

# Invoking obligations *erga omnes* in the twenty-first century: Progressive developments since *Barcelona Traction*

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## 1 Introduction

In April 2014 the Republic of the Marshall Islands instituted proceedings before the International Court of Justice against India, the United Kingdom and Pakistan respectively.<sup>1</sup> The focus of the applications concerned the alleged failure of these countries to fulfil their obligations under customary international law, as enshrined in Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT).<sup>2</sup> In accordance with this article:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Although the Marshall Islands and the United Kingdom are party to the treaty while India and Pakistan are not, the Marshall Islands claimed that the obligation in article VI of the NPT, in accordance with which parties

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<sup>1</sup>*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* (Application) [2014]; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* (Application) [2014] par 2; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Application) [2014]. The applications are available at [www.cij-icj.org](http://www.cij-icj.org) (accessed 18 February 2014).

<sup>2</sup>See, eg, *Marshall Islands v Pakistan* n 1 above par 2. 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Nuclear Non-Proliferation Treaty) (London, Moscow, and Washington, DC (Done in triplicate) 1 July 1968, 729 UNTS 161).

undertake to pursue in good faith and bring to conclusion negotiations leading to nuclear disarmament, constitutes customary international law.<sup>3</sup> According to the Marshall Islands the three countries in question have through their conduct acted contrary to the objective of nuclear disarmament and breached the customary obligation.<sup>4</sup> Moreover, the Marshall Islands submitted that this obligation was of an *erga omnes* nature and owed to the international community as a whole. As a result, every State has a legal interest in its timely performance and a corresponding legal duty to help in bringing it about.<sup>5</sup> The Marshall Islands thus claimed standing before the ICJ on the basis that there was a dispute pertaining to a customary *erga omnes* obligation between itself and other States which have all accepted the compulsory jurisdiction of the ICJ.

Whether the ICJ will accept that it has jurisdiction in these cases remains to be seen, *inter alia* in light of the various subjective matter reservations that India, Pakistan and the United Kingdom made when accepting the ICJ's compulsory jurisdiction.<sup>6</sup> However, the proceedings suggest some progressive developments in relation to the invocation and enforceability of obligations *erga omnes* before international judicial bodies have occurred since the *Barcelona Traction* case.<sup>7</sup> The following analysis gives an overview of the most prominent developments. It first recaptures the meaning of obligations *erga omnes*, as well as their relationship with *jus cogens* (peremptory norms of international law). Thereafter, the article gives an overview of developments pertaining to the enforcement of obligations *erga omnes*. It places particular emphasis on their (potential) invocation by judicial bodies, notably the ICJ and the International Tribunal for the Law of the Sea (ITLOS).

## 2 The recognition of obligations *erga omnes* (community interests)

In its well-known *Barcelona Traction* decision of 1970, the ICJ distinguished between obligations of a State towards the international community as a whole, and those arising towards other (individual) States.<sup>8</sup> As far as the former were concerned, all States could be held to have a legal interest in their protection, due to the importance of the obligations involved. Such obligations

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<sup>3</sup>*Marshall Islands v Pakistan* n 1 above par 36.

<sup>4</sup>*Marshall Islands v Pakistan* n 1 above par 53. In the case of the United Kingdom, the Marshall Islands also submitted that it violated its treaty obligations under art VI of the NPT. See *Marshall Islands v United Kingdom* n 1 above par 100.

<sup>5</sup>*Marshall Islands v Pakistan* n 1 above par 35.

<sup>6</sup>For a list of declarations and accompanying reservations see [www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3](http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3) (accessed 18 February 2015).

<sup>7</sup>*Barcelona Traction, Light and Power Company Ltd* (Second Phase) [1970] ICJ Rep 32.

<sup>8</sup>*Ibid.*

are thus obligations *erga omnes*.<sup>9</sup> Subsequently the ICJ has reaffirmed the notion on several occasions, including also in its advisory opinions on *Nuclear Weapons*, the *Construction of the Wall in Palestine* and *Kosovo*.<sup>10</sup> However, in none of these decisions did the *erga omnes* nature of the obligations in question form the basis of the decision. The decisions furthermore did not engage in a systematic analysis of the different categories of obligations *erga omnes*, nor of the composition of the international community.

The International Law Commission (ILC) shed light on some of these issues in its Articles on Responsibility of States for Internationally Wrongful Acts (ASR), which were adopted in 2001. In articles 42 and 48 it drew a distinction between breaches of bilateral obligations and obligations of a collective (community) interest nature, which include obligations towards the international community as a whole.<sup>11</sup> The ILC confirmed that breaches of obligations of a bilateral nature include situations where the performance of an obligation involves two individual States, even though the treaty framework or customary rule in question establishes obligations applicable to all States (parties).<sup>12</sup> In such an instance the nature of the obligations stemming from the multilateral treaty or customary rule can be described as ‘bundles of bilateral obligations’.<sup>13</sup> An example in point would be article 22 of the Vienna Convention on Diplomatic Relations of 1961, where the obligation to protect the premises of a diplomatic mission is owed by the individual receiving State to the individual sending State.<sup>14</sup>

Breaches of a collective nature, on the other hand, concern obligations that have been established for the protection of the collective interest of a group of States (*erga omnes partes*) or indeed of the international community as a whole (*erga omnes*).<sup>15</sup> There is strong support in doctrine for the submission that examples of *erga omnes (partes)* obligations can be found in particular in human rights treaties. Obligations stemming from regional or universal human rights treaties would have

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<sup>9</sup>*Ibid.*

<sup>10</sup>*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep 15; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 89. The opinions are available at [www.icj-cij.org](http://www.icj-cij.org) (accessed 18 February 2015). See also Hernandez ‘A reluctant guardian: The International Court of Justice and the concept of “international community”’ (2013) 83 *British Yearbook of International Law* 34.

<sup>11</sup>See art 42 and art 48 of the articles on State Responsibility available in Crawford *The International Law Commission’s Articles on State Responsibility* (2002) 257.

<sup>12</sup>Crawford n 11 above 257.

<sup>13</sup>Crawford n 11 above 258.

<sup>14</sup>See *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3; see also Crawford n 11 above 257-258.

<sup>15</sup>Crawford n 11 above 277.

*erga omnes partes* effect towards other States parties, as well as *erga omnes* effect to the extent that they have been recognised as customary international law.<sup>16</sup> The same would apply to the obligations articulated in the Statute of the International Criminal Court (ICC) and which grant the ICC jurisdiction over the most serious crimes of concern to the ‘international community as a whole’, namely genocide, crimes against humanity and war crimes.<sup>17</sup>

Similarly, the concept of sustainable development is a collective interest norm, as it requires States to take account of the interests of future generations when adopting environmental and economic policies.<sup>18</sup> However, it is disputed whether this norm has already acquired customary status.<sup>19</sup> The United Nations Convention on the Law of the Sea (UNCLOS) also in some respects contains *erga omnes partes* obligations.<sup>20</sup> For example, the seabed and ocean floor that stretches beyond the limits of the national jurisdiction constitute the common heritage of mankind.<sup>21</sup> A disputed area of *erga omnes* obligations includes those pertaining to trade liberalisation. It remains highly disputed whether WTO obligations are ‘bundles of bilateral obligations’ rather than *erga omnes partes* in nature.<sup>22</sup>

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<sup>16</sup>Dupuy ‘L’unité de l’ordre juridique international’ (2002) *Collected Courses of the Hague Academy of International Law* 297 382, 384; Crawford n 11 above 277-278; International Law Institute *The protection of human rights and the principle of non-intervention in internal affairs of states*, Resolution adopted during the Session of Santiago de Compostela (1989) art 1 available at [www.idi-iil.org/](http://www.idi-iil.org/) (accessed 18 February 2015). See Human Rights Committee General Comment No 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 of 26 May 2004 par 2.

<sup>17</sup>*Erga omnes (partes)* obligations are often articulated in terms that refer to the common interest of mankind. See Wolfrum ‘Enforcing community interests through international dispute settlement: Reality or utopia?’ in Fastenrath *et al* (eds) *From bilateral to community interest. Essays in honor of Judge Bruno Simma* (2011) 1134.

<sup>18</sup>The notion of sustainable development was one of the most important outcomes of the United Nations Conference on Environment and Development (Earth Summit) in Rio de Janeiro in 1992. See Cottier ‘Die Anwendbarkeit von völkerrechtlichen Normen im innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts’ (1999) 9 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 432; Wolfrum n 17 above 1135-1136.

<sup>19</sup>See Redgwell ‘International environmental law’ in Evans *International law* (2014) 697. The nature of sustainable development remains a controversial issue. For support of its customary *erga omnes* nature, see separate opinion of Judge Weeramantry in *Case concerning Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. See also Wolfrum n 17 above according to whom the community oriented nature of environmental obligations was first recognised in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (16 June 1972, UN Doc A/CONF.48/14/Rev 1) 3 par 6.

<sup>20</sup>Wolfrum n 17 above 1136.

<sup>21</sup>United Nations Convention on the Law of the Sea (UNCLOS) (Montego Bay, 10 December 1982, 1833 UNTS 397) arts 136-137, Wolfrum n 17 above 1136.

<sup>22</sup>See in particular Pauwelyn ‘A typology of multilateral treaty obligations: Are WTO obligations bilateral or collective in nature?’ (2003) 14 *European Journal of International Law* 907-951. Petersmann ‘Time for a United Nations “global compact” for integrating human rights into the law of worldwide organizations: Lessons from European integration’ (2002) 13 *European*

As far as the composition of the international community is concerned, States still constitute key members. However, membership in the international community is not exclusive to States and also includes international organisations with legal personality.<sup>23</sup> These would *inter alia* include the United Nations (UN) World Trade Organization (WTO), the European Union (EU), the African Union (AU) and the Organization of American States (OAS). The international community further consists of individuals to the extent that they possess international legal personality, for example in the context of global or regional systems for the protection of human rights, international investment dispute settlement and international criminal prosecution.

Such an inclusive view of the international community finds support in the ASR. Initially, a number of governments had suggested that the phrase ‘the international community as a whole’ should read ‘the international community of States as a whole’. These States pointed in particular to the definition of peremptory norms in article 53 of the two Vienna Conventions of 1969 and 1986, which uses that phrase in terms of the recognition of certain norms as having a peremptory character. The ILC, however, rejected this proposal on the grounds that whilst States belonged *ex officio* to the international community, such membership was no longer limited to States.<sup>24</sup>

### 3 The relationship between obligations *erga omnes* and *jus cogens*

The concept of *jus cogens* (peremptory norms of international law) was developed in particular in the work of the ILC on the law of treaties<sup>25</sup> and subsequently introduced into positive law by the Vienna Convention on the Law of Treaties of 1969 (VCLT).<sup>26</sup> As is well known, article 53 determines that:

[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be

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*Journal of International Law* 636. Petersmann ‘The WTO Constitution and human rights’ (2000) 3 *Journal of International Economic Law* 19.

<sup>23</sup>See Kritsiotis ‘Imagining the international community’ (2002) 13 *European Journal of International Law* 967.

<sup>24</sup>De Wet ‘The international constitutional order’ (2006) 55 *International & Comparative Law Quarterly* 57.

<sup>25</sup>Gaja ‘The protection of general interests in the international community’ (2014) 364 *Collected Courses of the Hague Academy of International Law* 47.

<sup>26</sup>The Vienna Convention on the Law of Treaties (the Vienna Convention) (Vienna, 23 May 1969, 1155 UNTS 331). Reprinted in (1969) 8 *International Legal Materials* 679.

modified only by a subsequent norm of general international law having the same character.

In addition, article 64 of the VCLT declares that ‘[if] a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’.<sup>27</sup>

The notion of peremptory norms of international law thus developed within the treaty context for the purpose of treaty invalidation. However, it has subsequently been invoked and recognised beyond this context.<sup>28</sup> In fact, it is in particular due to the invocation of the concept in other areas of international law that has resulted in the identification of a limited number of peremptory norms by judicial bodies and in doctrine.<sup>29</sup> According to the ILC, the most frequently cited candidates for *jus cogens* status include

- (a) the prohibition of aggressive use of force;<sup>30</sup>
- (b) the right to self-defence;
- (c) the prohibition of genocide;
- (d) the prohibition of torture;
- (e) crimes against humanity;
- (f) the prohibition of slavery and the slave trade;
- (g) the prohibition of piracy;
- (h) the prohibition of racial discrimination and *apartheid*, and
- (i) the prohibition of hostilities directed at civilian population (‘basic rules of international humanitarian law’).<sup>31</sup>

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<sup>27</sup>The definition in the VCLT was influenced, in particular, by the work of Albert Von Verdross who himself was strongly influenced by natural law. In accordance with Verdross’ line of reasoning general principles of morality or public policy common to the legal orders of civilized States would constitute a limitation to contradicting treaty obligations. In his view immoral treaties would include those preventing the maintenance of law and order within a State, defence against external attack, care for the bodily and spiritual welfare of citizens, as well as the protection of foreigners abroad. See Von Verdross ‘Forbidden Treaties in international law’ (1947) 31 *American Journal of International Law* 572. See also Von Verdross ‘*Jus dispositivum* and *jus cogens* in international law’ (1966) 60 *American Journal of International Law* 56.

<sup>28</sup>See extensively Gaja n 25 above 47. On 52 he noted that the ILC subsequently gave peremptory norms a more general relevance in relation to circumstances precluding wrongfulness, countermeasures and in relation to serious breaches of international law. See also De Wet ‘The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law’ (2004) 15 *European Journal of International Law* 98-99.

<sup>29</sup>Gaja n 25 above 52.

<sup>30</sup>See also Gaja n 25 above 59 who suggested that in the *Kosovo* advisory opinion n 10 above par 81 the ICJ implicitly characterised the prohibition of the use of force as a peremptory norm.

<sup>31</sup>ILC *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law* A/CN.4/L.682, 13 April 2006, par 374. See also ILC ‘Articles on State Responsibility, Commentary on Article 40’ pars4-6 in

In this context one has to remember that article 53 VCLT did not identify any norms having peremptory status. This relates to the fact that at the time of its adoption the concept was regarded with suspicion by some western countries (notably France<sup>32</sup>), while enjoying more support amongst the (then) socialist and newly independent States.<sup>33</sup> Article 53 VCLT was thus negotiated to leave it to the ‘international community as a whole’ to identify those international law norms belonging to the category of *jus cogens*. This process of identification has led to much debate. According to one line of reasoning, *jus cogens* obligations are not grounded within the law itself, but in metaphysical principles of justification.<sup>34</sup> It regards peremptory obligations as a manifestation of the fundamental values of the international community which exist independently from the will of States.<sup>35</sup> This line of reasoning is reminiscent of the natural law thinking of the seventeenth and eighteenth century and vulnerable to arbitrary conclusions as to what constitutes the underlying values of the international community.<sup>36</sup> On the one hand, it is true that the purpose of invalidating treaties that conflict with peremptory norms would be the protection of the most fundamental values of the international community.<sup>37</sup> Peremptory norms, therefore, do represent core values of the international community.<sup>38</sup> On the other hand, attempts to determine (norms of positive law representing) these values independently from the will of States will lead to arbitrary conclusions, depending on one’s own perception of fundamental values.<sup>39</sup>

The better view is that in order to acquire peremptory status, a norm first has to be recognised as customary international law, whereafter the international community of States as a whole further agrees that it is a norm from which no derogation is permitted.<sup>40</sup> A peremptory norm would therefore be subject to

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*Official Records of the General Assembly, Fifth-sixth Session (A/56/10) 283-284; ibid, ‘Draft Articles on the Responsibility of International Organizations with Commentaries’ Yearbook of the International Law Commission (United Nations 2011), commentary to article 26.*

<sup>32</sup>France has still not ratified the VCLT in large part due to opposition to *jus cogens*.

<sup>33</sup>Suy ‘Article 53 Treaties conflicting with a peremptory norm of general international law (“*jus cogens*”)’ in Corten and Klein (eds) *The Vienna Convention on the Law of Treaties A commentary volume II* (2011) 1225. See also Vidmar ‘Norm conflicts and hierarchy in international law: Towards a vertical international system?’ in De Wet and Vidmar (eds) *Hierarchy in international law: The place of human rights* (2012) 26.

<sup>34</sup>Hernandez n 10 above 38-39.

<sup>35</sup>Fragmentation Report n 31 above par 361.

<sup>36</sup>Gaja n 25 above 53-54.

<sup>37</sup>See n 27 above.

<sup>38</sup>See Dupuy ‘Some reflections on contemporary international law and the appeal to universal values: A response to Martti Koskenniemi’ (2005) 16 *European Journal of International Law* 133.

<sup>39</sup>Gaja n 25 above 54.

<sup>40</sup>Shelton ‘Normative hierarchy in international law’ (2006) 100 *American Journal of International Law* 300. It is of course possible that a norm of *jus cogens* finds its way into a treaty, as is the case with most of the obligations on the ILC’s list referred to above.

‘double acceptance’ by the international community of States as a whole.<sup>41</sup> The link between peremptory norms and customary international law is clearly referred to in articles 53 and 64 of the VCLT which refer four times to peremptory norms as a ‘norm of general international law’.<sup>42</sup>

This threshold for gaining peremptory status is high, for although it does not require a consensus amongst all States (and one single State would not be able to block the recognition of a peremptory norm), it does require the acceptance of a large majority of States. The fact that complete consensus amongst States is not a requirement for the emergence of a peremptory norm further implies that the (very small number of) States not in agreement can nonetheless be bound against their will by a peremptory obligation.<sup>43</sup> For example, the claim of South Africa’s government that it was a persistent objector to the prohibition of racial discrimination and apartheid was universally rejected with the argument that peremptory law does not exempt persistent objectors.<sup>44</sup> In the case of a peremptory norm the will of an individual State can be overruled by the collective will, underpinned by the fundamental values of the international community of States.<sup>45</sup>

The first time that the ICJ referred explicitly to *jus cogens* in a majority opinion was in *Congo v Rwanda* in 2006.<sup>46</sup> Earlier decisions nonetheless contain implicit references to peremptory norms. For example, the *Nicaragua* decision referred to certain principles of humanitarian law as ‘intransgressible’ principles of customary international law.<sup>47</sup> Moreover, the *Barcelona Traction* decision provides authority for the conclusion that *jus cogens* obligations would have *erga omnes* effect.<sup>48</sup> Without expressly referring to *jus cogens* the ICJ implied as much by the types of obligations it mentioned as examples of *erga omnes* norms. These included the out-lawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination. Given the fact that these same prohibitions come widely regarded as being of a peremptory nature, it follows that when an obligation is recognised as one from which no derogation is permitted due to its fundamental nature, all States

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<sup>41</sup>Vidmar (Hierarchy) n 33 above 25.

<sup>42</sup>Gaja n 25 above 54-55.

<sup>43</sup>Vidmar (Hierarchy) n 33 above 26.

<sup>44</sup>Vidmar (Hierarchy) n 33 above 26.

<sup>45</sup>See Shelton n 85 below 299, who also notes that the notion of *jus cogens* deviates from the notion of a strictly voluntarist view of international law.

<sup>46</sup>See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 32.

<sup>47</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 100 par 190.

<sup>48</sup>*Barcelona Traction* decision n 7 above 32.



(and other subjects of international law) have a legal interest in its protection.<sup>49</sup> Peremptory norms thus embody community interests of a fundamental nature.

One should nonetheless be careful not to assume that the opposite also applies, namely that all *erga omnes* obligations necessarily also have *jus cogens* status.<sup>50</sup> For example, the human rights obligations contained in the ICCPR and ICESCR would arguably all have *erga omnes* effect to the extent that they have acquired customary international law status.<sup>51</sup> Their collective interest nature gives the international community as a whole an interest in their performance and reflects that they amount to more than mere ‘bundles of bilateral obligations’. At the same time, this fact does not in and of itself elevate all *erga omnes* human rights obligations to peremptory norms. The peremptory character of the prohibition of for example genocide and torture resulted from their specific recognition as such by a large majority of States. Finally, it is worth noting that the purpose of *jus cogens* is different from that of obligations *erga omnes*. While the peremptory status of a norm can result in the invalidity of conflicting (treaty) obligations and establish a hierarchy amongst international obligations, the *erga omnes* nature of a particular obligation can result in the invocation of international responsibility.<sup>52</sup>

#### 4 The enforcement of obligations *erga omnes*

The issue of the invocation of responsibility in case of the violation of obligations *erga omnes* raises the question of the enforceability of community interests. Stated differently, having determined that there are certain legal obligations in the observance of which all States have a legal interest, the question becomes whether avenues exist for their enforcement ‘on behalf of the international community’. In answering this question, one should distinguish between (decentralised) measures undertaken by individual States or groups of States and judicial enforcement measures. Within the latter category one further needs to distinguish between enforcement by a judicial

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<sup>49</sup>*Ibid*; Gaja n 25 above 55; Hernandez n 10 above 41; Frowein ‘collective enforcement of international obligations’ (1987) 47 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 71.

<sup>50</sup>Gaja n 25 above 56; Dupuy n 16 above 385.

<sup>51</sup>Those rights in the International Covenant on Civil and Political Rights (CCPR) (New York, 16 December 1966, 999 UNTS 171) and International Covenant on Economic, Social and Cultural Rights (ICESCR) (New York, 16 December 1966, 993 UNTS 3) which have not yet acquired customary status would nonetheless have *erga omnes partes* effect towards other State parties.

<sup>52</sup>Crawford ‘Responsibility for breaches of communitarian norms: An appraisal of article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts’ in Fastenrath *et al* (eds) *From bilateralism to community interest. Essays in honour of Judge Bruno Simma* (2011) 230.

body with general substantive jurisdiction, namely the ICJ and enforcement by functional judicial bodies with limited substantive jurisdiction. One such example is the International Tribunal for the Law of the Sea (ITLOS).

#### 4.1 *Decentralised enforcement by (groups of) States*

The first avenue through which *erga omnes* status can impact the enforcement of the obligations in question concerns article 48 of the ASR, which has created a system of responsibility for serious violations of international obligations towards the international community as a whole (*erga omnes*). In accordance with article 48, States other than injured States are entitled to invoke responsibility where that obligation breached is owed to the international community as a whole. When invoking responsibility in this fashion, the invoking State may claim from the responsible State cessation of the internationally wrongful act, as well as performance of the obligation or reparation in the interest of the beneficiaries.

The right to claim cessation and performance is a modest mechanism for enforcement of the most fundamental obligations in international law. After all, so-called serious violations of international law would first and foremost include violations of peremptory obligations. The question therefore arises whether non-injured States may also adopt countermeasures against the responsible State, such as economic sanctions in the case of serious violations of international law. This issue remains controversial, as articles 49 and 52 of the ASR limit the countermeasures to be undertaken in accordance with the ASR to injured States.<sup>53</sup> At the same time however, article 54 ASR determines that the chapter on countermeasures:

Does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

The inclusion of article 54 ASR suggests that while articles 49 and 52 ASR are only concerned with injured States, international customary and/or treaty law may still provide for countermeasures by non-injured States in the case of the violation of obligations *erga omnes*.<sup>54</sup>

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<sup>53</sup>See Dupuy ‘Back to the future of a multilateral dimension of the law of state responsibility for breaches of “obligations owed to the international community as a whole”’ (2012) 23 *European Journal of International Law* 1062.

<sup>54</sup>Gaja n 25 above 130. This position is also supported by the *Institut de Droit International* (IDI) in as far as it concerns non-forcible countermeasures, see *IDI Resolution on obligations and rights erga omnes in international law* (27 August 2005), art 5(c) available at [www.idi-](http://www.idi-)

Support for this position can be found in the ICJ's Advisory Opinion on the *Construction of the Wall in Palestine*. When referring to the Israeli violations of obligations *erga omnes* regarding the right of self-determination of the Palestinian people and certain obligations under international humanitarian law, the ICJ underscored the positive obligations of the members of the international community to take lawful measures in order to bring these violations to an end. It thus urged States to adopt measures going beyond non-recognition as provided for in article 41(2) ASR.<sup>55</sup> Other examples of countermeasures by non-injured States for the violation of obligations *erga omnes* include the oil boycott by Arab countries in 1973-1974 in response to Israel's occupation of the West bank and Jerusalem; the freezing of funds of the Federal Republic of Yugoslavia (Serbia) and the non-performance of bilateral aviation agreements by EU member States in reaction to human rights violations in Kosovo in 1998; as well as the freezing of assets of members of the Zimbabwean government by EU members and other States in response to human rights violations in 2003.<sup>56</sup> Similarly, the sanctions by the EU and the United States against Russia in 2014 in response to its annexation of the Crimea can arguably be justified as countermeasures in terms of article 54 ASR.

Finally, it is worth noting that article 49(3) of the Draft Articles on Responsibility of International Organizations (DARIO) includes a provision similar to article 54 ASR. Article 49(3) does, however, limit the invocation of responsibility of an international organisation by other international organisations for breaches of obligations *erga omnes* to situations where the functions of the organisation in question include the safeguarding of the respective community interest that underlies the obligation breached.<sup>57</sup> A practical impediment to the application of article 49(3) remains the lack of dispute resolution mechanisms before which such organisations could bring claims of this nature.<sup>58</sup>

#### 4.2 *Judicial enforcement through the ICJ*

Despite the proliferation of judicial bodies in current international law, the ICJ has certain features that set it apart in terms of universality. It is the principal

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[iil.org/idiE/resolutionsE/2005\\_kra\\_01\\_en.pdf](http://www.un.org/ida/idiE/resolutionsE/2005_kra_01_en.pdf) (accessed 18 February 2015).

<sup>55</sup> *Construction of the Wall* Advisory Opinion n 10 above pars 159-160; Crawford (Bilateralism) n 52 above 233.

<sup>56</sup> See Gaja n 25 above 129. See also Dupuy n 53 above 1062.

<sup>57</sup> Crawford (Bilateralism) n 52 above 232; Gajan 25 above 106 noted that although the DARIO does not address the case of international organisations invoking the responsibility of a State for violating obligations *erga omnes*, it should in principle be possible for organisations to invoke the responsibility of such States where the conditions of art 49(3) are met.

<sup>58</sup> Crawford (Bilateralism) n 52 above 232, 346.

judicial organ of the United Nations and any member State can bring a case before it, as well as participate in the election of the judges through voting in the General Assembly.<sup>59</sup> Since its inception almost a 100 States from all regions of the world have brought cases before the ICJ and/or participated in advisory opinion proceedings. Moreover, unlike any specialised (functional) international judicial body, the ICJ has substantive jurisdiction over the whole field of international law.<sup>60</sup>

These distinguishing features create the expectation that the ICJ will play a significant role in the enforcement of international law, including obligations towards the international community as a whole.<sup>61</sup> In reality, however, the ICJ has been reluctant to see itself as an institution responsible for the progressive enforcement of community interests. It has thus far acknowledged the notion of either *jus cogens* or *erga omnes* in only eight of its majority decisions.<sup>62</sup> In most of these decisions the recognition of the concept was essentially rhetorical (symbolic) or *obiter dictum* and was not decisive for the case at issue.<sup>63</sup> Instead, the ICJ prefers to rely on technical and narrowly tailored grounds for answering questions before it.<sup>64</sup>

The ICJ's reluctance to serve as guardian of community interests manifested itself in particular in its initial narrow interpretation of the notion 'legal interest'. As is well known, the ICJ gave a very restrictive interpretation of 'legal interest' in the *South West Africa* decision of 1966. At the time it was unwilling to assume that a State may have a legal interest in vindicating a

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<sup>59</sup>Greenwood 'The role of the International Court of Justice in the global community' (2010/11) 17 *University of California Davis Journal of International Law and Policy* 241.

<sup>60</sup>Greenwood n 59 above 241-242.

<sup>61</sup>Hernandez n 10 above 58. A broader role for the ICJ is however envisaged in separate opinions of recent cases. See, eg, the Separate Opinion of Judge Simma in *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 327-328.

<sup>62</sup>These are in chronological order the *Barcelona Traction* decision n 7 above; see also *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) [1996] ICJ Rep; *Construction of the Wall* Advisory Opinion n 10 above; *Armed Activities* decision n 46 above; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections)[2011]; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep [Hereinafter *Habré* decision].

<sup>63</sup>Hernandez n 10 above 30.

<sup>64</sup>Gordon 'Innate cosmopolitan dialectics at the ICJ: Changing perceptions of international community, the role of the court, and the legacy of Judge Alveraz' (2014) 27 *Leiden Journal of International* 326.

principle of international law where it has not suffered material damages – unless this was explicitly provided for in an international text or instrument.<sup>65</sup> In the absence of a legal interest in this restrictive sense, a State could not claim standing before the ICJ.

This cautious approach formed a contrast with that of the Permanent Court of International Justice (PCIJ), the predecessor to the ICJ that was created under the League of Nations. In 1923 the notion of communitarian interests was invoked before the PCIJ in the *SS Wimbledon* case that concerned the right of passage through the Kiel Canal.<sup>66</sup> The case concerned Germany's denial of entry into the Kiel Canal to the *SS Wimbledon* which carried arms and munitions destined for Poland. Germany based its refusal to allow passage on its Neutrality Orders pertaining to the Russo-Polish war. Great Britain, France, Italy and Japan claimed that such refusal violated their right to passage in accordance with article 380 of the Treaty of Versailles, which guaranteed passage to vessels of commerce and war to all nations at peace with Germany. The PCIJ allowed the claim, concluding that the Kiel Canal 'has been permanently dedicated to the use of the whole world'.<sup>67</sup>

In coming to this conclusion, the PCIJ gave a progressive interpretation of the relevant standing provisions of the Treaty of Versailles. Article 386(I) of the Treaty determined that in the event of a violation of any of the conditions in articles 380 to 386, or in the event of a dispute pertaining to their interpretation, 'any interested power can appeal to the jurisdiction instituted for the purpose by the League of Nations'.<sup>68</sup> The PCIJ interpreted this rather vague wording progressively, granting standing to the United Kingdom, France, Italy and Japan. While the United Kingdom (as the flag State) and France (as the State of incorporation of the firm that chartered the ship) could claim a direct (material) interest in the case, this was not the case for Italy or Japan.<sup>69</sup> However, the PCIJ interpreted article 386(I) as establishing a general interest for all parties possessing fleets and merchant vessels flying their

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<sup>65</sup>*South West Africa* (Second Phase Judgment) [1966] ICJ Rep par 44. At par 88 the ICJ further underscored that its Statute did not provide for an *actio popularis* approach that would allow any members of the international community to initiate proceedings in vindicating the violation of community interests. See also Hernandez n 10 above 30.

<sup>66</sup>*Case of the SS 'Wimbledon' (Great Britain v Germany) (Judgment of 17 August 1923)* PCIJ Rep Series A No 1 at 22, 28; Crawford (Bilateralism) n 52 above 228.

<sup>67</sup>*Wimbledon* case n 66 above 28. Crawford (Bilateralism) n 52 above 228.

<sup>68</sup>Cited in the *Wimbledon* case n 66 above 20. See also Kawano 'Standing of a state in the contentious proceedings of the International Court of Justice' (2012) 55 *Japanese Yearbook of International Law* 221-222.

<sup>69</sup>Tzanakopoulos 'The Permanent Court of International Justice and the "international community"' in Tams and Fitzmaurice (eds) *Legacies of the Permanent Court of International Justice* (2013) 356.

respective flags, regardless of whether their pecuniary interests were affected.<sup>70</sup> The PCIJ was thus willing to admit standing of individual States in the general interest by means of a progressive interpretation of a vague standing provision.<sup>71</sup>

The ICJ took a first step towards a more progressive interpretation of the notion of legal interest in the *Barcelona Traction* case, when formally recognising the existence of obligations *erga omnes*.<sup>72</sup> However, the recognition of the notion of community oriented obligations was not decisive for the decision and the implications of such recognition for the purpose of standing were not addressed. Some 20 years later, in the 1995 *Case Concerning East Timor (Portugal v Australia)*, there were implicit indications that the ICJ may have broadened its understanding of ‘legal interest’ – despite the fact that it declined to rule on whether Australia had behaved unlawfully in concluding a treaty with Indonesia pertaining to the East Timorese continental shelf (while East Timor was *de facto* administered by Indonesia). Although Portugal and Australia had accepted the ICJ’s compulsory jurisdiction in accordance with article 36(2) of the ICJ Statute, a ruling in this case would simultaneously have resulted in a ruling on the lawfulness of the behaviour of a third State (Indonesia), which had not consented to the ICJ’s jurisdiction. This in turn would have constituted a violation of the ICJ Statute which only foresees jurisdiction in instances where States had voluntarily subjected themselves to it.<sup>73</sup>

In reaching this conclusion the ICJ acknowledged the *erga omnes* status of the right to self-determination and in particular also the right of self-determination of the East-Timorese people.<sup>74</sup> The ICJ nonetheless underscored that regardless of the nature of the obligations invoked, it could only rule on the lawfulness of the conduct of a State which had consented to its jurisdiction.<sup>75</sup> The ICJ thus made it clear that the *erga omnes* status of a right did not in and of itself oblige States to accept its jurisdiction. However, implicit in the ICJ’s argument was the assumption that had Indonesia accepted the ICJ’s jurisdiction, Portugal would have been able to invoke the right of self-determination of the East Timorese people against Indonesia before the ICJ.

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<sup>70</sup> *Wimbledon* case n 66 above 20.

<sup>71</sup> Tzanakopoulos n 69 above 356-357. See also *The Interpretation of the Statute of the Memel Territory* (Preliminary Objection) [1932] PCIJ Ser A/B No 47 at 247, 249; (Merits) [1932] PCIJ A/B No 49. The applicants claimed (and were granted) a general interest in the status of the territory on the basis of the terms of the treaty.

<sup>72</sup> *Barcelona Traction, Light and Power Company Ltd* n 7 above.

<sup>73</sup> See also *East Timor* decision n 62 above 102.

<sup>74</sup> *East Timor* decision n 62 above 102-03.

<sup>75</sup> *East Timor* decision n 62 above 102; see also Hernandez n 10 above 48.

Portugal would thus have had a legal interest in the protection of the right of self-determination of the East-Timorese people, on the basis of the *erga omnes* character of this right. This in turn constituted an implicit recognition of a broadening of the notion of ‘legal interest’ for the purposes of standing before the ICJ statute.<sup>76</sup>

An expanded notion of ‘legal interest’ has since been endorsed explicitly in the decision on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, also known as the *Habré* case.<sup>77</sup> In deciding whether Senegal had breached its obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (the Convention against Torture), in accordance with which it either had to prosecute former Chadian President Hissène Habré without delay or had to extradite him, the issue of Belgium’s standing before the ICJ arose. Belgium relied both on the compromissary clause in article 30(1) of the Convention against Torture and on the declarations made by both parties under article 36(2) of the ICJ Statute.<sup>78</sup>

In confirming Belgium’s standing the ICJ determined that all State parties to the Convention against Torture had a common interest in compliance with the obligation to initiate prosecution by the State on whose territory an alleged offender was present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties had a ‘legal interest’ in the protection of these ‘obligations *erga omnes partes*’.<sup>79</sup> Therefore, each State party to the Convention can make a claim concerning the cessation of an alleged breach by another State party, without proving any special interest.<sup>80</sup>

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<sup>76</sup>See De Wet ‘*Jus cogens* and obligations *erga omnes*’ in Shelton (ed) *The Oxford handbook of international human rights law* (2013) 556-557.

<sup>77</sup>*Habré* decision n 62 above 422. See also *Armed Activities* decision n 46 above separate opinion of Judge Simma par 38. Pellet ‘The Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A requiem for states’ crime?’ (2001) 32 *Netherlands Yearbook of International Law* (2001) 77.

<sup>78</sup>*Habré* decision n 62 above par 42.

<sup>79</sup>*Habré* decision n 62 above par 68.

<sup>80</sup>*Habré* decision n 62 above par 69. See a similar line of reasoning in the Separate Opinion of Judge Simma in the *Armed Activities* decision n 46 above 35. See also Crawford (Bilateralism) n 52 above 235 who noted that Australia, in its institution of proceedings against Japan concerning the whaling in the Antarctic, invoked an obligation *erga omnes partes* under the International Convention for the Regulation of Whaling. However, its formal base for jurisdiction was article 36(2) of the ICJ Statute and the respective declarations pertaining to compulsory jurisdiction by the two countries. See *Whaling in the Antarctic (Australia v Japan)* (Application Instituting Proceedings) [2010].

It is noteworthy that this broadened notion of ‘legal interest’ for the purposes of standing first and foremost concerned States parties to the Convention against Torture. The ICJ tailored its decisions towards the common interest of the parties to the Convention and explicitly referred to *erga omnes partes* obligations. It remains to be seen whether the ICJ would also allow standing in situations where States base their claims exclusively on the fact that a customary international law of a community oriented nature had been violated. Such a claim would then be based on the *erga omnes* proper character of the international obligation at stake. A claim of this nature would, however, only have a chance of succeeding between States which have both accepted the compulsory jurisdiction of the ICJ in terms of article 36(2) of the ICJ Statute.<sup>81</sup> In the *Habré* decision the court refrained from addressing this issue and focused instead on the fact that both Senegal and Belgium are parties to the Convention against Torture.<sup>82</sup>

The ICJ may soon have to confront the issue whether the violation of an *erga omnes* proper obligation as such provides a sufficient legal interest for the purposes of standing, in a situation where all parties have (in principal) accepted its compulsory jurisdiction. This is due to the proceedings initiated by the *Marshall Islands*, set out in the section 1 above. As indicated, it remains to be seen whether the ICJ will have jurisdiction, since several of the States involved have added reservations when accepting the ICJ’s compulsory jurisdiction.<sup>83</sup> It is further debatable whether the ICJ will accept that an *erga omnes* customary obligation to bring about nuclear disarmament in the manner argued by the Marshall Islands indeed exists. Even so, the proceedings do in principle present the ICJ with a test-case for acknowledging that where the violation of an obligation *erga omnes* proper is at stake, the legal interest of States (that have accepted the compulsory jurisdiction of the ICJ) is a given for the purpose of standing.

Finally, it is worth emphasising that the *jus cogens* status of a particular *erga omnes* obligation does not (yet) in and of itself provide jurisdiction before the

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<sup>81</sup>The ICJ can only exercise jurisdiction over disputes if and to the extent that States have accepted its jurisdiction in accordance with art 36(1) or art 36(2) of the ICJ Statute. This condition is not affected by the broadening of the notion of ‘legal interest’. Even so, Gaja n 25 above 112 suggested that the existence of a judicial remedy, based on consent, available to a State to whom an obligation *erga omnes* is owed when seeking compliance with the obligation on behalf of the international community, can be defined as an *actio popularis*.

<sup>82</sup>See Hernandez n 10 above 49 according to whom the ICJ based the judgment on the narrowest possible interpretation of *erga omnes* obligations.

<sup>83</sup>*Marshall Islands v India* n 1 above; *Marshall Islands v Pakistan* n 1 above; *Marshall Islands v United Kingdom* n 1 above.



ICJ, nor does it have any other 'automatic' effect.<sup>84</sup> While the ICJ may be in the process of broadening its definition of 'legal interest' for the purpose of standing, it can only do so in disputes between States which have indeed accepted the ICJ's jurisdiction as provided for in article 36 of its Statute. The fact that a violation of a peremptory obligation is at issue does not in and of itself compensate for the absence of such acceptance.<sup>85</sup> The majority of the ICJ judges do not (yet) seem to be convinced that peremptory norms would weigh heavier than procedural barriers under international law that regulates admissibility and jurisdiction. Stated differently, disputes concerning the violation of the prohibition of peremptory norms cannot (implicitly) provide a basis for jurisdiction which it would otherwise not possess; neither do they automatically set aside procedural requirements for or impediments to such jurisdiction. For example, the prohibition of genocide cannot establish access to the ICJ in contravention of the requirements of article 36(1) of the ICJ Statute.<sup>86</sup> The peremptory character of these prohibitions also does not automatically invalidate an otherwise valid reservation to the ICJ's jurisdiction. Similarly, the ICJ did not accept that a peremptory obligation can displace State immunity.<sup>87</sup>

#### 4.3 Judicial enforcement through functional judicial bodies

It is possible that the evolving notion of 'legal interest' in the jurisprudence of the ICJ will find resonance with functional (specialised) judicial bodies. Even though they have limited subject-matter jurisdiction, it is possible that the subject-matter for whose enforcement they are responsible includes obligations *erga omnes (partes)*. A prominent example is the Seabed Authority created by UNCLOS. Article 153(1) UNCLOS determines that activities in the seabed area shall be organised, carried out and controlled by the Seabed Authority on behalf of 'mankind as a whole'. The seabed area includes the seabed ocean floor as well as the subsoil thereof beyond the limits of national jurisdiction.<sup>88</sup> Article 187 UNCLOS further determines that the Seabed

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<sup>84</sup>In the *Habré* decision n 62 above par 99, the ICJ did in passing refer to the peremptory status of the prohibition of torture. However, the peremptory status did not feature in relation to its reasoning pertaining to the *erga omnes partes* nature of the obligations in the CAT. Instead, it based the common legal interest of countries in prosecuting torture on the shared values embodied in the Convention.

<sup>85</sup>Vidmar 'Rethinking *jus cogens* after *Germany v Italy*: Back to article 53?' (2013) 60 *Netherlands International Law Review* 14, 42.

<sup>86</sup>*Armed Activities* decision n 46 above par 125; Talmon '*Jus cogens* after *Germany v Italy*: Substantive and procedural rules distinguished' (2012) 25 *Leiden Journal of International Law* 987-988.

<sup>87</sup>*Jurisdictional Immunities* decision n 62 above par 951. See also Hernandez n 10 above 55; Talmon n 86 above 989-990.

<sup>88</sup>See UNCLOS n 21 above art 1(1); Wolfrum n 17 above 1141.

Disputes Chamber (the Chamber) of the International Tribunal for the Law of the Sea (ITLOS) shall have jurisdiction in disputes with respect to activities in the seabed area between States parties concerning the interpretation or application of the relevant part of UNCLOS and Annexes thereto.<sup>89</sup> The question arises whether a party to UNCLOS would have standing before the Chamber to initiate judicial proceedings against the delimitation of the outer continental shelf by a coastal State, on the basis that it would unjustifiably curtail the scope of the international deep seabed area.<sup>90</sup> The rationale behind such proceedings would be that the seabed area constitutes the common heritage of mankind,<sup>91</sup> as a result of which all States parties would have a legal interest in its protection.

In this context one should keep in mind that article 76 UNCLOS grants coastal States the right to delineate the outer limits of their continental shelves. Where such delimitation allegedly infringed the rights of States with adjacent or opposite coasts, these States can initiate a claim in their own right.<sup>92</sup> It remains, however, controversial whether States that cannot argue that their rights as adjacent or opposite States have been infringed may bring a case on the basis that it would unjustifiably limit the seabed area which is preserved for mankind. Such a claim would be of a purely collective interest nature, directed at enforcing obligations *erga omnes partes*.<sup>93</sup>

The drafters of UNCLOS did not explicitly address this issue.<sup>94</sup> However, some authors suggest that the competencies of the Chamber provided for in UNCLOS should be interpreted in accordance with article 48(1)(b) ASR, which allows non-injured States to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. In line with this reasoning the term 'invoke' would include also the initiating of judicial proceedings before a competent judicial body (in this case the Chamber).<sup>95</sup> One should further keep in mind that article 288 of UNCLOS explicitly determines that those judicial bodies which have jurisdiction over disputes relating to UNCLOS have jurisdiction 'over any dispute concerning the interpretation and application of this Convention'. Article 288 does not contain an explicit requirement that the States concerned have to defend their

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<sup>89</sup>Gaja n 25 above 148, 177; Wolfrum n 17 above 1141.

<sup>90</sup>Wolfrum n 17 above 1141.

<sup>91</sup>UNCLOS n 21 above art 137.

<sup>92</sup>Wolfrum n 17 above 1141-1142.

<sup>93</sup>See extensively Wolfrum n 64 above 1141-1142 who describes this as a public interest claim (*actio popularis*).

<sup>94</sup>Wolfrum n 17 above 1142.

<sup>95</sup>Wolfrum n 17 above 1144; Crawford (Bilateralism) n 52 above 236.

individual interests.<sup>96</sup> One can therefore argue that a combined reading of the articles pertaining to the jurisdiction of the Seabed Authority, article 288 UNCLOS and article 48(1)(b) ASR would provide States parties with standing before the Chamber in order to protect the seabed area in the interest of mankind.<sup>97</sup> Thus far no case of this nature has been initiated.

## 5 Concluding Remarks

In the almost fifty years since its controversial *South-West Africa* decision, the ICJ has shown some progression in its understanding of the concept of ‘legal interest’ and its implications for the invocation and enforceability of obligations *erga omnes*. Similarly, other specialised judicial bodies like ITLOS may follow suit if and when they are presented by a case that concerns the enforcement of obligations *erga omnes (partes)*. This in turn may result in increased litigation before these bodies aimed at enforcing community oriented obligations in situations where the jurisdiction of the judicial body in question has indeed been accepted.

However, formal jurisdictional requirements contained in the respective statutes of the judicial bodies in question will remain an obstacle for enforcement in the foreseeable future. The *erga omnes* character of a particular obligation cannot impose jurisdiction on States against their will. This remains the case also where the respective *erga omnes* obligations qualifies as *jus cogens*. States’ consent remains a corner stone for international judicial dispute settlement in the twenty-first century. This in turn implies that the progressive enforcement of obligations *erga omnes* remains an incremental process to be pursued with patience and endurance.

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<sup>96</sup>Wolfrum n 17 above 1144.

<sup>97</sup>Wolfrum n 17 above 1144-1145. Wolfrum ‘Intervention in proceedings before international courts and tribunals: To what extent may interventions serve the pursuance of community interests?’ in Boschiero *et al* (eds) *International courts and the development of international law: Essays in honour of Tullio Treves* (2013) 222. He argues that art 32 of the Statute of ITLOS (in Annex VI of UNCLOS (n 21)) can facilitate interventions by States parties in the interest of obligations *erga omnes partes*. This article allows for all States parties to intervene in proceedings concerning the interpretation or application of UNCLOS. The article is aimed at safeguarding the overarching objective of the treaty.