The inclusion of these provisions followed a debate about whether the breach of all obligations should trigger the application of the same regime of responsibility. See Fifth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, 1976, YILC vol. II (Part One), at 24, 26, paras. 72, 80.

[18]The provision is modelled on Art. 60 of the Vienna Convention on the Law of Treaties (VCLT). See Commentary, *supra* note 8.

[19]See Art. 42(b)(i), ARSIWA, reflecting Art. 60(2)(b), VCLT. The state 'must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed'. Commentary, ibid., at 119.

[20]See Art. 42(b)(ii), ARSIWA, reflecting Art. 60(2)(c), VCLT. This clause addresses the category of integral or interdependent obligations, the breach of which 'affect[s] *per se* every other State to which the obligation is owed' such that 'they must all be considered as individually entitled to react to [the] breach'. Commentary, ibid., at 119. In other words, 'each party's performance is effectively conditioned upon and requires the performance of each of the others'. ibid.

[21]See Ch. II, Part 3, ARSIWA.

[22]The Articles do not use the term 'legal interest' to describe the entitlement to invoke responsibility under Art. 48, since this would have blurred the distinction between Art. 42 and Art. 48. Commentary, *supra* note 8, at 126.

[23]Ibid.

[24]Ibid., at 127.

[25]See also ibid.

[26]Ibid.

[27]Crawford, *supra* note 3, at 551.

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that states other than an injured state be entitled to take some more limited measures in order 'to protect the community or collective interest at stake'.[28] Accordingly, a state is entitled to seek cessation of the breach and perhaps also assurances and guarantees of non-repetition, under Article 48(2)(a), but also reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached', under Article 48(2)(b).[29] The effectiveness of Article 48 in filling this gap of enforceability is, however, limited by the decoupling of the entitlement to invoke responsibility, on the one hand, and the availability of countermeasures, on the other. Under international law as it then stood, and as reflected in the Articles, only injured states are entitled to resort to countermeasures. This limitation vis-à-vis states acting under Article 48 is anticipated by Article 54, the savings clause permitting states other than injured states to take 'lawful measures', whatever they may be,[30] to 'ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'. Absent a rule of international law permitting the use of countermeasures by states under Article 48, '[t]he pragmatic compromise – and, indeed, the only possible political solution – was to defer debate to another day'.[31]

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

2.2 The practice of the International Court of Justice

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

[28]Commentary, *supra* note 8, at 127.

[29]International obligations being increasingly 'unilateral or vertical', the selection of remedies in Art. 48(2) may be explained by the fact that '[b]reach of these duties is unlikely to injure another state directly or give rise to a classic claim for reparations'. The emphasis on cessation is justified by states' interest in continued compliance with these obligations. D. Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', (2002) 96 AJIL 833, at 834.

[30]The Commission noted that '[p]ractice on this subject is limited and rather embryonic'. Commentary, *supra* note 8, at 137. On the objection of some states, the provision was therefore 'reduced ... from a substantive article to a savings clause'. Crawford, *supra* note 8, at 875.

[31]Bederman, *supra* note 8, at 828. To whatever extent subsequent state practice supports the use of countermeasures for the enforcement of obligations *erga omnes*, it may bear on the permissibility of recourse to the ICJ. See generally, M. Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', (2016) 29 *QIL Zoom-In* 3; C. Hillgruber, 'The Right of Third States to Take Countermeasures', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006), 265, at 283–7.

[32]Commentary, *supra* note 8, at fn 724.

[33]*SS Wimbledon*, PCIJ Rep. Series A No 1, 15, at 20.

[34]Ibid.

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In contrast to the PCIJ, the ICJ in the earliest proceedings in which the question of standing to bring a dispute in respect of collective interests was at issue, namely the *South West Africa Cases*, wavered. Following the institution by Ethiopia and Liberia of proceedings against South Africa in respect of the latter's alleged violation of its mandate for South West Africa under the League of Nations, it fell to the Court to address the question of Ethiopia and Liberia's 'legal right or interest regarding the subject matter of their claim'.[35] In its initial decision of 1962, the Court endorsed the applicants' standing to bring the dispute as member states of the League of Nations with 'a legal right or interest' in South Africa's compliance with its obligations 'towards the inhabitants of the Mandated Territory, and towards the League of Nations and its Members'.[36] Conversely, based on its subsequent assessment of the Covenant of the League of Nations and the instrument of mandate for South West Africa, the Court found in its final decision of 1966 that South Africa's obligations in respect of the mandate had been owed to the League of Nations as a whole and not to its member states individually.[37] It relied *inter alia* on a restrictive reading of the jurisdiction clause specified in Article 7(2) of the instrument of mandate, which in its view did not confer upon member states a substantive right to invoke the responsibility of the mandatory.[38] Accordingly, neither the Covenant nor the instrument conferred on the former member states of the League of Nations a right of recourse to the ICJ.[39] The Court did not, however, exclude in principle the existence under international law of a right of standing, absent injury, where 'such rights or interests' are 'clearly vested in those who claim them, by some text or instrument, or rule of law'.[40] At the same time, it rejected in broader terms the resort by states to an '*actio popularis*', which it considered '[wa]s not known to international law' at the time.[41]

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

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

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

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

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

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

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

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

[41]Ibid., at 47, para. 88.

[42]Commentary, *supra* note 8, at 127. The Court's reference at paragraph 34 to 'instruments of a ... quasi-universal character' suggest that its statements also address the content of Art. 48(1)(a), that is obligations *erga omnes partes*.

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> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ... others are conferred by international instruments of a universal or quasi-universal character.[43]

Going beyond the treaty-based disputes that had previously been at issue in *SS Wimbledon* and the *South West Africa* cases, in which contexts it was primarily the interpretation of relevant jurisdiction clauses that had been at issue, the Court recognized a category of 'obligations *erga omnes*'[44] under both treaty law and general international law,[45] even if it did not elaborate upon the legal basis for their existence[46] and notwithstanding the fact that the violation of obligations *erga omnes* had not been at issue in *Barcelona Traction*.[47]

A series of subsequent disputes provided the Court the opportunity to elaborate upon the arguably broad concept it had introduced in *Barcelona Traction*. This is not to say that the Court always took the opportunity to do so. In *Nuclear Tests (Australia* v. *France)*, for instance, the majority did not address the question of Australia's standing to bring a dispute in respect of France's future compliance with what Australia characterized as the *erga omnes* prohibition of atmospheric nuclear tests under customary international law since, in the view of the Court, France had in fact undertaken an obligation not to conduct further tests. Judge *ad hoc* Barwick was alone in endorsing, if only in principle, a right of standing in respect of obligations *erga omnes* that confers upon individual states, such as Australia, a corresponding right to compliance.[48] Conversely, Judge de Castro rejected the contention, including on the basis that the dictum in *Barcelona Traction* should be taken '*cum grano salis*'.[49] So also in *Bosnian Genocide*, only Judge Oda obliquely addressed the issue of standing, asserting that the *erga omnes partes* nature of the obligations under the Genocide Convention did not mean that responsibility for a breach could be invoked 'in inter-State relations', including by instituting proceedings at the ICJ.[50] In his view, the alleged breach by a state party of an obligation *erga omnes partes* does not automatically give rise to a dispute as to the 'interpretation, application or fulfilment' of the treaty with another state party.[51] For a dispute to exist, the latter must demonstrate the resultant infringement of its rights.[52] For Judge Oda, this was doubtful, since the obligations *erga omnes*

[43] *Barcelona Traction*, *supra* note 4, at 32, paras. 33–4.

[44] But see ibid., at 47, para. 91. Whether the Court's subsequent statement at para. 91 serves to exclude the broad right of standing expressed here is subject to debate. Interpretations which retain the effectiveness of the dictum at paras. 33 and 34 are preferred. Simma, *supra* note 6, at 296; but see Dominicé, *supra* note 2, at 362. For a detailed discussion see J. Crawford, 'Multilateral Rights and Obligations in International Law', (2006) 319 *Collected Courses of the Hague Academy of International Law* 329, at 424–5; Tams, *supra* note 2, at 176–9.

[45] Tams, ibid., at 123.

[46] Tams and Tzanakopoulos, *supra* note 4, at 796–7.

[47] The value of the Court's dictum is subject to debate. It is often suggested that its statements were an attempt to correct its heavily criticised approach in *South West Africa*, and an exercise in judicial activism. F. Zarbayev, 'Judicial Activism in International Law – A Conceptual Framework for Analysis', (2012) 3 JIDS 247, at 276–7. It may also be that the Court was setting the stage for subsequent developments. N. Ridi, '"Mirages of an Intellectual Dreamland"? *Ratio*, *Obiter* and the Textualization of International Precedent', (2019) 10 JIDS 361, at 381–2.

[48] *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253, at 437 (Judge Barwick, Dissenting Opinion). Based on his reading of the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, Tams goes further in concluding that 'the majority of judges expressing a view was prepared to take the *Barcelona Traction* dictum at face value'. Tams, *supra* note 2, at 180–2.

[49] Ibid., at 387 (Judge de Castro, Dissenting Opinion) (hereafter 'de Castro Dissent').

[50] *Application of the Convention on the Prevention and Punishment of the Crimes of Genocide*, Judgment of 11 July 1996, [1996] ICJ Rep. 595 (hereafter '*Bosnian Genocide*'), at 626, para. 4 (Judge Oda, Declaration) (hereafter 'Oda Declaration').

[51] Art. IX, Convention on the Prevention and Punishment of the Crime of Genocide.

[52] Oda Declaration, *supra* note 50, at 626, para. 3.

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enumerated in the Genocide Convention were owed principally to individuals and groups. Their breach was thus better addressed by means other than adjudication.[53]

Similarly, when in 1995 Portugal invoked Australia's optional clause declaration under Article 36(2) of the ICJ Statute to bring a case against Australia pertaining *inter alia* to the violation of the right of the people of Timor-Leste to self-determination – arguably an obligation *erga omnes* – it fell to the Court to determine whether Portugal enjoyed standing to initiate the proceedings. The Court in *East Timor* did not address Australia's argument that Portugal did not have 'a sufficient interest of its own to institute the proceedings' and thus lacked *locus standi*.[54] Instead, the decision turned on whether the Court could adjudicate the dispute without the participation of Indonesia, which had not consented to the exercise of the Court's jurisdiction but whose rights and obligations were, in Australia's view, at issue. While endorsing the *erga omnes* nature of the obligation to respect the right of self-determination,[55] the Court rejected Portugal's contention that its characterization as such meant that the indispensable third party rule, which called for Indonesia's participation, could be discarded.[56] As the Court explained, 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things'.[57] A different conclusion was reached by Judge Weeramantry, who dissented on the basis that 'the practical operation' of obligations *erga omnes* would be restricted by the requirement of consent such that the former would be 'substantially deprived of its effectiveness'.[58] The Court having affirmed the requirement of consent to jurisdiction, the decision lent no further clarity as to whether, conditional upon Indonesia's consent, the violation of an obligation *erga omnes* would confer a right of standing on Portugal or on any other state.[59]

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

[53]Ibid., at 626, paras. 4, 6.

[54]*East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 99, para. 20 (hereafter '*East Timor*').

[55]Ibid., at 102, para. 29.

[56]Ibid., at 105, para. 35.

[57]Ibid., at 102, para. 29.

[58]*East Timor*, *supra* note 54, at 172 (Judge Weeramantry, Dissenting Opinion) (hereafter 'Weeramantry Dissent'). See also *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 88, at 117–19 (Judge Weeramantry, Separate Opinion) (hereafter 'Weeramantry Separate Opinion').

[59]J. A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', (1994) 248 *Collected Courses of the Hague Academy of International Law* 350, at 429; Simma, *supra* note 6, at 297. But see Tams, *supra* note 2, at 184.

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

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

[62]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Memorial of Belgium of 1 July 2010, 79–80, paras. 5.14–5.18.

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

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

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

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

Judge Xue also rejected the majority's suggestion that the concept of obligations *erga omnes partes* was necessary in cases in which 'no State would be in the position to make ... a claim'.[70] For her, the non-adjudicatory accountability mechanisms specified in the Convention, including the role of the Committee against Torture, 'are designed exactly to serve the common interest of the States parties in the compliance with the obligations under the Convention'.[71] In the same vein, and relying once again on the text of the treaty, both dissenting judges claimed that since states parties could make reservations to exclude the jurisdiction of the ICJ in respect of their treaty obligations, there could be no generalized right of standing for each of them to invoke, in the collective interest, responsibility for the breach of those obligations.[72] That is, 'the parties do not form a single homogeneous group which assumes the same obligations and can claim the same rights'.[73] When it came to Senegal's obligations under customary international law, the opportunity to affirm *locus*

[63] *Obligation to Extradite*, *supra* note 60, at 449, para. 68. Judge *ad hoc* Sur questioned whether all the obligations arising under the Convention derive from the prohibition of torture, thereby rendering them obligations *erga omnes partes*. Ibid., at 613–15, paras. 27–30, 34 (Judge *ad hoc* Sur, Dissenting Opinion) (hereafter 'Sur Dissent'). See also ibid., at 575, para. 17 (Judge Xue, Dissenting Opinion) (hereafter 'Xue Dissent').

[64] Ibid., at 450, para. 69.

[65] Ibid., para. 70.

[66] Xue Dissent, *supra* note 63, at 574, para. 14.

[67] Sur Dissent, *supra* note 63, at 618, para. 44.

[68] Xue Dissent, *supra* note 63, at 574–5, paras. 15–16. Judge *ad hoc* Sur also questioned the Court's implicit reliance on the ARISWA. Sur Dissent, ibid., at 614–15, paras. 30–31.

[69] Xue Dissent, ibid., at 575, para. 17.

[70] *Obligation to Extradite*, *supra* note 60, at 450, para. 69.

[71] Xue Dissent, *supra* note 63, at 576, para. 19.

[72] Ibid., at 577, paras. 22–3; Sur Dissent, *supra* note 63, at 616–17, para. 39.

[73] Sur Dissent, ibid., at 616, para. 36.

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standi in respect of obligations *erga omnes* arising under customary international law was missed since the Court found that a dispute with Belgium did not exist in respect of those obligations.[74]

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

Another recent case of a state seeking to act in the collective interest was the Marshall Islands' institution of proceedings against a number of states in respect of their alleged violations of the integral obligation, arising variously under treaty law and customary international law, to negotiate a move towards nuclear non-proliferation. Contrary to the *Whaling* decision, the three decisions of 2016, issued on the basis of the optional clause declarations of the UK, India and Pakistan respectively,[81] endorsed the existence of a collective interest in nuclear non-proliferation but found, as Judge Oda had in *Bosnian Genocide*, the absence of a bilateral dispute between the parties necessary for the exercise of the Court's jurisdiction.[82] As such, the question of standing did not arise.[83] Each dissenting judge challenged what he considered to be the majority's excessively formalistic approach to a 'dispute'. In Judge Crawford's view, for example, the adjudication of a multilateral dispute of this kind, while 'ultimately be[ing] fitted within the bilateral mode of dispute settlement', does not require that the 'underlying relations' between the parties be 'bilateral

[74]*Obligation to Extradite*, *supra* note 60, at 444–5, para. 54. As noted by Judge *ad hoc* Sur, limited explanation was offered in support of the majority's view. Sur Dissent, ibid., at 610, para. 17.

[75]Judgment of 31 March 2014, [2014] ICJ Rep. 226 (hereafter '*Whaling*').

[76]*Whaling in the Antarctic (Australia v. Japan; New Zealand Intervening)*, Australia's Application Instituting Proceedings, 31 May 2010, para. 2. During oral proceedings, Australia clarified that it was seeking 'to uphold its collective interest, an interest it shares with all other parties'. Verbatim Record CR 2013/18, 9 July 2013, 28, para. 19.

[77]See *Whaling*, *supra* note 75, at 242–3, paras. 32–3.

[78]See ibid., at 251–2, paras. 56–8.

[79]P. Urs, 'Guest Post: Are States Injured by Whaling in the Antarctic?', *Opinio Juris*, 14 August 2014, available at opiniojuris.org/2014/08/14/guest-post-states-injured-whaling-antarctic/; M. Fitzmaurice, *Whaling and International Law* (2015), 109–10. This is also how Japan's Foreign Ministry understood the decision. Cf. Fitzmaurice, ibid., at 114.

[80]For an explanation of the dynamics of the case see C. J. Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment', in M. Fitzmaurice and D. Tamada (eds.), *Whaling in the Antarctic: The Significance and the Implications of the ICJ Judgment* (2016), 193, at 206–9. Australia's approach was 'unusual' since 'claimant States had usually opted for a different, "dualistic", approach that emphasised the right to vindicate general interests but also stressed the claimant State's special position'. Tams, ibid., at 204. See also T. Stephens, 'Law of the Sea Symposium: A Comment on Natalie Klein's Post', *Opinio Juris*, 27 May 2013, available at opiniojuris.org/2013/05/27/law-of-the-sea-symposium/; Crawford, *supra* note 3, at 373.

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

[82]*Marshall Islands*, ibid., at 854, paras. 20, 44–58.

[83]For the view that the Court might have been better off dismissing the cases for inadmissibility see V.-J. Proulx, 'The *Marshall Islands* Judgment and Multilateral Disputes at the World Court: Whither Access to International Justice?', (2017) 111 *AJIL Unbound* 96.

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ab initio'.[84] Judge Tomka added that the dispute would have in any event been rendered inadmissible due to the absence from the proceedings of other nuclear weapons states with which the UK, India and Pakistan were obliged to negotiate, suggesting ultimately that another forum was more appropriate.[85]

Most recently, The Gambia in its institution in 2019 of proceedings against Myanmar in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* did so explicitly on the basis of 'the *erga omnes* and *erga omnes partes* character of the obligations that are owed under the Genocide Convention'.[86] Accordingly, The Gambia sought

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

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

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

These decisions together provided the basis for the Court's provisional affirmation of The Gambia's standing in its order for provisional measures on the ground that 'any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party'.[92] Accordingly, the Court rejected Myanmar's counter-arguments. It had been Myanmar's contention that, although it had consented to the jurisdiction of the Court by its

[84] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, [2016] ICJ Rep. 1093, at 1102, para. 21 (Judge Crawford, Dissenting Opinion). See also F. Paddeu, 'Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory', (2017) 76(1) *Cambridge Law Journal* 1, at 2–3.

[85] This did not, however, make all nuclear weapons states indispensable third parties. *Supra* note 81, at 898, para. 38 (Judge Tomka, Separate Opinion).

[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, The Gambia's Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019, para. 15 (not yet published).

[87] Ibid.

[88] See, e.g., *Bosnian Genocide*, *supra* note 50, at 615, para. 31.

[89] *Barcelona Traction*, *supra* note 4, at 32, para. 34.

[90] *Obligation to Extradite*, *supra* note 60, at 449, para. 68.

[91] *Reservations*, *supra* note 1, at 23. See also ibid., at 51 (Judge Álvarez, Dissenting Opinion) (hereafter 'Álvarez Dissent').

[92] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, Order for Provisional Measures of 23 January 2020, para. 41 (not yet published) (hereafter '*Rohingya Genocide*').

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acceptance of the compromissory clause in Article IX of the Genocide Convention, it had made a reservation to exclude the application of Article VIII of the Convention, which in its view was the provision that actually permitted the Court to render a decision as an organ competent to take appropriate 'action'. Conferring a right of standing on The Gambia would thus vitiate the requirement of Myanmar's consent to what it considered ultimately to be the application of Article VIII.[93] The Court also rejected Myanmar's argument that *locus standi* was conferred only on specially affected states, such as Bangladesh, and that permitting the institution of proceedings by The Gambia 'would represent a major inroad into fundamental principles concerning the consensual nature of the Court's jurisdiction'.[94] If only specially affected states were entitled to standing before the Court, and it was only Bangladesh that was, in Myanmar's view, entitled to initiated the proceedings, the Court would have been unable to exercise its jurisdiction owing to Bangladesh's reservation to Article IX of the Convention, which effectively made the Court's jurisdiction conditional upon Myanmar's consent.[95] Judge Xue, consistently with her dissent in *Obligation to Extradite*, challenged the majority's reasoning on the question of standing. She sought once again to separate the collective interest of states parties under the treaty, on the one hand, and standing to institute proceedings before the Court, on the other. In her view:

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

On the question of enforcement, Judge Xue, like Judges Oda and Tomka had previously done, emphasized the existence of alternative mechanisms for addressing breaches of the Genocide Convention, including through the architecture of the UN.[97]

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

[93]Ibid., para. 35.

[94]Verbatim Record CR 2019/19, 11 December 2019, 53, para. 56 (hereafter 'Verbatim Record I').

[95]Ibid., at 53, paras. 55–6.

[96]*Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, Order for Provisional Measures of 23 January 2020, para. 6 (Judge Xue, Separate Opinion) (not yet published) (hereafter 'Xue Separate Opinion').

[97]Ibid., para. 7. See also M. Ruffert, 'Special Jurisdiction of the ICJ in the Case of Infringement of Fundamental Rules of the International Legal Order?', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006), 295, at 307.

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

Generally speaking, 'it is common for broad principles enunciated in early cases', such as the notion of obligations *erga omnes*, 'to be subject to narrowing and refinement by later courts'.[98] The ICJ has not yet had the opportunity to engage in such a process in depth, at least not in respect of the right of standing to invoke responsibility for the breach of obligations *erga omnes*. Even beyond the question of standing, the *Marshall Islands* cases illustrate the challenges involved in the adjudication of disputes bilaterally where obligations *erga omnes* are owed multilaterally.[99] In fact, the conferral by the Court of a generalized right of standing to enforce obligations in the collective interest raises a number of difficulties in its operation within the existing architecture of international law. Principal among these is the tension between the effectiveness of obligations *erga omnes*, which depends on the ability of non-injured states to invoke the responsibility of a breaching state, and the consent-based, bilateral system of inter-state dispute resolution that characterizes proceedings at the Court. With a view to identifying the practical limits of an otherwise wide right of standing to enforce obligations *erga omnes*, and to temper the expectations that are likely to be placed upon this category of obligations, the following discussion identifies some of the constraints that might qualify the wide right of standing which the Court has now undoubtedly recognized. First, it identifies the limits of the Court's own recognition of *locus standi* vis-à-vis obligations *erga omnes*. Secondly, it limits states' resort to the contentious jurisdiction of the Court based on the requirement of the breaching state's consent to jurisdiction. Thirdly, it considers the availability of *locus standi* for a state acting in the collective interest where an injured state may be able itself to institute proceedings. Finally, it considers the implications of this right of standing for states wishing to intervene in the proceedings. On this basis, and in anticipation of the Court's future treatment of these issues, the article offers tentative conclusions as to the scope of the right of standing to invoke responsibility for breaches of obligations *erga omnes*.

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

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

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

[98]Crawford, *supra* note 3, at 378.

[99]See Paddeu, *supra* note 84.

[100]Simma, *supra* note 6, at 295.

[101]Tams, *supra* note 2, at 102. This is indeed the better view. If obligations *erga omnes* did not give rise to a right of standing, the concept would be 'of rhetorical value only'. Tams, ibid., at 158. In support see C. Tomuschat, 'Obligations Arising for States Without or Against their Will', (1993) 241 *Collected Courses of the Hague Academy of International Law* 203, at 365; Frowein, *supra* note 59, at 427; Crawford, *supra* note 44, at 425. For a detailed discussion see Tams, ibid., at 162–80.

[102]De Castro Dissent, *supra* note 49, at 387. See also Brown Weiss, *supra* note 3, at 801.

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Any remaining doubt as to the connection between the recognition of obligations *erga omnes*, on the one hand, and *locus standi*, on the other, has been dispelled by the more recent jurisprudence of the Court in *Obligation to Extradite* and *Rohingya Genocide*.[103] The same position was effectively taken in the *Whaling* case,[104] with one commentator observing that the decision 'could be seen as a sequel to' the decision in *Obligation to Extradite*.[105]

Even so, the contribution of the Court's practice on the point is not unqualified. While *Barcelona Traction* identified obligations *erga omnes* as existing under both multilateral treaties and general international law, giving rise in principle to *locus standi* in respect of both treaty law and customary international law, the Court did not 'announc[e] a new rule as much as a category, a general idea, an alternative way of establishing legal relations in international law'.[106] Viewed in this light, the subsequent practice of the Court, which has so far recognized a right of standing in respect only of breaches of obligations *erga omnes partes* under multilateral treaties, cannot necessarily be taken to represent the endorsement of a broader right of standing also in respect of obligations *erga omnes* under customary international law.[107] While there is no qualitative distinction between obligations *erga omnes* and *erga omnes partes*, nor between states' interests in compliance with collective obligations under treaty law and customary international law respectively, the Court has simply not been required, in its decisions to date, to address the issue of standing by reference to customary international law. This has been the case even in disputes in which the Court acknowledged the existence of obligations *erga omnes* under customary international law, such as in *East Timor* and *Obligation to Extradite*.[108] To the extent that the Court might address the breach of obligations *erga omnes* arising under customary international law in the future, states' willingness to bring a dispute on this basis alone and the Court's willingness to confer *locus standi* might both be made more difficult by the absence of a textual hook – such as a jurisdiction clause or the object and purpose of a treaty – on which to hang such a right.[109]

3.2 The enduring requirement of consent to jurisdiction

The Court's conferral of *locus standi* to invoke the responsibility of a state in breach of an obligation *erga omnes* is conditioned upon the requirement of the breaching state's consent to the contentious jurisdiction of the Court, whether through the issuance of a declaration under Article 36(2) of the Statute, in accordance with a treaty's compromissory clause, or by special agreement. The satisfaction of this procedural requirement is usually regarded as a condition precedent in discussions of standing.[110] Accordingly, 'the *erga omnes* concept does not affect the consensual character of the Court's jurisdiction'.[111] Yet others seek to overcome what they perceive to be

[103]See Kawano, *supra* note 12, at 230; M. Andenas and T. Weatherall, 'International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012', (2013) 62 ICLQ 753, at 765–6.

[104]See *supra* note 79.

[105]Tams, *supra* note 80, at 210.

[106]Crawford, *supra* note 44, at 423.

[107]But see Andenas and Weatherall, *supra* note 103, at 764.

[108]See also J. Heieck, 'Rohingya Symposium: Judicial Intervention and the Duty to Prevent Genocide in the Rohingya Genocide Case – The Role of Obligatio Erga Omnes and Nouvelle Protection Diplomatique', *Opinio Juris*, 25 August 2020, available at opiniojuris.org/2020/08/25/rohingya-symposium-judicial-intervention-and-the-duty-to-prevent-genocide-in-the-rohingya-genocide-case-the-role-of-obligatio-erga-omnes-and-nouvelle-protection-diplomatique/.

[109]Indeed, it is more difficult to establish the content of an obligation *erga omnes* under customary international law. Kawano, *supra* note 12, at 215–16.

[110]See, e.g., Art. 3, Obligations *Erga Omnes* under International Law, Resolution of the Institut de Droit Internationale (2005); Tams, *supra* note 2, at 161–2; G. Gaja, 'The Protection of General Interests in the International Community', (2011) 364 *Collected Courses of the Hague Academy of International Law* 15, at 111–12; Kawano, *supra* note 12, at 219–20; S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law', (2010) 21 EJIL 387, at 414–15.

[111]Tams, *supra* note 2, at 159–60.

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a barrier to the effectiveness of obligations *erga omnes* by suggesting that the Court, in issuing its dictum in *Barcelona Traction*, 'could not [have] overlook[ed] the possible consequences of [obligations *erga omnes*] for the jurisdiction of the Court'.[112] Accordingly, in the words of Judge Weeramantry, the enforcement of obligations *erga omnes*, 'which transcend the individual rights and obligations of litigating States', requires that international law 'look[s] beyond procedural rules fashioned for purely *inter partes* litigation'.[113] This conflict between the effectiveness of obligations *erga omnes* and the requirement of consent to jurisdiction arises not only in the application of the indispensable third party rule, discussed in *East Timor*, but also in respect of a reservation purporting to exclude the application of a treaty's compromissory clause and the adjudication of the dispute in the collective interest absent the participation of an injured state.

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

A second, analogous manifestation of the conflict between the enforcement of obligations *erga omnes* and the requirement of consent to jurisdiction, pertaining specifically to multilateral treaties, is the issuance by states parties of reservations purporting to exclude the jurisdiction of the Court in respect of the obligations *erga omnes partes* arising thereunder. For its part, the Court has rejected the suggestion that a reservation to a treaty's compromissory clause is impermissible when it comes to the enforcement of obligations *erga omnes partes*.[119] As emphasized by Judge Xue in *Obligation to Extradite*, the blanket conferral of standing on states parties by virtue of their status as such is therefore ineffective to the extent that the breaching state party has excluded either the substantive obligation that is the subject of the dispute, precluding the

[112]Frowein, *supra* note 59, at 427.

[113]Weeramantry Separate Opinion, *supra* note 58, at 118. See also Weeramantry Dissent, *supra* note 58, at 172–3.

[114]*East Timor*, *supra* note 54, at 104–5, para. 34.

[115]Ibid. See also Ruffert, *supra* note 97, at 303–4.

[116]Simma, *supra* note 6, at 297.

[117]Weeramantry Dissent, *supra* note 58, at 173.

[118]See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, at 261, para. 55. See also Gaja, *supra* note 110, at 118. Neither does the indispensable third-party rule require the participation in the proceedings of all states to which the obligation is owed. Ibid., at 117–18.

[119]*Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, [2002] ICJ Rep. 219, at 245–6, paras. 71–2.

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possibility of a breach in the first place,[120] or the application of the compromissory clause conferring jurisdiction upon the Court.[121] In the same case, Judge *ad hoc* Sur explained that

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

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

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

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

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

[120]The permissibility of a reservation, if unspecified, depends on the reservation's compatibility with the object and purpose of the treaty. *Reservations*, *supra* note 1, at 24. As Simma explains, community interest in multilateral treaties 'manifests itself at two levels'. First, through 'adherence by as large a number of States as possible', notwithstanding that a state 'has relativized its consent to the substance of the treaty by way of reservations', and secondly, to maintain 'the integrity of at least the essence of the treaty obligations by stating the precondition of the compatibility of the reservations made with the object and purpose of the treaty'. Simma, *supra* note 6, at 340–2.

[121]Xue Separate Opinion, *supra* note 96, para. 6.

[122]Sur Dissent, *supra* note 63, at 616–17, para. 39.

[123]Xue Separate Opinion, *supra* note 96, para. 6.

[124]Álvarez Dissent, *supra* note 91, at 52–3. See also Simma, *supra* note 6, at 342–4; Crawford, *supra* note 2, para. 324.

[125]Simma, ibid., at 342.

[126]The answer depends on whether a reservation to a compromissory clause constitutes a minor and therefore permissible reservation. *Reservations*, *supra* note 1, at 24.

[127]Myanmar took the view that all its neighbouring states would be specially affected. It is unclear why this might be the case. See Verbatim Record I, *supra* note 94, at 53, para. 56; Verbatim Record, CR 2019/21, 12 December 2019, 14–15, paras. 15–17 (hereafter 'Verbatim Record II').

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

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

3.3 The indispensable injured state?

Myanmar's consent-based objection to the exercise of the Court's jurisdiction in *Rohingya Genocide*, while unconvincing, raises the related question of whether a state other than an injured state may institute proceedings before the Court where an arguably injured state may be able itself to do so.[130] The issue raises practical concerns about whether an injured state is best placed to represent the collective interest,[131] or if its proximity to the breach or the breaching state creates political risks that prevent it from acting effectively or at all.[132] In this respect, *Rohingya Genocide* is clearly distinguished from the Court's prior cases since *Barcelona Traction*, in which the states instituting the proceedings did so both in the collective interest and on the basis of injury, as in *East Timor* and *Obligation to Extradite*, or where there was simply no injured state to speak of, as in the *Whaling* case. Endorsing The Gambia's right to institute the proceedings in the collective interest, the Court rejected Myanmar's contention that it was only an allegedly injured state that had a right to do so. In this regard, the Court seems tentatively to have aligned itself with the ILC's progressive development of the law on the issue. While emphasizing the significance of Article 48 of the ARSIWA in situations in which there is no injured state to invoke responsibility, the Commission did not eventually limit the scope of the provision in this way. Instead, Article 48(2)(b) permits a state other than an injured state to claim reparation 'in the interest of the injured State or of the beneficiaries of the obligation'. In accordance with the ILC's approach, it was permissible, in the view of the Court, for The Gambia to bring the dispute without any assessment of whether there was in fact an injured state with more firm standing upon which to do so.

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

The consequences of the position effectively taken by the Court pertain first to the provision of remedies. On the one hand, compliance with certain obligations having been recognized to be in the collective interest, cessation of the breach and assurances and guarantees of non-repetition

[128]Verbatim Record I, ibid.

[129]Weeramantry Dissent, *supra* note 58, at 172. See also Simma, *supra* note 6, at 330–1.

[130]Verbatim Record II, *supra* note 127, at 15, para. 16 (Myanmar arguing that 'the right of non-injured States to invoke ... responsibility is subsidiary' to the right of an injured state to do so).

[131]Shelton, *supra* note 29, at 854.

[132]S. R. Singh, 'Standing on "Shared Values": The ICJ's Myanmar Decision and Its Implications for Atrocity Prevention', *Opinio Juris*, 29 January 2020, available at opiniojuris.org/2020/01/29/standing-on-shared-values-the-icjs-myanmar-decision-and-its-implications-for-atrocity-prevention/.

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may no longer be regarded as remedies that are available exclusively to the injured state.[133] On the other hand, where reparation is specifically sought in the interest of the injured state (within the meaning of Article 48(2)(b)), the participation in some form of the injured state proves necessary.[134] Were these remedies to be conferred without the participation in the proceedings of the injured state, the indispensable third party rule might be rendered inapplicable to the extent that the provision of remedies for the breach of an obligation *erga omnes* may be said to constitute the subject-matter of the dispute. Where, however, the state instituting the proceedings does not purport to act in the interest of an injured state (as with The Gambia), further clarification is warranted as to the preclusive effects of the Court's decision, that is, the application or not of the principle of *res judicata* to subsequent claims by the injured state or other states,[135] in particular where the remedies awarded by the Court go beyond cessation and assurances and guarantees of non-repetition.[136] For its part, the ILC did not overlook that the entitlement of a state acting under Article 48 of the ARSIWA 'will coincide with that of an injured State in relation to the same internationally wrongful act', but did not conclusively address the issue.[137] Presumably, the question is one of claim preclusion and not the stricter test of identity – including the identity of the parties – usually required for the operation of *res judicata* in international law. In accordance with the view expressed by Judge Weeramantry and seemingly adopted also by the majority in *Rohingya Genocide*, if *erga omnes* rights operate *erga singulum* then so does the principle of *res judicata*, suggesting that the principle will only apply to the same parties, that is, with conclusive but not preclusive effects.[138]

Secondly, although not relevant to the proceedings in *Rohingya Genocide*, complications may also arise from the injured state's loss of the right to invoke responsibility due to its waiver or acquiescence in the lapse of the claim,[139] warranting clarification as to whether other states acting in the collective interest preserve the right, *erga singulum*, to invoke responsibility for the breach.[140] The primary justification to date for the Court's conferral of a right of standing being to fill a gap in enforcement,[141] a proposal that itself remains contentious, further discussion of the consequences of its permissive approach to the institution of proceedings in the collective interest – even where an injured state may be able itself to do so – is necessary.

[133]Shelton, *supra* note 29, at 839–40.

[134]The ILC anticipated that a state other than an injured state seeking reparation for a breach 'may be called on to establish that it is acting in the interest of the injured party', which, if a state, will be able to represent its own interests. Commentary, *supra* note 8, at 127.

[135]See Arts. 59–60, ICJ Statute.

[136]Discussion of the remedies that may be awarded to a state other than an injured state is limited. To date, the Court has not purported to limit itself to the remedies specified in Art. 48(2) ARSIWA, imposing, for example, a reporting requirement on Myanmar as a provisional measure in *Rohingya Genocide.* For the view that the Court also went beyond the remedies sought by Australia in the *Whaling* decision see Tams, *supra* note 80, at 209.

[137]Commentary, *supra* note 8, at 126.

[138]See Weeramantry Dissent, *supra* note 58, at 172–3. For an overview of the ICJ's approach to *res judicata* see N. Ridi, 'Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf* Case', (2018) 31 LJIL 383.

[139]See Art. 45, ARSIWA.

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

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

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3.4 Third state intervention

At the time of writing, The Maldives, Canada, and The Netherlands have expressed an intention to intervene in the proceedings in *Rohingya Genocide*.[142] Were these or other states to intervene as states parties to a treaty whose construction is at issue, the question of their participation is straightforward: Article 63(2) of the Statute confers upon all states parties a right to intervene in the proceedings on the condition that the construction given by the Court to the treaty 'will be equally binding upon [them]'.[143] Alternatively, under Article 62(1) of the Statute, a state may request permission to intervene on the ground that it has 'an interest of a legal nature which may be affected by the decision'. In this latter context, the question arises whether the Court's conferral of *locus standi* on states other than an injured state to institute proceedings for the enforcement of an obligation *erga omnes* logically requires that it permit, on the same basis, the intervention in the proceedings of all other states having a legal interest in the matter. Put differently, where the breach of an obligation *erga omnes* is at issue, there appears to be no distinction between the interest of the state instituting the proceedings and the interests of states seeking to intervene under Article 62(1).[144] As such, the intervention in the proceedings of all states to which the obligation *erga omnes* is owed must be permitted, since '[w]hatever "interest of a legal nature" is required in Article 62 of the Statute, it cannot be higher than the one that justifies bringing a claim before the Court'.[145] This permissive approach to intervention under Article 62 has the advantage of discouraging a multiplicity of proceedings pertaining to the same breach. In light of an anticipated increase in what has so far been a limited interest in intervention, however, considerations of judicial economy[146] may warrant the revision of the Court's existing procedures for intervention under the Statute.[147]

3.5 Broader considerations

In addition to the issues discussed, the conferral by the Court of *locus standi* to institute proceedings for the enforcement of obligations *erga omnes* poses the broader question as to how to strike '[the] appropriate balance between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes'.[148] Those who are reluctant to confer a right of standing for the enforcement of obligations *erga omnes* are concerned not only about an increase in inter-state adjudication but also the corresponding use and misuse of unilateral countermeasures, ostensibly in the collective interest.[149] It is also sometimes suggested, including by some judges at the Court, that non-adjudicatory means of dispute resolution are preferable.[150] Conversely, the sufficiency of non-adjudicatory

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

[143]There is no comparable right to intervene in respect of general international law. G. Gaja, 'A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice', in U. Fastenrath et. al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011), 665, at 672.

[144]Kawano, *supra* note 12, at 236.

[145]Gaja, *supra* note 110, at 119. Cf. B. McGarry, 'Third-State Intervention in the Rohingya Genocide Case: How, When, and Why? [Part I]', *Opinio Juris*, 11 September 2020, available at opiniojuris.org/2020/09/11/third-state-intervention-in-the-rohingya-genocide-case-how-when-and-why-part-i/.

[146]McGarry, ibid.

[147]See Gaja, *supra* note 110, at 120–2. There is an interesting comparison to be made between the intervention in contentious cases of potentially all states to which the obligation *erga omnes* is owed and the Court's advisory proceedings in which collective interests are also addressed and in which all states are entitled to participate.

[148]Crawford, *supra* note 3, at 553.

[149]Verbatim Record I, *supra* note 94, at 54, para. 57; Weil, *supra* note 5, at 433; Brown Weiss, *supra* note 3, at 805.

[150]Proulx, *supra* note 83, at 101.

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measures to strike this balance, including within the framework of the UN, remains contested, and ignores the important contribution of the ICJ in the settlement of international disputes.[151] When it comes to countermeasures, moreover, there is considerable support for the view that the availability of adjudication is likely to reduce resort to countermeasures,[152] with one commentator suggesting that the risk of litigation incentivizes greater compliance with obligations *erga omnes ab initio*.[153]

On balance, the anticipated increase in the adjudication of disputes as a justification to limit standing for the enforcement of obligations *erga omnes* is overstated. To begin with, many multilateral treaties explicitly provide for a right of standing in the collective interest.[154] The practical effects of the conferral by the Court of a generalized right of standing to institute proceedings for the enforcement of obligations *erga omnes* is thus limited to 'a narrowly defined circle of community interests'.[155] What is more, a state's decision whether to bring a dispute before the ICJ is a pragmatic one in which 'the odds are weighted against a decision in favour of litigation',[156] and which may be co-ordinated among states,[157] as in *Rohingya Genocide*. As one commentator observes, therefore, what is likely to be a relatively limited increase in adjudication before the Court may be a reasonable compromise for the enforcement of collective interests:

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

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

4. Conclusion

Since its once divisive dictum in *Barcelona Traction*, the Court has recognized that the category of obligations *erga omnes* it identified in that decision confers on states to whom the obligation is owed a corresponding right to invoke the responsibility of the state in breach. While in several of its decisions, such as *East Timor*, the Court refrained from expressly conferring a right of standing for the enforcement of collective interests, it did so unequivocally in *Obligation to Extradite* and most recently in its order for provisional measures in *Rohingya Genocide*. The same position has arguably been taken in *Whaling*. The Court cannot thus walk back the connection it has now clearly endorsed between the status of a primary obligation as *erga omnes* and the right of standing to institute proceedings for its enforcement. At the same time, the Court has not addressed the contours of what is on its face a wide right of standing, provoking the assessment in this article of

[151]Crawford, *supra* note 2, para. 341.

[152]Tams, *supra* note 2, at 24; Frowein, *supra* note 59, at 427. For the view that states are anyway unlikely to resort to countermeasures for the enforcement of obligations *erga omnes* see Tomuschat, *supra* note 101, at 367.

[153]Singh, *supra* note 132.

[154]See *supra* note 3.

[155]Tams and Tzanakopoulos, *supra* note 4, at 792.

[156]Scott, *supra* note 8, at 29. See also M. A. Becker, 'The Situation of the Rohingya: Is There a Role for the International Court of Justice?', *EJIL: Talk!*, 14 November 2018, available at www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/.

[157]P. Picone, 'The Distinction between Jus Cogens and Obligations Erga Omnes', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 411, at 423–4.

[158]Brown Weiss, *supra* note 3, at 805. See also Tomuschat, *supra* note 101, at 367; Crawford, *supra* note 2, para. 341.

[159]Paddeu, *supra* note 84, at 4.

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the limits of *locus standi* for the enforcement, and ultimately the effectiveness, of obligations *erga omnes*. What appears to be a blanket conferral of standing to bring disputes in the collective interest is somewhat more limited than the Court's statements in *Barcelona Traction*, *Obligation to Extradite* and *Rohingya Genocide* suggest. First, barring the dictum in *Barcelona Traction*, none of the Court's decisions to date confer a right of standing to enforce obligations *erga omnes* under customary international law, since proceedings were initiated pursuant to the compromissory clause of a multilateral treaty or dismissed owing to the lack of a dispute, or perhaps even because the Court sought to limit the invocation of obligations *erga omnes* by invoking the *erga omnes partes* nature of the obligation at issue. The second limitation is the enduring requirement of consent to jurisdiction, manifested in various ways, all effectively excluding *locus standi* in the absence of the breaching state's consent. Where an injured state may be able itself to institute proceedings, a third set of constraints is likely to emerge from the partial if not total intersection of its interest with the legal interests of a non-injured state seeking to institute proceedings. The participation in the proceedings of a state with a legal interest in the dispute, which would arguably include all the states to which an obligation *erga omnes* is owed, will also require clarification and perhaps attendant revision. In the final analysis, the effectiveness of obligations *erga omnes* is tempered in practice by the constraints inherent in the existing architecture of international law, which remains primarily a forum for the adjudication of bilateral disputes.[160] Taken together, these considerations reflect a collective call for clarity as to the interaction between the right of standing vis-à-vis obligations *erga omnes* and the existing bilateralist international legal order, including the *inter partes* nature of the Court's contentious jurisdiction. A discussion of the limits and consequences of *locus standi* for the enforcement of obligations *erga omnes* also serves the vital function of communication to states which, uneasy about the Court's extended reach when it comes to the enforcement of collective interests, might otherwise withdraw their consent to the adjudication of disputes which they perceive as involving their breaches of obligations *erga omnes*.

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

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