OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL PUBLIC ORDER AFTER THE DECISION IN THE *BELGIUM V. SENEGAL* CASE

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Abstract: This paper analyses the role of *erga omnes* obligations in contemporary Public International Law from the standpoint of relevant conventions and case-law. In this regard, the movement from bilateralism to community interest in the international legal system was confirmed by the International Court of Justice in its recent and emblematic case between Belgium and Senegal, in which the UN Convention against Torture was held to establish a public legal interest *inter partes* in the implementation of its provisions. Hence, the utility of the notion of *erga omnes* (*partes*) obligations with respect to standing before the Court was affirmed. It is sustained that, pursuant to this *obiter dictum*, international litigation on behalf of public interest is an irrevocable possibility, with the international judiciary, especially the International Court of Justice, playing an important part in the consolidation of the international legal public order.

Keywords: obligations *erga omnes*; international public order; standing.

I. Introduction

Much has been written about the Copernican revolution that has affected international law since the end of the Second World War. Indeed, it is commonplace to refer to the founding of the United Nations (hereinafter: UN), the rise of the human rights movement and the increase in environmental awareness as the driving forces of a permanent paradigm shift in international

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relations and international law; mention is made of a (emerging) "global public order", and the "international community" appears to be a solid, unitary entity in legal discourse. Regardless of the true motives for such a seemingly remarkable achievement and the reality of such propositions, matters which are best left to political scientists and international relations theorists, it is evident for the international lawyer that the legal body of rules upon which her profession is founded has undergone a significant transformation in the last few decades. This has been termed by a judge of the International Court of Justice (hereinafter: ICJ), Bruno Simma, a movement "from bilateralism to community interest"[2].

In other words: classical international law, characterized by strictly inter-State relations (the sole subjects of international law until recently) in a *quid pro quo* manner (that is to say, legal bonds were defined merely as contractual relationships between legal subjects imposing equal obligations owed reciprocally), is gradually becoming something resembling a system of public order, containing elements of public law. Brazilian authors have spoken of an "international law of solidarity [...] in a community of States endowed with meaning"[3], "a new *jus gentium*, or (universal) international law for humankind"[4]; or, put shortly, the construction of the "international rule of law"[5]. In the domain of legal technique, this has been expressed most prominently in the concepts of peremptory norms (*jus cogens*) and obligations *erga omnes*. They are important in that they have created a normative hierarchy (in the former case) and public legal interest (in the latter case) in international law.

In line with the aim of the present article, the notion of peremptory norms is beyond the scope of examination; reading the commentaries of the International Law Commission (hereinafter: ILC) on the law of treaties[6] is sufficient to give the reader considerable knowledge about the subject. Neither will the relation between *jus cogens* and obligations *erga omnes* be an object of study[7]. Rather, the analysis will dwell upon the effects of obligations *erga omnes* in the field of the law of international responsibility, especially in what concerns international adjudication, in the light of the recent landmark decision by the ICJ in the *Belgium v. Senegal* case. In order to understand the function performed by obligations *erga omnes* in current international law, it is necessary, firstly, to shed a light on their advent and history (section two). Subsequently, a brief

[2] SIMMA (2004; p. 229).
[3] AMARAL JÚNIOR (2012; p. 680).
[4] CANÇADO TRINDADE (2001; p. 1086).
[5] REZEK (2011; p. 24).
[6] INTERNATIONAL LAW COMMISSION (1966).
[7] Nevertheless, as a general rule, it can be said that all *jus cogens* norms are obligations *erga omnes*, whereas the reverse is not always true. See ORAKHELASHVILI (2006; p. 269).

overview of the ICJ decision is presented, together with a discussion on its legal effects and perspectives (section three). Next, legal doubts to which the ICJ did not provide a response are raised (section four). Last but not least, a conclusion on the topic is offered (section five).

II. The evolution of obligations *erga omnes*

The phrase "obligations *erga omnes*" first entered the vocabulary of international law in 1970, in the merits judgment of the ICJ in the *Barcelona Traction* case. In an oft-cited paragraph, the majority of the judges stated that:

> "[...] *an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes"*[8] *(emphasis added).*

This was a groundbreaking new idea for a court that had rejected any hint of community interest under international law just a few years before. In the second phase of the *South West Africa* cases in 1966, in a very close vote (ultimately decided by the tie-breaking opinion of President Percy Spender), the ICJ explicitly denied the existence of any form of international *action popularis*[9]. Now it seemed to have adopted a diametrically opposite position, advocating that certain obligations are of such importance for the international community that all States could be deemed to have a legal interest in their protection and compliance. However, this was not the first time that the ICJ invoked such a concept. In its early days, in the *Reservations to the Genocide Convention* advisory opinion, it had also noted that "[...] *in such a convention, the contracting States do not have 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"*[10].

What exactly is meant by "legal interest" in the 1970 *obiter dictum*? Broadly put, legal interest is a necessary condition for any international legal subject to make claims on the international plane, as part of the international claims process

[8] INTERNATIONAL COURT OF JUSTICE (1970; paragraph 33).
[9] INTERNATIONAL COURT OF JUSTICE. (1966; paragraph 88).
[10] INTERNATIONAL COURT OF JUSTICE. (1951; p. 23).

in the law of international responsibility. The legal rules governing most aspects of international responsibility were codified or progressively developed[11] by the ILC in its 2001 Articles on State Responsibility[12]. The following explanation is therefore based on those Articles[13] and their accompanying commentary[14].

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

The theory of obligations *erga omnes*, expanded by later academic literature, does not reach the same conclusion. Those obligations are, according to the ICJ[15], of such a special importance that all States may make legal claims alleging their violation. For instance, when a State violates the human rights of its own population (an event which would largely have been considered as pertaining to the exclusive domestic jurisdiction of the State half a century ago), any State may make legal claims with respect to this breach *as if it were a directly affected State* (but there are some exceptions in the prerogatives that can be exercised by this third party, to which this article will return in section four). Thus, it may at least claim the cessation of the internationally wrongful act and reparations for the benefit of those harmed[16], including before international judicial bodies (a claim made on the basis of an *erga omnes* obligation would, according to theory, be considered admissible with reference to legal interest,

[11] Article 1, paragraph 1, of the Statute of the International Law Commission sets out the object of that organ's work: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification" See UNITED NATIONS. **General Assembly Resolution 174(II) (1947)**, UN Doc. A/RES/174(II) (*Statute of the International Law Commission*), 1947.

[12] The Articles on State Responsibility have a long history, originating in the first attempts by the ILC to tackle the issue of international responsibility of States in the 1950s. After much controversy and changes in wording, which included an almost complete overhaul of its previous work in the mid-1990s, the Articles on State Responsibility were finally completed under the aegis of Special Rapporteur James Crawford in 2001. See DAILLIER, FORTEAU, PELLET (2009; p. 849).

[13] INTERNATIONAL LAW COMMISSION (2001a).

[14] INTERNATIONAL LAW COMMISSION (2001b).

[15] INTERNATIONAL COURT OF JUSTICE (1970; paragraph 33).

[16] INTERNATIONAL LAW COMMISSION (2001a; Article 48, paragraph 2).

apart from other admissibility criteria and questions concerning jurisdiction of the relevant court or tribunal)[17].

Finally, obligations *erga omnes* rely upon the same sources of international law as any other international obligation in that they may be created by treaty or by customary international law. The ILC divided the obligations *erga omnes* into two different categories: (general) obligations *erga omnes* and obligations *erga omnes partes*. The former are those obligations in the strict sense put forward by the ICJ in the *Barcelona Traction* case, creating a legal interest for the *whole* international community in their compliance. Consequently, they are usually created by custom, which is universal (even if one can imagine an *erga omnes* obligation established by a treaty of universal ratification, one wonders if it would not be better seen as an *erga omnes partes* obligation). On the other hand, obligations *erga omnes partes* exist as between certain States only; they are predominantly created by treaty, although it is equally possible for a local or non-universal custom to create such obligations.

In the *Barcelona Traction* decision, the ICJ indicated a number of obligations it held as possessing this *erga omnes* character. Those were the obligations outlawing acts of aggression and genocide and the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination[18]. Other than that, the Court has been reluctant to acknowledge further obligations *erga omnes*, as it has been in regard to *jus cogens* norms. It did so expressly in the *East Timor* case, in which it stated that "the right of peoples to self-determination (...) has an *erga omnes* character"[19]. Other international organs, however, have not been so hesitant. To take one clear example, the United Nations Human Rights Committee (hereinafter: HRC), in its General Comment 31, proclaimed the *erga omnes* nature of all obligations enshrined in the International Covenant on Civil and Political Rights[20] (hereinafter: ICCPR)[21]. Publicists have also pointed to obligations relating to the environment and other matters of public interest[22].

As an aside, the jurisprudence of the ICJ is open to criticism in what touches upon obligations *erga omnes*, as it is marred by definitional confusions. Besides the *obiter dictum* in the *East Timor* case, the Court in the *Israel Wall* advisory opinion

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[17] A distinction must be drawn between jurisdiction and admissibility. Objections to jurisdiction relate to conditions affecting the parties' consent to have the tribunal decide the case at all, while an objection to the admissibility of a claim invites the tribunal to dismiss or postpone the claim on a ground which affects the possibility or propriety of its deciding the particular case. See CRAWFORD (2012; p. 693).

[18] INTERNATIONAL COURT OF JUSTICE (1970; paragraph 34).

[19] INTERNATIONAL COURT OF JUSTICE (1995; paragraph 29).

[20] UNITED NATIONS. **International Covenant on Economic, Social and Cultural Rights (1966)**. In: **United Nations Treaty Series**, vol. 993, 1966.

[21] UNITED NATIONS HUMAN RIGHTS COMMITTEE (2004, paragraph 2).

[22] BIRNIE, P.; BOYLE, A.; REDGWELL, C. (2009; p. 131).

also identified as *erga omnes* a number of obligations pertaining to international human rights law and international humanitarian law violated by Israel in the construction of the wall in Palestine, concluding that as a consequence, all States had a duty not to recognize or assist the resulting situation[23]. As judge Rosalyn Higgins observed in her separate opinion, this is inconsistent with the work of the ILC in the Articles on State Responsibility, which stipulates that the effects of the *erga omnes* character of an obligation are procedural and determinative of the admissibility of a claim, and have no relation to the duty of non-recognition or non-assistance[24]. The Court also added to the roster in the *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*[25] and *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*[26] (the obligations enshrined in the Genocide Convention are *erga omnes*), but without further inquiring into the legal effects of such findings.

In spite of those momentous decisions and statements, not much had come out of them in terms of legal effects until only recently. Non-judicial legal claims made on the basis of *erga omnes* obligations were rare at best, and most noticeably, no single international judicial claim had been successfully argued on such a basis. The 2012 *Belgium v. Senegal* decision was a dramatic turn for the law of international responsibility in this respect.

III. The *Belgium v. Senegal* decision and its (limitless) legal consequences

The merits judgment of the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, or *Belgium v. Senegal* for short, was rendered on the 20th of July, 2012. It concerned a dispute about Senegal's compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad, for acts including crimes of torture and crimes against humanity which had been alleged against him. Habré ruled Chad from 1982, when he took power in the midst of an internal rebellion, to 1990, when he was overthrown by another *coup d'état*. His régime was marked by accusations of grave breaches of human rights, including enforced disappearance and illegal deprivation of liberty of political opponents. Soon after his deposition, Habré fled to Senegal, where he obtained political asylum.

From 2000 onwards, several Chadian citizens brought claims against Habré before Senegalese and Belgian courts, in addition to referrals to the United Nations Committee against Torture and the African Court on Human

[23] INTERNATIONAL COURT OF JUSTICE (2004a; paragraphs 155-159).
[24] INTERNATIONAL COURT OF JUSTICE (2004b; paragraph 37).
[25] INTERNATIONAL COURT OF JUSTICE (1996; paragraph 31).
[26] INTERNATIONAL COURT OF JUSTICE (2006; paragraph 64).

and People's Rights. The proceedings before the Belgian judiciary bore fruit: in 2005, the Belgian investigating judge issued an international warrant *in absentia* for the arrest of Habré, indicted as perpetrator or co-perpetrator of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes, among others. Pursuant to this finding, Belgium requested the extradition of Habré from Senegal. Ruling on this extradition request, a Senegalese court understood that the former Chadian President was still protected by his functional immunity as former Head of State. Senegal then referred the case to the African Union, which recommended prosecution, and provided no further replies to the Belgian request.

The present report of the decision will not deal with the *dispositif* or final merits decision of the case, focusing instead on the relevant part of the judgment on admissibility[27]. Insofar as this is concerned, the claims made by the Applicant, the Kingdom of Belgium, against the Respondent, the Republic of Senegal, were based on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, also known as UN Convention against Torture. The pleadings brought forward by Belgium were: firstly, that Senegal had breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture; secondly, that Senegal had breached and continued to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and under other rules of international law by having failed to bring criminal proceedings against Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings; and thirdly, that Senegal could not invoke financial or other difficulties to justify the breaches of its international obligations. Accordingly, it demanded that Senegal cease these internationally wrongful acts by submitting Habré without delay to its competent authorities for prosecution or, alternatively, by extraditing Habré to Belgium.

Leaving aside other preliminary objections relating to the jurisdiction of the ICJ, it is easily perceivable that there is a *prima facie* absence of legal interest of Belgium in the claims made against Senegal, because the conduct of the latter

[27] For the sake of convenience: the ICJ eventually held that Senegal had violated Article 6, paragraph 2 (by not preliminarily investigating the facts relative to the crimes attributed to Habré) and Article 7, paragraph 1 (by not referring the case of Habré to its competent authorities for prosecution) of the Convention against Torture, ordering that Senegal refers the case to its competent authorities for prosecution or, in the alternative, extradite Habré to Belgium.

did not in any manner *directly injure* Belgium: the failure to investigate and to initiate proceedings against Habré does not directly harm the Belgian State. Senegal raised the issue of inadmissibility, to which Belgium responded with two counterarguments: in the first place, Belgium would be entitled to make claims solely due to its being a party to the Convention against Torture; and alternatively, the entitlement would stem from Belgium's special interest with respect to the case by cause of its exercise of jurisdiction and request for extradition. For the present purposes, the second argument will be analyzed beforehand.

The second argument reflects the legal position consolidated in the Articles on State Responsibility. International responsibility may be invoked by two groups of States: those States injured and third States (Articles 42 and 48, respectively). The first hypothesis refers to breaches of bilateral obligations in the classical form, in which a directly injured State complains internationally about the internationally wrongful act. Additionally, in cases of obligations owed to a group of States or to the international community as a whole, the Articles on State Responsibility foresee the possibility of States especially affected by the violation to invoke international responsibility[28]. There is a clear overlap between this last provision and obligations *erga omnes*: both allow invocation of responsibility when obligations owed to a group of States or to the international community as a whole are violated. The distinction lies in the fact that, in invocation under Article 42, another condition is imposed: the State making the claim must be "especially affected by the violation". Even though the Belgian defense was not precise about the legal provisions it was alleging, it can be inferred from the decision that this argument was guided by the work of the ILC in Article 42.

The first argument found its inspiration in Article 48. This provision distinguishes the categories of obligations *erga omnes* between *erga omnes partes* and (general) *erga omnes*. The former are the obligations the ICJ alluded to in its *Barcelona Traction* dictum: all States, irrespective of their belonging to any specific group, are entitled to invoke responsibility of the State in violation. The latter are the obligations established for the protection of a collective interest of a group of States and owed reciprocally to all members of that group, as explained in detail above. The ICJ held that the Convention against Torture created obligations of the second kind among its State parties:

> "The common interest in compliance with the relevant obligations under the Convention against Torture implies

[28] The Articles on State Responsibility also permit, in Article 42, the invocation of responsibility by any State which is part of the group to which the obligation is owed (which may comprise the international community as a whole, as noted above) when the obligation violated "is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation". This case is nonetheless outside the scope of this paper.

> *the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party*. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end"[29] (emphasis added).

The ICJ accepted the *erga omnes partes* contention brought forward by Belgium. For that reason, it considered it unnecessary to pronounce on Belgium's first argument.

This otherwise unassuming paragraph came as a surprise for the average ICJ watcher. All of a sudden, a claim was accepted on the basis of *erga omnes partes*. This may signify the dawn of a new era in international dispute settlement, as a precedent favorable to international judicial litigation in the public interest presently exists. How did the ICJ reach the conclusion that the Convention against Torture created obligations *erga omnes partes*, if the text of that treaty is not unambiguous about it?

Treaty interpretation was fundamental in the reasoning of the ICJ, even if it did not precisely specify the methods employed. It started by highlighting the Preamble of the Convention under examination, which declares that the object and purpose of that instrument is "to make more effective the struggle against torture [...] throughout the world"[30]. It went on to observe that the obligations of State parties relative to preliminary inquiries and submission of any allegation of torture to their competent authorities for prosecution exist regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. From all of this, it concluded that "States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity"[31]. Finally, it recalled its *obiter dictum* in the *Reservations to the Genocide Convention* advisory opinion and declares the *erga omnes partes* character of the obligations contained in the Convention against Torture.

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[29] INTERNATIONAL COURT OF JUSTICE (2012a; paragraph 69).

[30] UNITED NATIONS. **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)**. In: **United Nations Treaty Series**, vol. 1.465, 1984, Preamble.

[31] INTERNATIONAL COURT OF JUSTICE (2012a; paragraph 68).

The decision was not without its critics, however. The most powerful objections came from the bench itself. Judge Xue Hanqin delivered a strong dissent[32] heavily criticizing the ICJ's conclusion regarding Belgium's standing on the basis of *erga omnes*, firstly by saying that such a nature of an obligation does not imply any procedural consequences (and that the Court in the *Barcelona Traction* dictum referred to substantive law rather than procedural rules)[33] and that Belgium should have proven its suffering direct injury to claim *locus standi*. In any event, Judge Xue disagrees with the Court's decisive finding that, unless State parties had legal standing derived from the *erga omnes partes* character of the conventional obligations, no State would be entitled to make claims and therefore their common interests would be unprotected: she asserts that the mechanisms of the Committee against Torture, established under the Convention, exist for this end[34].

Judge Skotnikov in his separate opinion disapproves the logic of the ICJ in the same problem[35]. He does not challenge the procedural scope of *erga omnes* obligations in principle, but questions the method of interpretation used by the Court. For him, the mere quote from the Preamble of the Convention against Torture and the analogy with the Genocide Convention are not enough to warrant such a conclusion; moreover, the "legal interest" that all State parties supposedly have within the Convention is contradicted by the discretion to opt-out from the jurisdiction of the ICJ and the complaints mechanism of the Committee against Torture, something which would be incompatible with the *erga omnes partes* nature of the obligations and the possibility to bring claims against any State party. He concludes that any *erga omnes partes* obligation should be explicitly qualified as such in the words of the relevant instrument.

Two pertinent commentaries on the dissent regarding *erga omnes* obligations are due. First and foremost, the fact that the jurisdiction of either the ICJ or a treaty body is excludable does not implicate that the obligations

[32] INTERNATIONAL COURT OF JUSTICE (2012b; paragraphs 12-23).

[33] It is respectfully submitted that this contention runs against the majority of doctrinal work since 1970. As early as 1973, *erga omnes*-inspired arguments were invoked by New Zealand and Australia in the *Nuclear Tests* case, although they were not addressed by the Court. See INTERNATIONAL COURT OF JUSTICE (1973, p. 49) for the New Zealand submission and INTERNATIONAL COURT OF JUSTICE (1974, p. 474) for the Court's decision. One prominent author traces the origins of communitarian norms in international law further back to the 1920s, in respect to the obligations regarding freedom of navigation in the Kiel Canal as declared by the Permanent Court of International Justice in the *Wimbledon* case (PERMANENT COURT OF INTERNATIONAL JUSTICE, 1923, p. 33) and the obligations of demilitarization of the Aland Islands as examined by an International Committee of Jurists appointed by the Council of the League of Nations (LEAGUE OF NATIONS, 1920, p. 17). See CRAWFORD (2013, p. 362).

[34] One crucial point should be made in this regard. The legal mechanisms established by the Convention against Torture are certainly not exclusive of other dispute settlement methods. Even if, within a given human rights treaty regime, a reporting system and inter-State and individual complaints mechanisms are established, this does not bar States from having recourse to other judicial instances. Such an interpretation would excessively isolate the treaty regime from the rest of international law, which would possibly foment fragmentation.

[35] INTERNATIONAL COURT OF JUSTICE (2012c; paragraphs 14-22).

in point are not *erga omnes*. Those are two separate and largely unrelated matters. Jurisdiction, as observed above, refers to the consent given by the parties to have their dispute settled by a third party, especially judicial organs. Legal interest is an issue of admissibility, which is posterior to jurisdiction. In any case, the lack of jurisdiction of judicial bodies does not rule out other means of dispute settlement through which legal claims can be made and do not depend on formal consent, such as diplomatic negotiations. International responsibility for an internationally wrongful act (and the corresponding right to reparation) arises independently of the adjudication of the claim.

Secondly, the interpretation of the Convention against Torture by the ICJ is not necessarily flawed. The rules of treaty interpretation laid out in the Vienna Convention on the Law of Treaties are not inflexible: the general rule of Article 31 should not be read as imposing a rigid and iterative step-by-step approach, but as a solid and single method whose elements are closely interrelated and cannot, and should not, be considered entirely separate[36]. It follows that the factors of "ordinary meaning", "context" and "object and purpose"[37] are mutually influenced. In its relevant part, the decision cited the Preamble, and further on compared its wording with the substantive obligations posited in the binding sections of the Convention, both of which are elements of "context"[38]. From all the above, the Court inferred the "common interest" and "legal interest" necessary for obligations *erga omnes partes*.

The possible effects of this unprecedented decision are manifold. For the ICJ, the doors are open to adjudication in the public interest with human rights conventions (the reasoning applied in the *Belgium v. Senegal* case to the Convention against Torture may well be extended to the ICCPR, the International Covenant on Economic, Social and Cultural Rights[39] (hereinafter: ICESCR), as well as any other "big nine" core human rights treaty, as well as any regional instrument)[40]. This also may encompass international environmental treaties, thus paving the way for international environmental litigation[41]. And it is not an exaggeration to imagine the transplantation of the *erga omnes partes* effects of obligations into international trade law: the defense of public interests and goals within the framework of World Trade Organization ("WTO") law and before its dispute settlement system may become a reality in the not so distant future.

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[36] GARDINER (2008; p. 141).

[37] UNITED NATIONS. **Vienna Convention on the Law of Treaties (1969)**. In: **United Nations Treaty Series**, vol. 1.155, 1969, Article 31, paragraph 1.

[38] UNITED NATIONS. **Vienna Convention on the Law of Treaties (1969)**. In: **United Nations Treaty Series**, vol. 1.155, 1969, Article 31, paragraph 2.

[39] UNITED NATIONS. **International Covenant on Economic, Social and Cultural Rights (1966)**. In: **United Nations Treaty Series**, vol. 993, 1966.

[40] MEGRET (2010; p. 129).

[41] STRAUSS (2009; p. 347).

Some words must be dedicated to the puzzle of the legal nature of WTO obligations. The standard stance in academic literature is that they are the quintessential bilateral norms, in that they exclusively concern trade (and nothing else), the dispute settlement mechanism in the WTO in charge of their interpretation and application is predominantly bilateral with little or no participation from third parties, and the obligations breached are perfectly identifiable and quantifiable, as opposed to "indivisible" *erga omnes* obligations (whose violation does not injure any specific State in a materially assessable quantity)[42]. Swimming against the tide, Chios Carmody bestows all WTO obligations with a collective character because, as he sees it, the WTO was created with the purpose of protecting not trade in itself, but the *expectations* of members States in regard to international trade. Furthermore, a "peace through law" approach shows, according to him, that the true objective of the world trade system is the construction of more stable and *interdependent* trade links. WTO law, as a law of both *expectations* and *interdependence*, therefore protects interests "over and above" those of member States individually considered, and hence its obligations are *erga omnes*[43]. A more moderate view may be that *some* WTO obligations are *erga omnes* (such as those mentioned by the Panel in *US-FSC*[44]), or that they have *some* features of *erga omnes* obligations[45].

To sum up, the notion of obligations *erga omnes*, be they general or *partes*, can be employed by any international adjudicator.

IV. Questions left unanswered

One risks being out of touch with positive law if one interprets judicial decisions and maxims too loosely. Restricting the reasoning of the ICJ in the *Belgium v. Senegal* case to very similar cases may sound conservative, but one needs to be cautious when dealing with international law. So while a judicial precedent for litigation on the basis of *erga omnes* obligations exists, its implications in other areas of international responsibility should be carefully analyzed.

To begin with, the type of reparations due for the third State invoking responsibility, if any, is still unsettled. The ICJ accepted Belgium's request for cessation of the internationally wrongful act. This, as well as the subsidiary obligation to offer assurances and guarantees of non-repetition, was deemed as being part of customary international law by the ILC in the circumstances

[42] PAUWELYN (2003, p. 928).
[43] CARMODY (2006, p. 421).
[44] WORLD TRADE ORGANIZATION (2002, paragraph 6.10).
[45] GAZZINI (2006, p. 740).

of Article 48 *erga omnes* obligations. The ILC, in addition, foresaw the right to reparation of the invoking third State. Such reparation could only be claimed on behalf and in the interest of the injured State. The ILC admitted that this specific aspect involved a measure of progressive development[46], and thus its status as custom is doubtful. Had it been the case, would the Court have considered it to be customary international law and allowed Belgium to claim any kind of reparation (in the form of restitution, compensation and satisfaction), even if there was no identifiable State or single entity injured? A likely guess would be in the affirmative, but the effects of obligations *erga omnes* in the determination of reparations remain to be elucidated. The question was not dealt with by the ICJ in the *Belgium v. Senegal* case, as it would amount to a finding *ultra petita*.

Another murky subject is the extent to which third States are free to adopt countermeasures against the State violating the *erga omnes* obligation. Countermeasures, as non-forcible measures of enforcement which involve the non-performance of a bilateral (mostly treaty) obligation, may be imposed in accordance with the conditions outlined in Chapter II of Part III of the Articles on State Responsibility. They are a form of self-help in international law. The limits prescribed include the proportionality of the reaction (Article 51) and the prohibition of violation of certain fundamental obligations (Article 50). Article 54 is a saving clause which leaves the issue undecided: the ILC confessed that sparse practice did not allow for a specific permissive provision, but neither could it be completely discarded. Countermeasures in the collective interest are often controversial: they may be approached as either an act of generous solidarity or, as one Brazilian author puts it[47], a form of (disguised) neocolonialism. The practice in regard to those countermeasures in the collective interest is still scant. There appears to be an emerging consensus, however, on the permissibility of reactions against *erga omnes* breaches[48].

A closer look reveals that there are two sources of controversy surrounding collective countermeasures[49]. The first concerns the connection between collective countermeasures and sanctions adopted by the United Nations Security Council (hereinafter: UNSC) under Chapter VII of the UN Charter[50] (namely, are States free to adopt collective countermeasures even in the face of a UNSC Resolution imposing sanctions? If so, are they free to adopt measures that go beyond the instructions of the Resolution?). The second refers to the size of the circle of States entitled to adopt collective countermeasures: is there a

[46] INTERNATIONAL LAW COMMISSION (2001b; Commentary to Article 48, paragraph 12).
[47] CARVALHO RAMOS (2012; p. 61).
[48] TAMS (2005; p. 331).
[49] SICILIANOS (2010; p. 1137).
[50] UNITED NATIONS. **Charter of the United Nations (1945)**. In: **United Nations Treaty Series**, vol. 1, 1945.

minimum threshold of gravity necessary for those measures to be adopted, or does *any* breach of obligations *erga omnes* give rise to this right?

Those questions are still hotly debated among academics. To the first, a possible answer would be that the liberty to adopt more stringent measures than those prescribed by a Chapter VII Resolution would depend on the UNSC's attitude and approval. If the relevant Resolution leaves a narrow scope for extensive interpretation (such as when the Council adopts so-called "intelligent sanctions", aimed at the political élite or trouble-makers of a State), it is difficult to concede that States have freedom to adopt other measures. Article 103 of the UN Charter and Article 59 of the Articles on State Responsibility leave no doubt as to the prevalence of Charter obligations over those of any other treaty obligation. Implementation of UNSC decisions is mandatory pursuant to Article 25 of the Charter. This is consistent with the view of the "constitutional" role of the Charter, even if the right to take collective countermeasures has its origins in customary rather than conventional law (an issue which, as seen above, is also polemical). If the UNSC leaves a wide margin of appreciation, States would be entitled to take collective countermeasures beyond those imposed by the Resolution, but the authority for such action would derive from the Resolution itself, and not from the law of international responsibility. The bottom line is that the threat of disturbing the legal balance provided by the UN Charter leads to the conclusion that Charter law still prevails.

The second question has received a wide range of responses. A convincing solution is that there should be no such minimum level or threshold for collective countermeasures to be adopted (i.e., only in cases of *grave* breaches of obligations *erga omnes*), for the reason that limitations are already in place by virtue of the requirement of proportionality, as enunciated in Article 51 of the Articles on State Responsibility. A third State taking collective countermeasures in response to a (relatively) minor breach of an *erga omnes* obligation would only have the right to take weaker countermeasures. A "minimum threshold" would be illogical in comparison with the final version of the ILC work on the law of international responsibility, which scrapped the notion of "international crimes" or any threshold evaluation of the gravity of an internationally wrongful act.

When all is said and done, the law of international responsibility relating to obligations *erga omnes* still deserves further clarification.

V. Conclusion

Not so long ago, before the *Belgium v. Senegal* dictum, skeptics had the upper hand inasmuch as obligations *erga omnes*, albeit conceptually developed,

remained unimplemented in practice. From their very inception, these obligations were haunted by the naked reality of power politics in international relations. To quote Bruno Simma again, "viewed realistically, the world of obligations *erga omnes* is still the world of the 'ought' rather than of the 'is'"[51]. One can safely say that, today, this landscape has changed considerably. Obligations *erga omnes* can proudly become the rallying cry of those wishful of a more rule-oriented international order, and perhaps optimism is justified more than ever because the ICJ, the principal judicial organ of the UN, has finally put the concept definitely in its agenda[52].

Firstly, obligations *erga omnes* have finally fulfilled the potential assigned to them by the ICJ in the *Barcelona Traction* decision. They do not merely denote the relative importance of substantive rights and duties; they also have an actual and tangible legal effect which is able to change the panorama of international law. In *Belgium v. Senegal*, completely reversing its prior position in the *South West Africa* cases, the Court held as valid a claim of admissibility based on the *erga omnes* (*partes*) character of a legal provision, in this instance the obligations of the Convention against Torture. With this, the ICJ has partly abandoned its (sometimes extreme) carefulness in assessing the nature of legal norms. This may mean that the long-awaited revival of the Court, dubbed "the Respected Old Lady" by Antonio Cassese[53], may be near. Adjudication before the ICJ in different subject-matters, despite the limits on jurisdictional consent, is prone to increase. This same reasoning can, and hopefully will, be repeated by other international judicial bodies.

One specific implication worthy of note refers to the possibility of adjudication of the right to self-determination of peoples. Its status as custom has been reiterated by the United Nations General Assembly many times over the course of the last decades[54]. It is also enshrined in Article 1 of the ICCPR and the ICESCR. The HRC held this provision as non-judiciable[55]. This does not impair the recourse to other international adjudicatory bodies, such as the ICJ, for dispute settlement in regard to the right to self-determination, either in its conventional or customary incarnation. Because the ICJ itself recognized the right to self-determination and the ensuing obligation as *erga omnes*, the only obstacle that remains for litigation in favor of self-determination is the

[51] SIMMA (1993; p. 125).
[52] RAGAZZI (2000; p. 217).
[53] CASSESE (2012; p. 239).
[54] UNITED NATIONS. **General Assembly Resolution 1514(XV) (1960)**, UN Doc. A/RES/1514 (*Declaration on the Granting of Independence to Colonial Countries and Peoples*), 1960. See also, UNITED NATIONS. **General Assembly Resolution 2625(XXV) (1970)**, UN Doc. A/5217 (*Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN*), 1970.
[55] UNITED NATIONS HUMAN RIGHTS COMMITTEE (1988; paragraph 6.3).

jurisdictional consent to be given by States, as propounded by Antonio Cassese two decades ago[56].

Yet, it is rather soon to celebrate. Much remains to be seen. As pointed out above, the full consequences of the *erga omnes* nature of obligations are still obscure, principally in what concerns reparations and countermeasures. Carefulness is therefore advisable if one does not wish to incur in innocuous and far-fetched predictions far from reality or unjustified idealism. It is not that the tension between positivist-voluntarist and communitarian conceptions of international is over, or that States will actually make use of their newly-confirmed legal tool. But it cannot be denied that international law has progressed greatly in the last years, and one of the main advances that took place in legal technique was the emergence of obligations *erga omnes*. The crown jewel in this long and steep road is, without a doubt, the confirmation given by the ICJ in the *Belgium v. Senegal* case.

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