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ON 'OBLIGATIONS ERGA OMNES PARTES' IN PUBLIC INTERNATIONAL LAW: 'ERGA OMNES' OR 'ERGA PARTES'?

A COMMENTARY ON THE JUDGMENT OF 20 JULY 2012 OF THE INTERNATIONAL COURT OF JUSTICE IN THE QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE (BELGIUM V. SENEGAL) CASE

Sobre 'obligaciones erga omnes partes' en derecho internacional público: 'erga omnes' o 'erga partes'?

Un comentario de la Sentencia de 20 de julio de 2012 de la Corte Internacional de Justicia en el caso Cuestiones Relativas a la Obligación de Procesar o Extraditar (Bélgica v. Senegal)

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ABSTRACT: The International Court of Justice, in its 2012 judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, found that Belgium had *ius standi* to claim Senegal's responsibility for the alleged breach of its obligations under Articles 6(2) and 7(1) of the Convention Against Torture and that such claims were admissible. Also, it concluded that it was not necessary to determine whether Belgium was 'specially affected' or 'injured'. The Court based these findings on the concept of 'obligations *erga omnes partes*', which it defined as obligations in the compliance of which states have an 'interest', which, in the case of the above provisions is a 'common interest'. Several members of the Court rejected the above findings as inconsistent with the law of international responsibility, and state practice and, for other reasons, ill-grounded. The present paper assesses the Court's definition and use of the concept of 'obligations *erga omnes partes*' in light of public international law. It also analyses the views expressed by other judges sitting on the Bench for the case. The present paper's main contentions are three. First, the characterisation of obligations in the performance of which all the states parties to a treaty have an 'interest' -arguably a 'common' one- as 'obligations *erga omnes partes*' is unnecessary. Secondly, such obligations, as defined, by the Court, remain merely '*erga partes*', binding on the parties to the treaty constituting their source *qua* parties to the treaty and subject, as any other conventional obligation, to the rule *res inter alios acta* and to the rules on reservations, which may prevent an 'obligation *erga omnes partes*' from becoming binding on states that have made a reservation to the provision setting out the terms of the obligation and on those accepting such reservations. In this connection, it is demonstrated that 'obligations *erga omnes partes*' are only of significance if they are 'obligations *erga omnes*' proper, primarily in the form of customary obligations under general rules customary international law, binding on the parties to the treaty *qua* custom and regardless of any reservation, in addition to being binding on non-parties to the respective treaty to which the customary rule is opposable. Thirdly, the legal consequences of the use of the concept give further indication of the redundancy of the concept.

RESUMEN: La Corte Internacional de Justicia, en su sentencia de 2010 en el caso *Cuestiones Relativas a la Obligación de Procesar o Extraditar (Bélgica v. Senegal)*, concluyó que Bélgica tenía legitimación procesal para pretender la responsabilidad de Senegal por la presunta violación de sus obligaciones conforme a los Artículos

6(2) y 7(1) de la Convención contra la Tortura y que tales pretensiones eran admisibles. Igualmente, concluyó que no era necesario que Bélgica fuera 'especialmente afectada' o 'lesionada'. La Corte basó sus conclusiones en el concepto de 'obligaciones *erga omnes partes*', que definió como obligaciones en el cumplimiento de las cuales los estados tienen un 'interés', que, en el caso de las citadas disposiciones, es un 'interés común'. Varios miembros de la Corte rechazaron las citadas conclusiones dada su inconsistencia con el derecho de la responsabilidad internacional y la práctica estatal y, por otras razones, infundadas. El presente artículo evalúa la definición de la Corte y su uso del concepto de 'obligaciones *erga omnes partes*' a la luz del derecho internacional público. Igualmente, analiza las opiniones manifestadas por otros jueces que participaron en la decisión del caso. Tres son los principales argumentos del presente artículo. En primer lugar, la caracterización de obligaciones en el cumplimiento de las cuales todos los estados partes tienen un interés –presuntamente uno 'común'– como 'obligaciones *erga omnes partes*' es innecesaria. En segundo lugar, tales obligaciones, conforme a la definición de la Corte, son meramente '*erga partes*', obligatorias para las partes del tratado que constituye su fuente en tanto partes al tratado y conforme, como es el caso de cualquier obligación convencional, con la regla *res inter alios acta* y las reglas sobre reservas, que pueden impedir que una obligación '*erga omnes partes*' devenga vinculante respecto de Estados que han hecho una reserva en relación con la disposición que establece los términos de la obligación al igual que respecto de los que aceptan la reserva. En este sentido, se demuestra que las 'obligaciones *erga omnes partes*' sólo tienen importancia si son 'obligaciones *erga omnes*' en sentido estricto, particularmente obligaciones consuetudinarias conforme a reglas generales consuetudinarias de derecho internacional, obligatorias para las partes del tratado en tanto costumbre y sin perjuicio de cualquier reserva, además de ser vinculantes respecto de terceros Estados, a los cuales les es oponible la regla consuetudinaria. Finalmente, las consecuencias del uso del concepto proveen más indicios de la redundancia del mismo.

INTRODUCTION

This paper studies the nature of so-called 'obligations *erga omnes partes*' in public international law, with a particular focus on issues arising out of or in connection with claims brought before international courts on the basis

of alleged breaches of such obligations. In this connection, it comments on the propositions made in this regard by the International Court of Justice in its Judgment of 20 July 2012 in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case as well as on the stances taken by several judges sitting on the Bench for this case, as set out in their declarations and separate or dissenting opinions.

In the above judgment, the Court found, in essence, that: (a) a party to a treaty creating obligations in the compliance of which all the parties to the treaty have a 'common interest', which are characterised as 'obligations *erga omnes partes*', has standing for the purposes of bringing claims arising out of the breach of such obligations, including, most prominently, an entitlement to invoke international responsibility; and (b) such claims are admissible, even in the absence of a special interest on the part of the party bringing the claim, which the Court needs not determine.

The main contentions of the present paper may be summarised as follows:

First, it is not necessary to characterise obligations in the performance of which all the parties to a treaty allegedly have a 'common interest' as 'obligations *erga omnes partes*'. The main reason for this proposition is that conventional obligations, in principle, are not 'obligations *erga omnes*' proper.

On the one hand, 'obligations *erga omnes partes*' are merely 'obligations *erga partes*', binding on the parties to the treaty constituting their source *qua* parties to the treaty and subject, as any other conventional obligation, to the rule *res inter alios acta* and to the rules on reservations, which may prevent an 'obligation *erga omnes partes*' from becoming binding on states that have made a reservation to the provision setting out the terms of the obligation and on those accepting such reservations.

On the other hand, so-called 'obligations *erga omnes partes*' are only of significance if they are 'obligations *erga omnes*' proper, primarily in the form of customary obligations, if the source of such customary obligations is a general custom, binding on the parties to the treaty *qua* custom, independently of the treaty and the reservations they may have made, as well as on non-parties to the treaty to which the customary rule is opposable. In this latter sense, 'obligations *erga omnes partes*' are '*erga omnes*' regardless of their binding effect '*erga partes*'.

Secondly, the characterisation of an obligation as 'obligation erga omnes partes' is not necessary for the purposes of determining (a) whether a party to a treaty bringing a claim on the basis of the breach of such obligations has

ius standi and (b) whether such claims are admissible. The legal basis for *ius standi* and admissibility of claims is the existence of a legal interest under the treaty.

Thirdly, and in addition to the fact that such characterisation is not necessary for the above purposes, the legal consequences of such characterisation provide further evidence of the redundancy of the concept.

The present paper is divided into four parts. The present part, Part I, provides an introduction. Part II primarily analyses the propositions made by the Court, particularly those setting out the concept of 'obligations *erga omnes partes*' and the legal consequences of this characterisation as to the claimant's *ius standi* and the admissibility of the respective claims. Part III assesses the Court's propositions in relation to these matters. Part IV concludes.

The scope of the present analysis and assessment of the Court's position, particularly in Parts II and III, excludes, in principle, the Court's considerations in relation to the merits of the dispute or other issues in connection with the Court's findings as to jurisdiction and admissibility in the specific case. The above analysis is confined to considering the Court's use and definition of the concept of 'obligation *erga omnes partes*' and references to other propositions or arguments is made only tangentially, if at all. Also, the present analysis is not fully reviewing the vast literature in which the notion has been used, as this task cannot be appropriately carried out here, given the paucity of space, and given that the present paper is concerned mainly with the use of the Court of the above concept, not that made by commentators in other instances and in relation to other areas.[1]

II. 'OBLIGATIONS *ERGA OMNES PARTES*' AND THE *QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE (BELGIUM V. SENEGAL)* CASE

This part of the paper summarises the Court's propositions made in connection with 'obligations *erga omnes partes*' as well as the positions of several

[1] The views of some commentators, and, in particular, the use of the concept in the ILC Commentaries to the ILC Articles on Responsibility of States for Internationally Wrongful Acts are briefly reviewed in the section on the nature of 'obligations *erga omnes parte*' as defined by the Court in the case at hand.

judges sitting on the Bench for the above case, as set forth in their dissenting or separate opinions.

1. The Court's propositions as to the concept and legal consequences of 'obligations erga omnes partes' in its Judgment of 20 July 2012

In its 2012 Judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, the Court unanimously found that it had "*jurisdiction to entertain concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984*".[2]

The Court considered the question of whether the position of party to the Convention is a sufficient condition for the existence of *ius standi* to bring claims "*concerning the cessation of alleged violations by another State party of its obligations under that instrument*".[3]

Thus, the Court found that "*standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings*".[4]

Hence, the Court found that "*the claims of Belgium based on these provisions are admissible*".[5] Furthermore, the Court found that "*there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal's compliance with the relevant provisions of the Convention*".[6]

In this connection, the Court made the following propositions: a) The parties to the Convention have a 'common interest to ensure, in view of they shared values' the prevention of acts torture and the prosecution of responsible of such acts[7]; b) That common interest implies that the obligations in

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2 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012) para. 122(1).

3 *Ídem.,* para. 67.

4 *Ídem.,* para. 70.

5 *Ibídem.*

6 *Ibídem.*

7 *Ídem.,* para. 68.

question are owed by any State party to all the other States parties to the Convention[8]; c) That common interest' is a "… legal interest" in the protection of the rights involved"[9] In support of this proposition, the Court cites its Judgment in the *Barcelona Traction* case[10]; d) These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case.[11] This proposition is illustrated by the Court by a reference to the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.

In this connection, the Court further pointed out, through a citation of its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, that the parties to the above category of treaty have a 'common interest', namely, an interest which is not 'of their own', but an interest in "*the accomplishment of those high purposes which are the raison d'être of the Convention*".[12]

(a) The parties' 'common interest' "*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*".[13] In this connection, the Court puts forward that, were the parties required to have a 'special interest', "in many cases no State would be in the position to make such a claim."[14] Thence the Court's finding to the effect that it need not establish the existence of a 'special interest' on the part of the claimant.

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8 *Ibídem.*

9 *Ibídem.*

10 *Ibídem,* stating: "*All the States parties "have a legal interest" in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33)*".

11 *Ibídem.*

12 *Ibídem,* citing ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, Reports 1951, p. 23.

13 *Ibídem,* stating: "*The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party*".

14 *Ídem.,* para. 69, stating: "*If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim*".

(b) The parties to the Convention, thus, "*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*".[15]

2. The position of several judges sitting on the Bench for the case in relation to the concept and legal consequences of 'obligations erga omnes partes

This section analyses the stances taken by judges sitting on the Bench for the case in relation to the main question analysed in this paper, as set out in their respective dissenting and separate opinions and declarations.

A) Declaration of Judge Owada

Judge Owada, in his declaration attached to the Court's judgment, clarifies that his vote in favour of the finding in Subparagraph (3), Operative Paragraph 122, of the Court's judgment was made on the basis that, in his view, "*Belgium's entitlement to this standing derives from its status as a State party to the Convention, and nothing else*".[16] Three aspects of his considerations are of relevance to the present paper.

First, in his opinion, there is a "*divergence of views on the methodology*" as to "how the Court should appreciate the nature of the present dispute and define its subject-matter", which has a particular impact on the manner in which it addressed issues of jurisdiction and admissibility.[17]

In particular, as to admissibility, in his view, there was a 'difference of views' between the parties to the case as to the claimant's standing to being the claim, which consisted of two elements, namely the status of Belgium as a party to the Convention and its special interest, which would give it *ius standi* in the present case.[18]

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15 *Ibídem*, stating: "*It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end*".

16 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Declaration of Judge Owada*, para. 15.

17 *Ídem.*, para. 1.

18 *Ídem.*, para. 16, directly quoting para. 66 of the Judgment.

The Court, in his view, did not address this element of the difference of views between the parties, which "*admittedly relates to an issue that belongs to the merits of the case*", and which, in his view, was "*a more contentious claim*"[19]. as it focused only on one of the elements of the difference, namely, the status of Belgium as a party to the Convention.[20]

Secondly, the Court's approach, in his opinion, "*will inevitably have its legal consequences upon the scope of the subject-matter of the dispute that is admissible before the Court and upon the nature and the scope of the claims on which Belgium can seise the Court in this dispute*".[21] Particularly, it would entail that Belgium "*is in a legal position neither to claim the extradition of Mr. Habré … nor to demand an immediate notification*" pursuant to Articles 5(2) and 6(4) of the Convention, respectively, but merely to "*insist on compliance*", "*like any other State party to the same Convention*".[22]

Lastly, Judge Owada does not seem to fully agree on the Court's proposition that the Convention creates obligations *erga omnes partes*, as he considers that the Convention would only 'allegedly' do so.[23] On this point, which he considers to be an "arguably controversial basis for entitlement of a State party to the Convention", he apparently concurs with Judge Skotnikov's views, indicating that the issue as to its plausibility is not directly addressed in his considerations.[24]

B) Separate opinion of Judge Skotnikov

Judge Skotnikov considered that the Court "*erred as to the grounds on which*" it made its finding of admissibility of Belgium's claims pursuant to Articles 6(2) and 7(1) of the Convention.[25] Indeed, he concludes, for the reasons commented on below in further detail, that the Court's finding does not "*seem to be founded in law, be it conventional or customary*".[26] In particular, he put forward the following propositions.

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19 *Ídem.*, para. 18.

20 *Ídem.*, para. 17.

21 *Ídem.*, para. 21.

22 *Ídem.*, para. 22.

23 *Ídem.*, para. 19.

24 *Ídem.*, para. 21.

25 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Declaration of Judge Skotnikov*, para. 1.

26 *Ídem.*, para. 22.

First, "*Belgium did not seise this Court simply as a State party to the Convention*".[27] Accordingly, the Court, in his view, failed to fulfil its "*duty under its Statute to settle disputes*", "*by reducing" Belgium's "status in the present proceedings to that of any State party to the Convention*".[28]

Secondly, the Court's finding that Belgium has *ius standi* to invoke Senegal's responsibility for the alleged breach of the obligations set out in Articles 6(2) and 7(1) of the Convention is, in his view, a finding which "*is not properly explained, nor is it justified*".[29]

In this connection, he enquires whether the parties' 'common interest' amounts to "*a right of any State party to invoke the responsibility of any other State party before this Court, under the Convention against Torture, for an alleged breach of obligations erga omnes partes*".[30]

The implication of such a right in the parties' 'common interest' was not explained by the Court, in his view.[31]

Also, he posits that the Court's finding is not sufficiently demonstrated, as it is not based on interpretation of the Convention, but merely relies only on a citation of the Convention's Preamble and the characterization of it "*as being similar to the Genocide Convention*".[32]

In particular, he considers that the Court's equation of a 'common interest' to the above 'procedural right' would require, in order to be proved, to address the following issues, which the Court failed to address: (a) The question of "*how such treaties could simultaneously envisage the right of a State party to make reservations to its jurisdiction*"[33]; (b) The existence of

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27 *Ídem.*, para. 5.

28 *Ídem.*, para. 9.

29 *Ídem.*, para. 10.

30 *Ídem.*, para. 12.

31 *Ídem.*, para. 18, stating: "*By contrast, in the view of the Court, an entitlement of each State party to the Convention against Torture to make a claim concerning the existence of an alleged breach by another State party is implied in the common interest of the States parties' compliance with the relevant obligations under the Convention against Torture (see Judgment, paragraph 69). No explanation is offered in support of this statement*".

32 *Ídem.*, para. 13.

33 *Ídem.*, para. 14.

"*opt-out or opt-in clauses*"[34] in relation to the Court's jurisdiction and the Committee against Torture's competence, which remains optional[35]; (c) The inexistence of an express grant of a right to invoke responsibility, as illustrated by the European Convention on Human Rights, which expressly provides for such a right in Article 33 and "*[i]nterestingly, and most logically*" does not allow for reservations to the European Court of Human Rights' jurisdiction.[36]

In this connection, he further stated that the Court had failed: (1) To demonstrate "*in respect of the same –and rather important– entitlement*", how the inexistence of an express provision can lead to the same results as those under a treaty which includes such a provision[37] and whether the inclusion or exclusion by the drafters of such a provision is of no consequence[38]; (2) To take into account the ILC Articles on State Responsibility, "*which do not support the Court's position*", particularly in light of the commentaries to Article 48 thereof, according to which the entitlement to invoke responsibility granted to 'any state party' to a treaty is only predicated of treaties expressly allowing for it, "*without in any way implying that such an entitlement is allowed in treaties which do not contain a specific provision to that effect*". Indeed, the ILC's commentaries, in his opinion, are not ambiguous, as it expressly pointed out that states ought to have a specific 'right of action conferred by a treaty' or be 'considered an injured state' in order to be able to invoke responsibility[39]; (3) To cite any relevant precedent or mention facts indicating the inexistence of state practice providing authority for the Court's ´propositions.[40]

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34 *Ídem.*, para. 16, stating: "*If the logic adopted by the Court were correct, no such opt-out or opt-in clauses would have been allowed in the Convention. The simple truth is that the Convention does not go as far as the Court suggests*".

35 *Ídem.*, para. 15, stating: "*Furthermore, under the Convention against Torture, any State party has the right to shield itself not only from accountability before the Court but also from the scrutiny of the Committee against Torture. This scrutiny is based on the erga omnes partes principle but, tellingly, remains optional*".

36 *Ídem.*, para. 17.

37 *Ídem.*, para. 19, stating: "*Accordingly, it does not offer its view as to how that which is expressly provided for in one treaty could simply be implied in another, in respect of the same –and rather important– entitlement*".

38 *Ídem.*, further stating: "*If one accepts the logic of the Judgment, it would make no difference whether such an express provision were included in or excluded from a treaty by its drafters. This cannot be right*".

39 *Ídem.*, para. 21 (emphasis added not reproduced).

40 *Ídem.*, para. 20.

C) Separate opinion of Judge Cançado Trindade

Judge Cançado Trindade expresses the view that obligations *erga omnes partes* "*ensue*" from "*the absolute prohibition of torture, belonging to the domain of jus cogens*", set out in the Convention.[41] This, in his view, is acknowledged by the parties to the dispute.[42]

Furthermore, he characterizes the obligations under the Convention as obligations of result, as opposed to "*simple obligations of means or conduct*", given that "*we are here in the domain of peremptory norms of international law, of jus cogens, generating obligations erga omnes partes under the Convention against Torture*".[43]

Lastly, it is interesting to point out that Judge Cançado Trindade has used the concept 'obligation *erga omnes partes*' to refer to obligations which he had characterised as being '*erga omnes*' in separate opinions in his previous capacity as Judge of the Inter-American Court of Human Rights.[44]

D) Dissenting opinion of Judge Xue

Judge Xue expresses her disagreement with the Court's findings "*on a number of important issues*".[45]

In her opinion, the Court, by basing "*its reasoning on the notion obligations erga omnes partes*", failed to address the question[46] of "*whether Senegal owes an obligation to Belgium to extradite*".[47]

The existence of this obligation, in her view, "*first and foremost, depends on whether Belgium has entitlement to exercise jurisdiction in accordance*

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41 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012), *Separate Opinion of Judge Cançado Trindade*, paras. 104 and 175.

42 *Ídem.*, para. 104.

43 *Ídem.*, para. 175.

44 See, for instance, Inter-American Court of Human Rights, *Mapiripán Massacre vs. Colombia* (2005, Serie C n° 134)*, Separate Opinion of Judge A.A. Cançado Trindade*, para. 17.

45 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012), *Dissenting Opinion of Judge Xue*, para. 1.

46 *Ídem.*, para. 12.

47 *Ídem.*, para. 11.

with Article 5 of the Convention", which the Court should have had interpreted in order to properly address "this crucial issue presented by Senegal in the judgment".[48]

She pointed out that the Court's findings, based on this 'notion', that Belgium has standing to invoke Senegal's responsibility and that the former's claims are admissible, are "*abrupt and unpersuasive*".[49] In this connection, she further affirms that this "*entitlement to monitor the implementation of any State party on the basis of [sic] erga omnes partes, certainly goes beyond the legal framework of the Convention*".[50]

First, the 'notion' of 'obligation *erga omnes partes*', which is based on what she characterises as an *obiter dictum* taken from the Court's judgment in the *Barcelona Traction* case[51], "*goes far beyond treaty interpretation, deviating from the established jurisprudence of the Court*".[52]

In relation to the Court's use of the above *dictum*, she expresses the view that the Court 'misused' it "in several aspects", as in the above *dictum*, namely: (a) The Court only drew "*the distinction between obligations owed to the international community as a whole and those arising vis-à-vis another State*"; (b) the Court did not address "*the question of standing in respect of obligations erga omnes*", having confined itself to set out "*the conditions for the breach of obligations in bilateral relations*"; (c) The Court only considered "*substantive law rather than procedural rules*"; (d) The Court gave "*no indication to change the state of the law in the sense that there is no general standing resident with each and every State to bring a case in the Court for the vindication of a communal interest*".[53]

As for other instances of references by the Court to 'obligations *erga omnes*', Judge Xue considers that in none of them has the Court "*pronounced that the existence of a common interest alone would give a State entitlement to bring a claim in the Court*".[54]

48 *Ídem.*, para. 12.

49 *Ídem.*, para. 14.

50 *Ídem.*, para. 39.

51 *Ídem.*, para. 13.

52 *Ídem.*, para. 12.

53 *Ídem.*, para. 15.

54 *Ídem.*, para. 16.

Secondly, the Court's finding as to obligations *erga omnes partes* is inconsistent, particularly in light of the law of state responsibility, for the following reasons:[55] (a) The obligations to prosecute or extradite set out in the Convention "*are treaty rules, subject to the terms of the Convention*", without prejudice to the fact that the prohibition of torture "*has become part of jus cogens in international law*"[56] ; (b) The parties' 'common interest' in the "observance, by virtue of treaty law, of the above rules is without prejudice to "*the mere fact that a State is a party to the Convention*", as, *"[u]nder international law", "an interest in the compliance with" an obligation is different from the "standing to bring a claim against another State for the breach of such obligations in the Court*"[57]; (c) The law of state responsibility, as set out in Article 42, ILC Articles on State Responsibility, sets out a "*procedural rule*", which requires a state to "*show what obligations that another State party owes to it under the Convention have been breached. Such "injury", to use the language in Article 42 of the International Law Commission's Articles on State Responsibility, distinguishes the State from other State parties as it is "specially affected" by the breach*"[58]; (d) The applicability of the above "*procedural rule*" is not prevented by the *ius cogens* character of the prohibition of torture[59]; (e) The adoption of the "*the notion erga omnes partes … has blurred the distinction between the claimant State and the other State parties by prescribing a general right to invoke international responsibility in the Court*"[60]; (f) The Court's finding has "*no support of State practice in the application of the Convention*".[61]

Thirdly, the Court's finding as to admissibility, particularly its proposition that, were a special interest required, state parties would not be in a position to make claims "*concerning the cessation of an alleged breach by another State*" is unfounded[62] and inconsistent with the law of treaties[63], for the fo-

55 *Ídem.*, paras. 17 and 18.

56 *Ídem.*, para. 17.

57 *Ibídem.*

58 *Ibídem.*

59 *Ibídem.*

60 *Ídem.*, para. 18.

61 *Ídem.*, further stating: "*As a matter of fact, the dispute between the Parties arose over the interpretation and application of the principle aut dedere aut judicare under Article 7, paragraph 1. In other words, Belgium's Application rests on the terms of the Convention rather than the existence of a common interest*".

62 *Ídem.*, para. 19.

63 *Ídem.*, para. 23, stating: "*In accordance with treaty law, any interpretation and application of the object and purpose of the Convention should not contradict, or even override the*

llowing reasons: (a) The Convention created a "*reporting and monitoring system*", under Articles 17 to 20, and a "*communication mechanism*", pursuant to Article 21, which "*are designed exactly to serve the common interest of the State parties in the compliance with the obligations under the Convention*"[64]; (b) The existence, and conditions for the operation, of the above conventional mechanis[65], particularly those of the communications mechanisms[66], and the fact that states parties may make reservations pursuant to the Article 30(2) of the Convention, regarding, *i.a.*, the Court's jurisdiction under Article 30(1), *idem*,[67] indicate that "*the State parties in no way intended to create obligations erga omnes partes*" in Articles 6(2) and 7(1). Indeed, in her opinion, "*[o]bviously, if the State parties had intended to create obligations erga omnes partes, as pronounced by the Court, Articles 21 and Article 30, paragraph 1, should have been made mandatory rather than optional for the State parties*".[68]

E) Declaration of Judge Donoghue

In her Declaration, Judge Donoghue expresses her agreement with the Court's decision and exposes in further detail her views as to "*the meaning of*" Articles 6(2) and 7(1) of the Convention.[69]

She points out that "*[t]he question of whether Senegal complied with" its obligations under Articles 6(2) and 7(1) "is at the heart of this case*"[70] and that she agrees with the the findings of the Court for the following reasons: (a) Articles 4 and 5 "*unquestionably impose a duty on States parties to put in place legislation*"[71]; (b) The "*adherence*" of the obligations set out in Articles 4 and 5 *"is of consequence to all other State parties, so it is difficult to see why the duty would be owed to some State parties but not to others*"[72]; (c) Article 6 sets forth an obligation to "*to place the individual in custody and immediately*

clear terms of the treaty".

64 *Ídem.*, para. 19.

65 *Ídem.*, para. 20.

66 *Ídem.*, para. 21.

67 *Ídem.*, para. 22.

68 *Ídem.*, para. 23.

69 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Declaration of Judge Donoghue*, para. 1.

70 *Ídem.*, para. 2.

71 *Ídem.*, para. 10.

72 *Ibídem.*

to make a preliminary inquiry, whenever an individual allegedly responsible for torture is present in its territory, without limitation as to the location of the alleged offence or the nationality of the victim or alleged offender"[73]; (d) The "*breach of these obligation*" under Article 6 *"[o]nce again, is of consequence to all States parties*"[74] ; (e) Article 7(1) does not set out an obligation to extradite, but only "*to submit a case for prosecution*"[75]; (f) The obligations under Articles 6(2) and 7(1) arise in the event that an alleged offender is present in a state party's territory,[76] independently of an extradition request[77]; (g) Article 7(1), which "*requires submission for prosecution "in cases contemplated in Article 5*", "*might be seen to suggest that the duty to submit a case for prosecution is owed only to States that fit within Article 5: the State in the territory of which the offence allegedly occurred; the State of the offender's nationality; and the State of the victim's nationality (if that State exercises jurisdiction based on a victim's nationality)*"[78]; (h) The interpretation of Article 7(1) in the sense that its confined to the three cases contemplated in Article 5, as noted above, is a "*more parsimonious approach would greatly reduce the potency of the related obligations in Articles 4 to 7 of the Convention*", as this would imply that "*the alleged offender will enjoy precisely the sort of safe haven that the Convention was intended to eliminate*".[79]

The consequence of the 'parsimonious approach' would arise in the two following situations which are, in her view, "*hypothetical, but … not far-fetched*":[80] (1) On the one hand, if "*the State where the alleged offender is located owes no duty to any other State in a situation in which the alleged torture occurs in its territory and the victim and alleged offender are nationals of that State*" "*[t]he territorial State would be free to accord impunity to the alleged offender*"; (2) On the other hand, "*[t]he problem would persist if the alleged offender fled to the territory of another State. The State in the territory of which the alleged offence occurred (which, in this example, is also the State of nationality of the alleged offender and of the victim) might decide not to invoke the responsibility of the State in the territory of which the alleged offender is located*".

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73 *Ibídem.*

74 *Ibídem.,*

75 *Ídem.*, paras. 3 and 4.

76 *Ídem.*, paras. 8 and 9.

77 *Ídem.*, paras. 6 and 8, in relation to Article 7(1) and the two provisions in question, respectively.

78 *Ídem.*, para. 11.

79 *Ibídem.*

80 *Ibídem.*

Hence, the obligations set out in Articles 6(2) and 7(1) are "*owed to all States parties*", as was the case in relation to Mr Habré's case. In her opinion, for the reasons summarised above, "*[h]ere, it is again important to bear in mind the combined package of obligations comprising Articles 4 to 7 of the Convention*".[81]

Therefore, in light of the above, "*[f]or each of these provisions, therefore, it can be said that the State in the territory of which the offender is found has duties that correspond to rights on the part of all other States parties*".[82]

The Court's finding that the obligations set out in Articles 6(2) and 7(1) are *erga omnes partes* and that, hence, Belgium is entitled to invoke responsibility for their alleged breach, in her view, "*integrates into a single step its understanding of the primary rules specified in the Convention; their erga omnes character; and the secondary rules of State responsibility (i.e., that Belgium may invoke Senegal's responsibility). In all respects, the Court's analysis turns on substantive law*".[83]

Furthermore, Judge Donoghue clarifies that, in spite of the above, the "*characterization*" of "duties" as "*erga omnes partes*" "*may not fit every provision of the Convention*".[84]

Lastly, in her view, the fact that Article 30(2) provides for a "*compromissory clause of the Convention permits States to opt out of the jurisdiction of this Court*" does not "*detract from the erga omnes partes character of particular obligations*". In this connection, Judge Donoghue expresses her view that it is unclear "*how flexibility as to dispute resolution mechanisms could erode the substance of a State's duties under a treaty*"[85], which "*would apply to many human rights treaties that permit flexibility as to dispute resolution mechanisms*".[86]

On the one hand, in her opinion, the Court's finding would find support in the proposition that "*the erga omnes character of a norm could not itself be the basis for the Court's jurisdiction*", set out in the 1995 and 2006 judgments on the merits and on jurisdiction and admissibility in the *East Timor*

81 *Ídem.*, para. 9.

82 *Ídem.*, para. 10.

83 *Ídem.*, para. 13.

84 *Ídem.*, para. 12.

85 *Ídem.*, para. 17.

86 *Ídem.*, para. 16.

and *Armed Activities on the Territory of Congo* cases, respectively.[87] On the other hand, "*[t]he erga omnes partes character of provisions of the Convention against Torture defines the duties of all States parties, as a matter of substantive law*", and "*[a]ll States parties have an obligation to implement those duties in good faith, regardless of the dispute resolution mechanisms associated with the particular treaty*". The two abovementioned matters "*are, once again, 'two different things'*".[88]

F) Dissenting opinion of Judge *ad hoc* Sur

Judge *ad hoc* Sur expresses the view that the reference to *ius cogens* "*is entirely superfluous and does not contribute to the settlement of the dispute*".[89] In his view, the admissibility of Belgium's claim "*is at the heart of the dispute*"[90] and "*by contrast*" to prior instances of references to *erga omnes* obligations, "*the erga omnes partes effect is crucial to admissibility, and thus must be considered carefully*".[91] In his opinion, the obligation of Senegal "*to seise the competent authorities for the purpose of prosecution … is not owed to Belgium*", and the latter's claim is inadmissible.[92]

In particular, he puts forward the following propositions: (a) The Court substituted "*the Parties' apparently convergent positions with its own interpretation of the Convention*" as to, *i.a.*, the *erga omnes partes* character of obligations thereunder[93]; (b) The interpretation of the Convention by the Court fails to demonstrate "*that the Convention establishes an erga omnes partes obligation to submit the case to the competent authorities for the purpose of prosecution*"[94], which the Court merely "*asserts*", given "*the weakness, if not lack, of legal bases in the Convention itself", of the Court's proposition*".[95]

In particular, he points out that the Court did not interpret the treaty in accordance with the Vienna Convention on the Law of Treaties, as it "*it*

87 *Ídem.*, para. 17.

88 *Ibídem.*

89 ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012), *Dissenting Opinion of Judge* ad hoc *Sur*, para. 4.

90 *Ídem.*, para. 5.

91 *Ídem.*, para. 29.

92 *Ídem.*, para. 44.

93 *Ídem.*, para. 12.

94 *Ídem.*, para. 13.

95 *Ídem.*, para. 25.

has adopted a teleological interpretation, constructing, on the basis of a purpose which is said by it to govern all of the provisions, an obligation erga omnes partes which is not substantiated by the text or the intention of the parties, and even less so by their practice. Furthermore, the Court does not even attempt to consider the above directives, confining itself to unfounded assertions of principle".[96]

He characterizes the parties' obligation "*to submit the case to their competent authorities for the purpose of prosecution*" as a procedural one and submits that the Court's proposition is based on "*three general and undifferentiated principles or presuppositions, none of which is truly demonstrated, and which even appear to be contradicted by an examination of the Convention*".[97] These three presumptions are as follows:

(1) "*First, there are certain treaties establishing obligations erga omnes partes*".[98] In connection with this first presumption, he considers that the two obiter dicta[99] invoked by the Court are irrelevant, for the following reasons:

(i) The dictum in the 1970 Judgment in the *Barcelona Traction* case is irrelevant, for "*it pertains to obligations of conventional, not customary origin and because, moreover, the Court has ruled that it does not have jurisdiction to take cognizance of customary rules in the context of the present dispute*".

(ii) The dictum in the 1951 Advisory Opinion on *Genocide*, while concerning "*concerned a treaty … and therefore obligations erga omnes partes*", is irrelevant, as "*the rules in question were customary ones that were obligatory irrespective of participation in the Convention*", the character as *erga omnes partes* of obligations subject to reservations being disregarded as a result of the paradoxical invocation of "*some form of international public order so as to justify making reservations to it*".

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96 *Ídem.*, para. 35, further stating: "*The object and purpose of the Convention, as determined by the Court, have superseded and removed all other considerations. In this respect, the Court seems anxious to appear up to date, in touch with certain courts, notably the international criminal courts, and not outmoded by comparison. However, what is involved here is interpreting a convention, not conducting a trial*".

97 *Ídem.*, para. 26.

98 *Ídem.*, para. 27.

99 *Ídem.*, para. 29, stating: "*These two cases involved either an obiter dictum or a finding that was not essential to the settlement of the dispute or the response to the question*".

(2) "*Second, the Convention against Torture is one of these, because it falls into a particular category of treaties, a category which, incidentally, is overlooked by the Vienna Convention on the Law of Treaties codifying customary law on the subject*".[100]

(3) "*Third, all of the obligations contained in the Convention fall into this category, in particular the obligation to submit the case to the competent authorities for the institution of criminal proceedings*".

With respect to this third presumption, he further states that, if the first assertion is "*true in positive law, it would in no way imply that the Convention against Torture, particularly the Convention in its entirety, meets the conditions that are laid down*".[101]

Indeed, although the Court found that it lacks jurisdiction to rule on "*whether the rule invoked by Belgium was customary as well as conventional*", he affirms that "*obligations should be distinguished from their normative, conventional or customary framework*".

Also, he considers that the obligations set out in a treaty may differ in nature "*and the erga omnes partes character of a treaty as a whole cannot be presumed or inferred from the presence of an erga omnes partes obligation therein*".

In this latter regard, he further posits that "*regarding the Convention as a unit … has no legal basis*", particularly taking into account that some provisions are subject to reservation, including the definition of torture, and some may or may not be declarative of customary law[102], and that "*[t]he legal issue is thus the interpretation of the Convention against Torture and not its inclusion by declaration of the Court in a specific category of treaties said to create erga omnes partes obligations by their nature*".

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100 *Ídem.*, para. 27.

101 *Ibídem.*

102 *Ídem.*, para. 30, stating, in this regard: "*In my view, regarding the Convention as a unit –even though reservations may be made to it, including in respect of the very definition of torture, even though some requirements are optional and others discretionary, and even though certain stipulations reflect customary rules while others do not– has no legal basis*".

The Court fails to "*justify in any way*" that an obligation *erga omnes partes* is "*another basis of admissibility*", the foundation of which is, in his view, "*is doubtful to say the least*".[103]

The Court's proposition that obligations under the Convention have an *erga omnes partes* character may be attaining a different goal, namely that of establishing "*the admissibility of a questionable Belgian Application*" and of giving, ultimately, "*give the Convention against Torture the status of an erga omnes norm*", "*a sort of sacralization of the Convention*".[104]

The "*existence of an obligation erga omnes partes … was invoked only belatedly*".[105]

The proposition that "*a complaint by an individual which has not resulted in proceedings being brought is necessary for an inter-State dispute to exist and for implementation of the Convention*" would amount to "*privatizing*" an *erga omnes partes* obligation which, if it exists, must be borne directly and exclusively by the States parties.[106] In this connection, he further states that "erga omnes partes jurisdiction takes effect immediately and is not dependent on individual complaints".[107]

In addition, he considers that the Court's implicit reliance on the ILC Articles on Responsibility is not justified, as, in his view, it is unclear that they reflect customary law and, in particular, "*the articles relating to "States other than injured States" fell within the realm of progressive development, i.e., that they were not part of customary law as lex lata*".[108]

To conclude, he posits that, while "*[t]he universal prohibition of torture is thus a customary rule*", which he prefers to characterize as setting out an "an

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103 *Ídem.*, para. 20.

104 *Ídem.*, para. 13.

105 *Ídem.*, para. 20; see also para. 23, in which Judge *ad hoc* Sur expresses his views that Belgium "*should have made that request as soon as it became a party to the Convention, in 1999*" or "*since Belgium considers that the alleged breach dates back to 2000, that is to say, to the point when complaints against Hissène Habré failed in Senegal, it should have raised the matter then*".

106 *Ídem.*, para. 24.

107 *Ibídem.*

108 *Ídem.*, para. 31.

intransgressible obligation" rather than *ius cogens*[109], "*the same is not true of the obligation to prosecute*" as the former "*does not automatically apply; nor does it extend in either law or fact to all other obligations in the Convention*".

III. 'OBLIGATIONS *ERGA OMNES PARTES*' AND PUBLIC INTERNATIONAL LAW

This part of the paper sets out propositions in relation to the concept of 'obligations *erga omnes partes*' and the legal consequences of its use. The propositions made in this part intend to analyse the concept and the legal consequences it may have in light of a number of branches of public international law. Also, this part seeks to analyse the cogency of the propositions set forth by the Court in relation to the concept of 'obligations *erga omnes partes*'. It is divided into three sections, concerning, respectively, the nature and concept as well as the source of 'obligations *erga omnes partes*' and the legal consequences of the characterisation of an obligation as such.

1. The nature and concept of 'obligations erga omnes partes'

This section analyses the Court's 'definition' of 'obligations *erga omnes partes*' and demonstrates the following propositions:

First, in light of the definition of 'obligations *erga omnes partes*' set out in the Court's judgment, the only property of such obligations is the existence of 'an interest', which need not even be 'common', in the performance of the obligation. There would be, therefore, 'obligations *erga omnes partes*' in the performance of which there are individual interests or a 'common interest'. In this connection, the characterisation of the former type of obligation as an 'obligation *erga omnes partes*' would be a redundancy, as the existence of an interest, predicated individually of subjects to which the obligation is owed, is a property of any obligation.

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[109] *Ídem*., paras. 32 and 33, stating, respectively, that "*there is no question that the prohibition of torture is also an intransgressible obligation, in the sense of the Court's Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict (I.C.J. Reports 1996 (I))*" and that "*the notion of an 'intransgressible obligation' is certainly preferable to a reference to jus cogens, since the latter is supposed to render incompatible treaties null and void*".

Secondly, 'obligations *erga omnes partes*' may be of no significance, unless they are regarded as 'obligations *erga omnes*'. Indeed, 'obligations *erga omnes partes*' can only be conventional obligations, '*erga partes*', or 'obligations *erga omnes*' proper, primarily in the form of customary obligations. Hence, in the only aspect in which 'obligations *erga omnes partes*' would be significant, this characterisation proves to be redundant.

A) The 'definition' of 'obligations erga omnes partes' set forth by the Court

The Court seemed to have expressly sought to set out a 'definition' of 'obligations *erga omnes partes*' in the following sentence, contained in paragraph 68 of its considerations:

"*These obligations may be defined as "obligations erga omnes partes" in the sense that each State party has an interest in compliance with them in any given case*".[110]

Fist, the Court uses the nominal phrase "*[t]hese obligations*". The use of this phrase, and, in particular, of the demonstrative adjective 'these' is unclear, as it may be understood either as delimiting the types of obligation which "*may be defined*" as 'obligations *erga omnes partes*', or as characterising the obligations referred to by the nominal phrase, namely those set out in Articles 6(2) and 7(1) of the Convention, as 'obligations *erga omnes partes*'. The latter possibility is adopted in the present analysis. In this sense, the above sentence serves as 'definition' and as 'characterisation'.

Secondly, the Court uses the verbal phrase "*may be defined*". This use of the past participle 'defined' implies that the Court sought to set out a definition in the same sentence in which it characterised the obligations in the terms of the definition in question, as noted above.

Thirdly, the Court sets out the properties ascribed to 'obligations *erga omnes partes*' (*definiens*) in the definition through the use of a clause introduced through the prepositional phrase introduced by "*in the sense* …".

Fourthly, the above clause only assigns one property to 'obligations *erga omnes partes*', namely that of being an obligation in the performance of which "*each State party has an interest*". In this sense, the type of interest which must exist for an obligation to be an 'obligation *erga omnes partes*'

110 *Ídem*., para. 68.

must not necessarily be a 'common interest', as predicated of the obligations set out in Articles 6(2) and 7(1) of the Convention. Indeed, what is required is 'an interest'.

Therefore, there would be two types of 'obligation *erga omnes partes*', namely, obligations in the performance of which the interest is not 'common', and obligations in the performance of which the interest is common. Hence, the characterisation of an interest as 'common' is not necessary, provided that the interest in question is 'an interest' predicated of each party.

It seems, in this connection, that the Court's characterisation of the interest in the performance of the obligations set out in Articles 6(2) and 7(1) of the Convention as 'common' would only be relevant to the extent that the obligations of each state party to the Convention pursuant to those provisions would, through that qualification, correspond to each (the '*erga partes*' element) and all (the '*erga omnes*' element, arguably) the states parties to the Convention.

Furthermore, it must be noted that, interestingly, in all of the statements made by judges sitting on the Bench for the case in question, both those who are in favour of as well as those who oppose to the use of the concept of 'obligations *erga omnes partes*', it seems to be assumed that the existence of a 'common interest' is an element of the definition of 'obligations *erga omnes partes*'. None of them identified the futility of characterising an obligation as *erga omnes partes* if there is an interest of each party in the performance of the obligation, as such interest is arguably predicable of every party without the need for a concept in addition to that of obligation.

The following sub-section analyses the nature of 'obligations *erga omnes partes*' in light on the foregoing commentaries on the Court's definition and elaborates further on some of the implications of the only element which constitutes the *definiens* of the definition of an 'obligation *erga omnes partes*', namely, 'an interest' of 'each State party' to the treaty in the performance of the obligation.

B) The nature of 'obligations *erga omnes partes*' in accordance with the Court's definition and in light of relevant practice and literature

The nature of 'obligations *erga omnes partes*', in accordance with the Court's definition, is that of being (i) a conventional obligation (ii) in the performance of which 'each State party' has 'an interest'.

First, its nature as a 'conventional obligation' is implicit and arises not only from the fact that, in the case at hand, it is predicated of obligations under Article 6(2) and 7(1) of the Convention, but also from the fact that the definition of 'obligations *erga omnes partes*', analysed above, refers to the interest in its performance on the part of 'each State party'. The contradictions raised by the conventional nature of 'obligations *erga omnes partes*' is analysed in further detail below, in relation to the fact that this aspect of their nature flows from the fact that their source is a treaty.

Secondly, the only property explicitly predicated of 'obligations *erga omnes partes*' is the existence of an interest of each party to the treaty individually is predicable of any obligation. The attribution of this property to 'obligations *erga omnes partes*' is, as noted above, redundant, as regardless of whether it is '*erga omnes partes*' or not, there may always be 'an interest' of 'each State party' to the treaty in the performance of the obligation, which arises, in particular, when the obligation is owed to that state party. This aspect is studied in further detail below, in the section concerning the legal consequences of the characterisation of an obligation as an 'obligation *erga omnes partes*'.

The Wimbledon case is regarded as having involved an obligation erga omnes partes.[111] The International Criminal Tribunal (ICTY), in the Blaskic case, expressly stated that Article 29 of the ICTY Statute "*was valid erga omnes partes*".[112]

Further instances of 'obligations *erga omnes partes*' are, according to commentators, certain treaties in the fields of human rights, such as the European Convention on Human Rights, international humanitarian law, such as the 1949 Geneva Conventions and the 1977 Protocols thereto, international environmental law, such as the *Biodiversity Convention or the Ozone Protocol*, law of the seas, such as Article 218 in the United Nations Convention on Law of the Seas, and trade law, most prominently WTO agreements.[113]

The nature of 'obligations *erga omnes partes*' has also been the object of a large number of academic materials in which commentators often comment on the concept and its use in certain areas of public international law, particularly in light of the use of the term in Commentary 6 to Article 48(1)

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111 United Nations International Law Commission, *Third Report on State Responsibility*, p. 53, footnote 206.

112 Tams (2010) p. 120.

113 *Cfr., Ibídem,*

(a) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[114]

In this connection, there seems to be consensus among commentators and certain institutions, such as the ILC, that 'obligations *erga omnes partes*': (a) 'Obligations *erga omnes partes*' are a type of "multilateral obligation";[115] and, therefore, are, primarily, "*treaty-based*", as opposed to obligations *erga omnes*, which presumably derive from "*general international law*"[116], often equated to general customary international law[117]; (b) 'Obligations *erga omnes partes*' derive from 'specific legal regimes'[118] and are owed to "*the particular community of treaty parties*"[119], *i.e.*, "*all the parties to a particular*

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[114] United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682 , 13 April 2006, para. 393.

[115] United Nations International Law Commission, *Third Report on State Responsibility*, p. 50

[116] Tams (2010) pp. 121 and 122, noting that "*[c]ourts and commentators differentiating between obligations erga omnes and obligations erga omnes partes usually assume that the former derive from general international law – hence the need to distinguish them from treaty-based obligations*". See, *Ídem.*, p. 120, footnote 23, stating: "*commentators have asserted the existence of treaty-based obligations erga omnes (not: erga omnes partes) without clarifying that they would only be owed to the treaty parties*".

[117] This seems to be assumed by certain commentators. See, for instance, Tams (2010) p. 310, restating the view that obligations *erga omnes* arise under general international law and further specifying that "*a treaty-based counterpart*" would be in the form of "*so-called 'obligations erga omnes partes'*", the former being assumed, therefore, to be customary.

[118] Sicilianos (2002) p. 1139.

[119] This view is partially accepted by the ILC in its definition of obligation *erga omnes partes* for the purposes of identifying are which should be addressed in order to attain more consistency in the field of treaty law, *de lege ferenda*. United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, p. 251. See, also, Tams (2010) p. 122, stating, in relation to the use of the *dictum* in para. 34 of the judgment in the *Barcelona Traction* case, "*[c]ommentators interpreting para. 34 as an implicit recognition of obligations erga omnes partes do so with the proviso that these obligations would be owed not to the international community as a whole but to the particular community of treaty parties. This, however, is not what the Court said: it did not mention communities of treaty parties, but quite clearly stated that all States (members of the international community) have a legal interest in seeing obligations erga omnes observed*".

regime"[120], which have "*a common legal interest*" "*in the maintenance and implementation*" of the regime establishing the obligation[121]; such interest would be a "*public interest of all States parties*"[122], "*of all of them jointly*"[123]; (c) 'Obligations *erga omnes partes*', which are regarded to have been taken into account in Article 48(1)(a), ILC ARSIWA, are analogous to 'interdependent' or 'integral' obligations, which are considered to be recognised in Article 60(2)(c), VCLT.[124] Indded, they are considered to be "*collective*", the relationships which they create not being susceptible of separation "*into bilateral components*"[125]; (d) 'Obligations *erga omnes partes*' give rise to a "*legally protected interest, for the purposes of State responsibility, in the legal relations of third States inter se*", alongside 'integral obligations'[126], which would be a sub-category of 'obligations *erga omnes partes*'[127]; It must be noted, in any case, that injuries arising from the breach of the obligation would not be to the exclusion of being injured in other manners and in relation of other obligations through the same "*breach*"[128]; (e) 'Obligations *erga omnes partes*' would have, arguably, a degree of significance and universality arguably lesser than obligations *erga omnes*, even if arising in the same field, as illustrated by "*human rights obligations*".[129]

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120 United Nations International Law Commission, *Third Report on State Responsibility*, p. 49.

121 *Ídem.*, p. 49.

122 *Ibídem.*

123 Inter-American Court of Humann Rights, *Las Palmeras vs. Colombia, Separate Opinion of Judge A.A. Cançado Trindade* (2000, Serie Cn° 67), para. 12, further stating that such an obligation would also be "*of direct interest of each State party*".

124 Pellet A., (2002), p. 10

125 See, Pauwelyn (2002) p. 1, arguing that obligations under the WTO agreements are bilateral.

126 United Nations International Law Commission, *Third Report on State Responsibility*, p. 48

127 *Ídem.*, p. 49, footnote 195.

128 It would be more accurate to say that the same 'conduct' amounts to as many breaches as obligations are so breached and, therefore, that a state affected by these breaches is injured in as many forms as obligations are breach as a result of the same 'conduct'. This idea is expressed using the concept of breach in *ídem.*, p. 50, illustrating the proposition that "*it is possible for a State to be injured – for its legal interests to be affected – in a number of different ways in respect of the same breach*", through the reference to the single breach of an obligation *erga omnes*, namely being "*the victim of an unlawful armed attack" and an obligation erga omnes partes, i.e., being the State of the vessel which is "denied the right of transit through an international waterway*".

129 United Nations International Law Commission *Third Report on State Responsibility*, p. 43, footnote 182.

C) The conditions for characterising an obligation as an 'obligation *erga omnes partes*'

Thus, in light of the foregoing, the conditions for the existence of, and, hence, for characterising an obligation as, an 'obligation *erga omnes partes*' would be, according to the Court, three: (1) The existence of a treaty; (2) The existence of an obligation under the treaty; (3) The existence of 'an interest' in the performance of the obligation under the treaty on the part of 'each State party'. The question as to the 'common' or 'general' character of such interest is discussed in further detail below, in connection with the legal consequences of the characterisation of an obligation as 'obligations *erga omnes partes*'.

The two first conditions, as noted above, are implicit, the second one flowing from the Court's statements. The third condition is the only property explicitly predicated of 'obligations *erga omnes partes*' in the Court's definition.

The following sub-section studies the sources of 'obligations *erga omnes partes*' and the issues which may arise in this particular regard.

2. The source of 'obligations erga omnes partes'

This section deals with issues which arise in relation to the source of 'obligations *erga omnes partes*', including some of the problems discussed above, in relation to the definition and nature of such obligations.

A) Treaties as a source of an 'obligation *erga omnes partes*' and the law of treaties

The Court, in its definition of, and in the statements made in connection with the characterisation of the obligations under Articles 6(2) and 7(1) of the Convention as, 'obligation *erga omnes partes*', implies that the source of such obligations are treaties.

The fact that the source of an 'obligation *erga omnes partes*' are rules provided for in treaties implies that the scope of the obligation is determined by and coextensive with the scope of application of the relevant conventional rule. The scope of application of the latter, in turn, is determined by the law of treaties, as codified in the Vienna Convention on the Law of Treaties (VCLT). In this sense, as has been stressed elsewhere, the primary nature of an 'obligation *erga omnes partes*' is conventional and so is its legal

regime.[130] Thus, 'obligations *erga omnes partes*' are, first and foremost, '*erga partes*'.

This is without prejudice to the fact that, insofar as Article 48(1)(b), which is regarded as adopting the concept of 'obligation *erga omnes partes*', does not expressly refer to treaties as a source of such obligations, it would be possible to posit the existence of customary 'obligations *erga omnes partes*', in which case the source would be a special customary rule, particularly of regional character.[131]

In particular, there are questions which arise in relation to the fact that treaties are the source of 'obligation *erga omnes partes*', including, *i.a.*: (a) whether both bilateral and multilateral treaties can create 'obligations *erga omnes partes*'; (b) whether a treaty providing for reservations can create 'obligations *erga omnes partes*'; and (c) whether the existing law of treaties, as codified in the Vienna Convention on the Law of Treaties (VCLT), provides a basis for the concept of "*community of States parties as a whole*", as noted by the ILC on its Final Report on Fragmentation of International Law.[132]

The ILC, in its Final Report on Fragmentation of International Law, suggests that divergence in the field of treaty law could be "*mitigated*", *i.a.*, through the use of the distinction between "*synallagmatic*" and "*integral or interdependent*" treaties, the latter being characterised as "concluded *erga*

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130 It has been further suggested, in relation to 'obligation *erga omnes partes*', that such a legal regime would be set out by the 'express and implied terms of the treaty of which they form part'. See, in this connection, Tams (2010) p. 125.

131 Indeed, special customary rules of a regional character can create obligations "*owed to a group of states*", including a state other than the one injured by a breach, and establish such obligations "*for the protection of a collective interest of the group*".

132 United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, p. 251, stating: "*In general, the VCLT gives insufficient recognition to special types of treaties and the special rules that might go to interpret and apply them. More work here seems necessary. It is proposed to give guidelines on how the Vienna Convention provisions might give recognition to the wide variation of treaty types and normative implications of such types and whether it might be possible to set up informal guidelines on how to deal with treaty conflicts. At least the following themes might be part of such an effort: … (e) What it means for obligations to be owed "to the international community as a whole" (erga omnes obligations) or to the "community of States parties as a whole" (obligations erga omnes partes) should be further elaborated*".

omnes partes".[133] The ILC, nonetheless, does not specify whether such 'integral or interdependent treaties' are only multilateral or may also extend to those that are bilateral.

Nevertheless, the ILC, in its work on the responsibility of states, as noted in the reports submitted by the Special Rapporteur Crawford, accepted the proposition that, *de lege lata*, obligations *erga omnes partes* would only arise subject to two conditions, namely, "*first to express stipulations, and second to such stipulations in multilateral treaties*", without prejudice to the fact that "*general international law*", which is presumably of a customary nature only, "*parallels and reinforces a multilateral treaty provision in the public interest*".[134]

B) Custom as a source of 'obligations *erga omnes*' proper and the concept of 'obligation *erga omnes partes*'

There is consensus that the concept of 'obligations *erga omnes*' was set out in the Court's judgment in the *Barcelona Traction* case.[135] 'Obligations *erga omnes*' proper are defined, according to this judgment, as obligations owed by all states and other subjects of international law to the community.

In this regard, they may be considered as arising, primarily, under customary rules opposable to the entire community, namely 'universal' or 'general' customary international law. This is usually not expressly pointed out, as

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133 United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, para. 472, stating: "*The risk of divergence - a commonplace in treaty law - would be mitigated by making the distinction between "reciprocal" or "synallagmatic" treaties (in which case mere "divergence" in interpretation creates no problem) and "integral" or "interdependent" treaties (or treaties concluded erga omnes partes) where the use of that other treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted*".

134 United Nations International Law Commission, *Third Report on State Responsibility*, p. 43.

135 Frowein (2008); see also the ILC, describing it as the *locus classicus* in this subject, United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682 , 13 April 2006, para. 387.

customary international law is often assumed to be general and referred to, simply, as 'general international law'.

The ILC, in its Final Report on Fragmentation of International Law, notes that the "*distinction between "bilateral" and erga omnes obligations seems analogous to the domestic distinction between contracts and public law obligations*".[136]

Nonetheless, in spite of the primarily customary nature of obligations *erga omnes* proper, it has not been ruled out that such obligations may be created by treaties. This is, indeed, acknowledged by the ILC and the *Institut de Droit International*.[137]

Indeed, while, in practice, during and in connection with the process of conclusion of such multilateral treaty, customary rules may be formed and come into force before the multilateral treaty is concluded and enters into force, it cannot be excluded that the effect of the treaty, once it is universal, would create obligations '*erga partes*' equal in their effects to obligations *erga omnes* proper.

In this regard, it must be noted that, to the extent that even universal treaties may be withdrawn from, the obligation would, still, remain merely '*erga partes*', its '*erga omnes*' effect being only a matter of degree and, in particular, of the degree to which the treaty remains universal or general, which is contingent.

Hence, the most prominent source of obligations *erga omnes* is, thus, custom, as noted above. Interestingly, Judge Tomka, in his previous capacity as member of the ILC, noted that "*[t]he examples of obligations erga omnes partes given by the Special Rapporteur, particularly obligations in the field of the environment in relation to biodiversity or global warming, were par excellence obligations for the benefit of all States, irrespective of whether they were parties to the relevant multilateral treaties*".[138]

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136 United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, para. 395.

137 *Ídem.*, para. 403.

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

3. The legal consequences of the characterisation of obligations as 'obligations erga omnes partes'

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

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

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

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

(b) Secondly, a claim arising from the breach of an 'obligation *erga omnes partes*' is admissible in relation to any party to the treaty, regardless of whether it was 'specially affected' or 'injured'.

To the extent that issues of *ius standi* and admissibility of claims, leaving aside specificities governed by the applicable procedural rules, depend on the finding as to whether there is (1) a legal interest, or, in the Court's terms, 'an interest', in the performance of an obligation and (2) a right to invoke responsibility, this part will be confined to the study of these two latter elements.

A) The existence of 'an interest' as an element of the definition of, and a condition for the characterisation of a conventional obligation as, 'obligation erga omnes partes' and its relevance to the legal consequences of such characterisation

The right to react against breaches of treaty obligations is regarded by some commentators as arising from the respective treaty, not from the nature

of the obligation breached, particularly its alleged character as an 'obligation *erga omnes partes*'.[139]

This would be illustrated, as noted by some of the judges sitting in the Bench for the case in their statements, analysed above, by the lack of relevant state practice in the field of, for instance, inter-state proceedings before the Human Rights Committee, as states need not demonstrate that their obligation is an 'obligation *erga omnes partes*', but simply that the treaty allows them be institute such proceedings.[140]

Indeed, some commentators have expressed that the question of identifying an 'obligation *erga omnes partes*' and distinguishing it from 'obligations *erga omnes*' is irrelevant, insofar as 'a treaty expressly recognises a general legal interest or confers specific rights of protection'.[141]

In this connection, Judge Tomka, in his previous capacity as member of the ILC, pointed out that "*the existence of a legal interest would be a question of the interpretation or application of the relevant primary rules*".[142]

B) The right to invoke responsibility for the breach of an 'obligation *erga omnes partes*' of any state party to the treaty which constitutes the source thereof and the scope of such right of invocation under the law of international responsibility

Article 48 of the ILC ARSIWA is regarded as establishing the right to invoke responsibility for the breach of "an obligation *erga omnes* or *erga omnes partes*".[143]

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139 Tams (2010) p. 125.

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

141 *Ídem.*, p. 125.

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

143 Gaja (2010) p. 12, stating: "*Article 48 of the same Articles adds that in the case of breach of an obligation erga omnes or erga omnes partes any state is entitled to invoke the responsibility of another state; performance of the obligation to make reparation may then be requested 'in the interest of the . . . beneficiaries of the obligation breached'. It is clear that those beneficiaries include individuals, for example when their human rights are infringed*".

The scope of "*legal consequences legal consequences of the responsibility of a State*" "*which differently affected States*", namely, those which are not "*specially affected*", "*may invoke*" if the obligation breached is an "*obligation erga omnes partes*" or an "*obligation erga omnes*" proper is almost identical.[144]

Indeed, the scope of the right encompasses the same legal consequences, except for the fact that in the event of "*well-attested gross breaches*" of "*obligations erga omnes*", a "differently affected state" would be entitled to invoke the legal consequences of responsibility and adopt countermeasures "*individually*", *i.e.*, not on behalf of the specially affected state or by agreement between all states.[145]

On the one hand, "*injured states*", as a result of the breach of a bilateral obligation, and "*specially*" as well as "*differently affected states*" as a consequence of the breach of a multilateral obligation, are entitled to directly seek "*cessation*" and "*assurances of guarantees*",[146] the minimum component of which is "*the right to a declaration by a competent court or tribunal in respect of the breach*".[147]

On the other hand, while "*injured states*", in the event of breach of a bilateral obligation, and "*specially affected*", in the case of breach of a multilateral obligation, may also directly seek the other elements of responsibility, namely restitution, compensation and satisfaction, and even have resort to countermeasures under the applicable conditions, "*differently affected states*" may only seek these other elements of responsibility "*on behalf of the specially affected state*" or "*by agreement between the States parties*".[148]

The only distinction between states "*differently affected*" by the breach of an obligation *erga omnes* proper as opposed to states "*differently affected*" by the breach of an 'obligation *erga omnes partes*' is whether the type of breach is a "*well-attested gross breach*", which would only be predicable, in principle, of obligations *erga omnes*.

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144 United Nations International Law Commission, *Third Report on State Responsibility*, particularly "Table 2", p. 56, which allows to graphically appreciating the above proposition.

145 *Ídem.*, p. 56.

146 *Ibídem.*

147 *Ídem.*, footnote 213.

148 *Ídem.*, p. 56.

The difference, nonetheless, only arises in relation to resort to countermeasures individually, *i.e.*, not necessarily on behalf of the state specially affected or with the agreement of all the states.

CONCLUSIONS

The present paper has sought to demonstrate that the concept of 'obligations *erga omnes partes*', which it analysed in terms of its definition, nature, sources and legal consequences of characterisations of an obligation as such, is, at best, redundant. In this sense, the present writer concurs with Judge Higgins observation that "*[t]he Court's celebrated dictum in Barcelona Traction … is frequently invoked for more than it can bear*".[149]

Indeed, as discussed above, 'obligations *erga omnes partes*' are only of significance if they are 'obligations *erga omnes*' proper, primarily in the form of customary obligations under general rules customary international law, binding on the parties to the treaty *qua* custom and regardless of any reservation, in addition to being binding on non-parties to the respective treaty to which the customary rule is opposable.

Therefore, as noted above, while the concept of obligation *erga omnes* proper, as set out in the dictum of the Court's judgment in the Barcelona Traction case is predicable of obligation in the performance of which all the states have a common interest, the existence of a 'common interest' in relation to conventional obligations, particularly those of a multilateral character may lead to the same consequences to which the existence of an obligation *erga omnes* proper leads, particularly as to *ius standi* and admissibility of claims, yet does not turn the respective obligation into a new form of obligation *erga omnes*, nor is it the legal basis for findings as to *ius standi* and admissibility of claims, which remain to find their legal basis on the existence of a common

[149] Cited in United Nations International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 13 April 2006, para. 398, footnote 559. It has been suggested that the concept of 'obligations *erga omnes partes*' is, in a way, the outcome of a commonly held view whereby obligations *erga omnes* are regarded as unique in nature, leading to the extension of their apparently unique quality of empowering 'States to vindicate general interests' to other areas. Tams (2010) p. 308, referring to the above explanation for the use of the concept as 'the myth of uniqueness'.

interest in accordance with the provisions of the treaty. Indeed, should such a legal basis exist under the treaty, the use of the concept of 'obligation *erga omnes partes*' is devoid of purpose, as the rationale for the use of the concept of *erga omnes* was to "*close an enforcement gap*", which "*is hardly necessary where a treaty expressly provides for standing in the public interest*".[150]

Hence, the question is not whether an obligation is '*erga omnes partes*', which is likely to remain merely binding '*erga partes*', or properly *erga omnes*, in which case there is no any need for a further characterisation, but whether the treaty, in practice always multilateral, although the Court did not expressly rule out bilateral treaties from its definition, as noted above, accords the "*each*" and, in addition to the Court's definition, "*every*", state party a legally protected interest in the performance by each and every other state party of obligations under the treaty.

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