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DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE IN GAMBIA v. MYANMAR AND SOUTH AFRICA v. ISRAEL CASES AS A NEW PERSPECTIVE OF ADJUDICATION OF CRIME OF GENOCIDE

Abstract: The author analyses the effects of decisions of the International Court of Justice in two recent genocide cases – Gambia v. Myanmar and South Africa v. Israel – as an element of progressive development of the Law of the Court in adjudicating of the crime of genocide.

The Court in its decisions, both in the Judgement on Preliminary objections in Gambia v. Myanmar case as well as the orders on provisional measures in both cases, introduced the concept of obligations erga omnes partes in terms of obligations owed to a group of states, so breach of those obligations enables all States members of a group to invoke the responsibility for breach.

The essential meaning of the obligations erga omnes partes, understood as secondary rules of international law, lies in the horizontal expansion of the jurisdiction of the Court ratione personae based on the subject matter of the dispute without deviating from the principle of consent as a fundamental principle of which ICJ rests.

He concludes that, despite the fact that they are not free of legal difficulties, obligations erga omnes partes are valuable step in promotion of the rule of law in international community.

Keywords: obligations erga omnes partes; ICJ jurisdiction ratione personae; res iudicata erga omnes partes; common interest; related ICJ jurisprudence.

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On November 11, 2019 The Republic of The Gambia instituted proceedings against the Republic of the Union of Myanmar before the International Court of Justice, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide through "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group".

Specifically, The Gambia argued that "from around October 2016 the Myanmar military (the 'Tatmadaw') and other Myanmar security forces began widespread and systematic 'clearance operations' – the term that Myanmar itself uses – against the Rohingya group. The genocidal acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, such genocidal acts continued with Myanmar's resumption of 'clearance operations' on a more massive and wider geographical scale".

The Gambia contended that these acts constitute violations of the Genocide Convention.

Along with the Application the Gambia submitted also request for indication provisional measures of protection.[1]

On January 20, 2021 Myanmar submitted preliminary objections to the jurisdiction of the Court and the admissibility of the claim.[2]

On December 29, 2023, South Africa filed an application instituting proceedings against Israel before the International Court of Justice concerning alleged violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide in relation to Palestinians in Gaza Strip.

According to the Application, "acts and omissions by Israel... are genocidal in character, as they are committed with the requisite specific intent... to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group" and that "the conduct of Israel – through its State organs, State agents, and other persons and entities acting on its instructions or under its direction, control or influence – in relation to Palestinians in Gaza, is in violation of its obligations under the Genocide Convention".

The Applicant further states that "Israel, since 7 October 2023 in particular, has failed to prevent genocide and has failed to prosecute the direct and public incitement to genocide" and that "Israel has engaged in, in engaging in and risk further engaging in genocidal acts against the Palestinian people in Gaza".

On the same day South Africa submitted request for indication of provisional measures of protection.[3]

The Court adopted provisional measures of protection in both cases.

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1 *Cour internationale de Justice*. www.icj-cij.org, case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Application Instituting Proceedings, paras. 2, 48–68.

2 *Ibidem*.

3 *Cour internationale de Justice*. www.icj-cij.org. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel), Application Instituting Proceedings, paras. 1, 18–21.

Basically, the measures adopted are similar to a large extent expressing the letter and spirit of the Convention with some differences that derive from specific circumstances surrounding the cases.

We will not deal specifically with these measures, but pay attention to the issue of Gambia's standing before the Court, as the crucial issue which will have a substantial impact on the future jurisprudence of the Court. Of the four preliminary objections to the jurisdiction of the Court and admissibility of claim,[4] two are relevant in this specific context – the First preliminary objection and the Second preliminary objection of the Myanmar.

In the First preliminary objection Myanmar claimed that "The Court lacks jurisdiction, or alternatively the application is inadmissible, as the real applicant in these proceedings is the Organisation of Islamic Cooperation", as an International organization.

The Myanmar referred to the fact that the Organisation consisted of 57 members "decided in March 1999 to bring these proceedings and the Gambia agreed to act in its capacity as chair of an OIC *Ad hoc* Committee to give effect to that OIC initiative...".[5] As only States can be parties to the Genocide Convention, the OIC as an international organization is not a party to that Convention, and therefore cannot invoke the compromisory clause in its Article IX.

The Bangladesh, as an affected State, was not in position to submit application, due to the fact that it put a reservation on Article IX of the Convention. The Myanmar contended that its interpretation is consisted with the approach taken by the International Law Commission ("ILC") in Article 7 of its 2011 Draft Articles on the Responsibility of International Organisations (the "2011 ILC Draft Articles"),[6] which deals with situation where "an organ of a State [...] is placed at the disposal of another international organisation".

According to the Second Preliminary Objection of Myanmar, the Gambia, as a non-injured Contracting Party to the Genocide Convention, lacks standing to bring the case against Myanmar under Article IX thereof, because the Convention does not provide for the concept of an *actio popularis*. Furthermore, The Gambia is also barred from bringing the case because Bangladesh, as the Contracting Party specially affected by the alleged violations of the Genocide Convention purportedly committed by Myanmar, has entered a reservation to Article IX and has thereby waived its right to settle disputes relating to the interpretation, application or fulfilment of the Convention by bringing a case before the Court under that provision.[7]

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4 Until this moment, Israel has not filed any preliminary objection in that regard.

5 *Cour Internationale de Justice*, www.icj.org, Case concerning Application of the Convention on the Prevention on the Punishment Crime of Genocide (Gambia v. Myanmar), First Preliminary Objections of the Republic of Union of Myanmar, paras. 25, 34–162.

6 Draft articles on Responibility of International Organizations, YILC 2011, II, Part Two.

7 *Cour Internationale de Justice*, www.icj.org, Case concerning Application of the Convention on the Prevention on the Punishment Crime of Genocide (Gambia v. Myanmar), Second Preliminary Objections of the Republic of Union of Myanmar, paras. 210–217, 222–260.

Second Preliminary Objection of the Myanmar is a combination of following elements:

– principle *parens patriae* according to which in order to appear before the Court as an Applicant has to be "injured State", i. e. "adversely affected by an internationally wrongful act". As in this particular case the victims of alleged genocidal acts are not citizens of Gambia, it has not legal interest to appear before the Court on the basis on Article IX of the Genocide Convention;
– if Contracting parties that are not specially affected by an alleged violation of the Convention are assumed to have standing to submit a dispute under Article, this standing is a specific one being subsidiary to and dependent upon the standing of States that are "specially affected".

Further, "that in bringing its claims before the Court, The Gambia has in fact acted as an "organ, agent or proxy" of the OIC, which is the "true applicant" in these proceedings. The Myanmar's main contention was that a third party, namely the OIC, which is not a State and cannot therefore have a reciprocal acceptance of jurisdiction with the respondent State, had used The Gambia as a "proxy" in order to circumvent the limits of the Court's jurisdiction *ratione personae* and invoke the compromissory clause of the Genocide Convention on its behalf".[8]

The Court rejected both preliminary objections. The rejection is based on community or common interest whose normative expression are obligations *erga omnes*.

The Court stated *inter alia* 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'etre* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions (*I.C.J. Reports 1951*, para. 23)".

It continued that "The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim".[9]

In its Order in the case the Court also invoked obligations *erga omnes partes* in order to establish its *prima facie* jurisdiction necessary for indication provisional measures.

The same ground the Court invoked to establish its *prima facie* jurisdiction in the provisional measured phase in South Africa v. Israel case.

8 *Ibidem*, para. 43.
9 *Ibidem*, para. 108.

THE BASIC ELEMENTS OF APPROACH OF THE COURT

In its previous decisions on provisional measures phase in both cases, as well in its Judgment on provisional measures on Gambia v. Myanmar case, the Court replaced the obligations *erga omnes* as elaborated in the famous *obiter dictum* in Barcelona case with its reduced, transcated form as the obligations *erga omnes partes*.

In Barcelona case the Court stated *inter alia:*

"...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 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*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law;[10] others are conferred by international instruments of a universal or quasi-universal character".[11]

It is reasonable to assume that this change in the approach of the Court is dictated by some ambiguities and controversies that accompany the concept of the obligations *erga omnes*.

The objective meaning of the Court's *dictum* in the Barcelona case is the promotion of *actio popularis* as a secondary rule of general international law. It was revolutionary, laudable idea, which, however, was divorced from legal reality, especially in 1970 when the judgement in Barcelona case was passed.

Did the Court really intend to promote the construction of obligations *erga omnes* as a part of positive international law?

It should be emphasized that the Court included the *dictum* in the judgment after it had already resolved the issue of the *ius standi* of Belgium, so from the point of judicial logic there was no need to deal with the obligations *erga omnes* at all.

The possible explanation of such decision of the Court is given by its principal legal advisor professor Thirlway, its "finest unseen actor".[12] Based on discussion in the deliberation stage in the work of the court forever closed to the public according to the law of Court, he states that: "... it is more or less an open secret that the passage in the Barcelona Traction judgment – with its specific reference to 'protection... from racial discrimination' was intended to a public disavowal by the Court in its 1970 composition, of at least one element in the controversial decision given by the (barest) majority of the judges sitting in 1966" (in Sout West Africa case – M. K.).[13]

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10 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

11 ICJ *Reports*, 1970, para. 33.

12 *Leiden Journal of International Law*, 2020, vol. 3, p. 261.

13 H. Thirlway, *The Law and Procedure of ICJ 1960–1989*, p. 94.

By its nature the Barcelona *dictum*, as it is commonly called, is in fact an *obiter dictum* meaning incidental statement said in passing and as such not essential to the decision and therefore not binding.[14]

Article 48 (Invocation of responsibility by a State other than an injured State) of ILC Articles on State Responsibility[15] was formulated with intention "to give effect to the International Court's statement in the Barcelona case".

But, it is highly doubtful as to whether the Article *per se* is capable to give effect to the ICJ dictum in the Barcelona case.[16]

The same consideration applies to the Resolution on obligations *erga omnes* in International Law adopted by Institut de droit international on its Krakow Session 2005.

There are two characteristics of judgments and advisory opinions following Barcelona Traction judgment in which the Court refers to the obligations *erga omens*.

Primo, consistent reference, either directly or indirectly to rules of *ius cogens*;[17] and

Secundo, tying *erga omnes* effects both to obligations and to rights, thus raising the issue as to whether the Court understand obligations *erga omnes* as secondary rule independent of primary rules of general international law or not?

It is also of relevance that since Barcelona case, the Court in all cases referring to obligations *erga omnes* did not deal with the relationship between such obligations and the issue of standing before the Court in a positive way. Moreover, the

14 Such position of the *obiter dictum* is indicated in the structure of the Barcelona judgement by the fact that in unusually extensive opinions of 12 judges appended to the judgement, obligations *erga omnes* are not mentioned at all.

15 The Article avoid to use the term "obligations *erga omnes*, giving explanation that the term "*erga omnes*" "conveys less information then the Court's reference to the international community as a whole and has something been confused with obligations owed to all parties of a treaty", see, page 9 *supra*.

16 The Articles on State Responsibility are not a codification in terms of Article 15 of the Statute of the International Law Commission. They are examples of new practise in the work of ILC based on Article 23(b) in terms of to "take note of or adopt the report". In this specific case the ILC recommended to the General Assembly simply to "take note" of the Articles, with the caveat that a later stage the General Assembly should consider the adoption of a Convention. The General Assembly followed this recommendation "without prejudice to the question of their future adoption or other appropriate action". It took this decision without a vote in the Sixth Committee as well as in the Plenary meeting. Consequently, the Articles on the Responsibility of States are, by their nature, closest to the semi-official codification and progressive development by the prestigious body of international lawyer such as International Law Commission. They have no binding force by themselves, but can possess it indirectly via customary law to the extent to which they express it.

17 East Timor case, Judgment, ICJ Reports 1995, para. 29; Also in armed Activities on the territory of Congo (New Application 2002), Judgment, ICJ Reports 2006, para. 125; Case concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide, Preliminary Objection, ICJ Reports, 1966, para 31; Construction of the Wall in the Occupied Palestine Territories, Advisory Opinion, ICJ Reports, 2004, paras. 155, 159; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Reports 2019, para. 180.

Court clearly stated in the East Timor case "The Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whether the nature of the obligations involved the Court could not rule on the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*". It seems that obligations *erga omnes* advocated by the Court in its *obiter dictum* in Barcelona case lead to *actio popularis* which in current International Law is rather a theoretical construction.[18]

The formulation in Barcelona *dictum* that "breach of obligations *erga omnes* enables all States to take action" implies that the obligations are rather moral or political than legal one.

Namely, the obligation in legal terms means duty to action, leaving no choice to take action or not. The term "enable" place the "action of all states" on the level of political expediency as a matter of discretion.[19]

The rigidity of understanding of obligations *erga omnes* as a legal obligations is softened in the Article 48 (1, a) of Articles on State Responsibility by introducing the *erga omnes partes* concept which has certain ground in the positive international law.

These obligations in the light of Judge Higgins observations are, in fact, provisions in an almost universally recognized multilateral conventions[20] and as such might be understood basically as an expression of the rule *pacta sunt servanda* in the frame of Article 60 of the Convention on the Law of Treaties (Termination or suspension of a treaty as a consequence of its breach).

It appears that the jurisprudence of the Court, from the Barcelona *obiter dictum* and onwards, does not recognize the obligations *erga omnes* as a separate and independent obligations in the structure of the international law.

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18 Prof. H. Thirlway, Principal Legal Advisor of the ICJ after extensive analysis of the jurisprudence of Court found that "The conclusion which has to be accepted is that obligations *erga omnes* to which "compulsory rights of protection have entered into the body of general international law still be – with possible exception of the obligation not to commit genocide – a purely theoretical category" – H. Thirlway, *op. cit.*, Part 1, p. 102. In South West Africa case the Court clearly stated that the *actio popularis* was "not known to international law at present..." ICJ Reports 1966, p. 45. States are aware of it, so that, "Notwithstanding of apparel, acceptance of the *erga omnes* concept, no state has invoked it in judicial proceedings since its emancipation in the Barcelona case" – L. Henkin, R. Pugh, O. Schahter, H. Smit, *International Law*, 1993, p. 556. Such an conclusion necessarily follows from the consensual nature of the jurisdiction of international courts.

19 Hence it is of fundamental importance that these actions are undertaken *lege artis*. In that regard article 5 of the Institut de droit international is relevant. It reads as follows: "Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligations is owed:
(a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;
(b) shall not recognize as lawful a situation created by the breach;
(c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach".

20 See, p. 10 *supra*.

In two pending cases – Gambia v. Myanmar and South Africa v. Israel involving issue which according to Barcelona *dictum*, indisputably by "their very nature... the concern of *All States* (emphasis added) genocide and torture – the Court's reasoning shifted to obligations *inter partes*.[21]

Obligations *erga omnes partes* applied by the Court, are defined by Article 48 (Invocation of responsibility by a State other than injured State) of International Law Commission's Articles on State Responsibility whose relevant provision reads as follows:

"1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

a) the obligations breached is owed to a group of States including that State, and is established for the protection of collective interest of the group"

As stated in the commentary to Article 48 (1, a) it deals with "the invocation of the responsibility by States other than the injured State acting in the collective interest". A State entitled under Article 48 "is acting not in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which the obligation is owed..."[22]

Institut de droit international designed obligations *erga omnes partes* in the following terms:

"Article 1.

....

(b) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action".[23]

So the constitutive elements of obligations *erga omnes partes* are:

– they are established for the protection of collective interest of the group;
– they are obligations owed to a group of States;
– they enables any member of a group to initiate appropriate judicial proceedings for protection of collective interest. In the light of these

21 It is striking that the Court known for meticulous editing of its decisions, incorrectly cited the relevant part of the Barcelona judgment with the effect of identifying obligations *erga omnes* with obligations *inter partes*. Namely, in Belgium v. Senegal case the Court stated: "All the States parties 'have a legal interest' in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para 33). These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case against torture" (para. 68. of the Judgment. Belgium v. Senegal case, ICJ Reports, 2012).
The same reasoning the Court applied in Gambia v. Myanmar case, para. 108 of the Judgment. In fact, according to Barcelona *dictum* "All States..." not "All the States parties..." can be held to have a legal interest as regards obligation *erga omnes* (para. 33 of the judgment in Barcelona case).

22 The ILC's Articles on State responsibility, Introduction, Text and Commentary, Introduction by J. Crawford, p. 276, para. 1.

23 Resolution Obligations *erga omnes* in International Law, Fifth Cttee, Krakow 2005.

elements it might be said that obligations *erga omnes partes* are a sort of reduced, transcated form of *actio popularis* advocated by Barcelona *dictum*.

There exist a slight difference between these two definitions that is not without a relevance. The definition given by the Institut de Droit International cites multilateral treaty as a source of obligations *erga omnes partes*, while, according to the Commentary to Article 48 "obligations protecting a collective interest... may derive from multilateral treaties or customary international law"[24]

Having that in mind the question might be posed as to whether obligations *erga omnes partes* are original concept or not?

In her separate opinion in the Construction of Wall case, Judge Higgins noted that "invocation (para. 157) of "the *erga omnes*" nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" while apparently viewed by the Court as something to do with "the *erga omnes* principle", is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase "ensure respect" as going beyond legislative and other action within a State's own territory. It observes that "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally". (*The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war*, Pictet, ed., p. 16.)".[25]

The opinion is supported by the fact that the obligations *erga omnes partes* as such does not necessarily imply the jurisdictional link among States that make up a group.

As correctly stated in the Resolution of the Institut the droit International: "Article 3:

In the event of there being a jurisdictional link between a State alleged to have commited a breach of an obligation *erga omnes* and a State to which the obligations is owed, the latter State has standing to bring a claim to the International Court

24 The ILC's Article on State Responsibility, Introduction, Text and Commentary, Introduction by J. Crawford, p. 277, para. 6. Since the obligations *erga omnes partes* are owed to a group of States, it is reasonably to assume that AOR has in mind particular or regional customary law.

25 Legal consequences of a construction of a wall in occupied Palestinian territory, Advisory Opinion, ICJ Reports 2004, para. 39. Also, Judge Xue in her dissenting opinion in Gambia v. Myanmar case, Judgment on Preliminary objections, para. 39.

of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation".[26]

The actions of the States to which the obligations is owed are not limited to judicial one.[27]

In contrast to obligations *erga omnes*, as designed in the *dictum* in Barcelona case, "the *erga omnes partes* applied in Gambia-Myanmar case and South Africa - Israel case is a treaty based concept.

In the frame of Genocide Convention such concept is not free of difficulties due to some features of the Convention.

Substantive provisions of the Convention are rules of *ius cogens* having absolute, *erga omnes* effects. As opposed to substantive ones its procedural provisions are of contractual nature and as such are subject to the will of the parties as demonstrated by the possibility of putting reservations on Article IX of the Convention.

So, the substantive provisions of the Convention bind all States regardless of whether they are parties to the Convention. In that sense, the ICJ in its Advisory Opinion concerning reservations to the Genocide Convention stated that: "the principles underlying the Convention... are recognised by civilized nations as binding on States, *even without any conventional obligations*".[28]

However, due to the possibility of putting a reservation on Article IX, the effects of *erga omnes partes* are in fact limited to the parties that did not use this possibility. This is the basis of the possible processual inequality between the parties to the Convention.

Judge Xue highlights a specific element dispute with more than one as Applicant or Respondent. She says: "When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. This is particularly true if several judges on the bench are nationals of member States of the international organization concerned. With the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining

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26 Resolution on Obligations *erga omnes* in the International Law, Fifth Cttee, Krakow Session 2005. (emphasis added).

27 Those States also:
"(a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations;
(b) shall not recognize as lawful a situation created by the breach;
(c) are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach". *Ibidem*, Article 5.
Any of the listed actions is related to the claim to responsible State to:
"a) cessation of internationally wrongful act, and assurances and guaranties of non-repetition...
b) performance of the obligation of reparation... in the interest of the injured State or of the beneficiaries of the obligation breached".
ILC Articles on State Responsibility, Introduction, Text and Commentaries, Introduction, J. Crawford, 2002, Article 48, para. 2.

28 ICJ Reports 1951, pp. 23-24, emphasis added.

the principle of equality of the parties, one of the fundamental principles of the Court for dispute settlement".[29]

The observations is not without merit as illustrated in the Legality of Use of Force States.[30]

Judge Xue also expressed concern that the Gambia's legal action "may challenge the principle of finality in the adjudication of the dispute".[31]

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29 The case concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Judgment on Preliminary Objection of 22 July 2022, Dissenting opinion of Judge Xue.

30 In legality of Use of Force cases Respondent States, although parties in the same interest, had 5 judges of their nationality in the Bench in the phase of indication of provisional measures (4 in the phase of preliminary objections), while the Respondent States having no judge of their nationality have chosen, in usual procedure, their judges *ad hoc* (Belgium, Canada, Italy and Spain). Only Portugal had not designated its judge *ad hoc*. More details, Legality of Use of Force (FR Yugoslavia v. Belgium), Provisional Measures, Dissenting Opinion of Judge Kreća, para. 1-4.

According to the settled jurisprudence of the Court if among the Members of the Court there is a judge having the nationality of even one of those parties, then no judge *ad hoc* will be appointed (*Territorial Jurisdiction of the International Commission of the River Oder, 1929. P.C.I.J., Series C, No. 17-11* p. 8; *Customs Regime between Germany and Austria. 1931, P.C.I.J., Series A/B. No. 41*, p. 88).

In the *South West Africa* case (1961) it was established that, if neither of the parties in the same interest has a judge of its nationality among the Members of the Court, those parties, acting in concert, will be entitled to appoint a single judge *ad hoc* (*South West Africa. I.C.J. Reports 1961*, p. 3).

For the basic function od the institution of judge *ad hoc* are:

"(a) to equalize the situation when the Bench already includes a Member of the Court having the nationality of one of the parties; and (b) to create a nominal equality between two litigating States when there is no Member of the Court having the nationality of either party" (S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, pp. 1124-1125).

This formal inequality may have substantive effect in the light of practise of so-called block-voting in the ICJ. See, E. Posner, H. de Figueredo, *Is the ICJ politically based?*, UC Berkeley International Law Workshop https://escholarship.org/uc/item/35j504g.

It should be noted that the analysis was performed on a statistical basis.

31 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar, Preliminary Objections, Judgment, Dissenting Opinion of Judge Xue, para 11. She was of the opinion that "Articles 59 and 60 of the Statute provide that the decision of the Court has no binding force except between the parties and in respect of that particular case and that the decision of the Court shall be final and without appeal. In the present case, if any State party has standing to take legal action in the Court for the protection of the common interest of the States parties in compliance with the obligations *erga omnes partes* of the Genocide Convention, one may wonder whether the Court's decision has binding force on all other States parties as well. According to Article 59, the effect of *res iudicata* of the judgment should be limited solely to the parties. It follows that, at least in theory, those States parties will not be prevented from exercising their right to institute separate proceedings for the same cause against the same State before the Court".

The possible challenge may be neutralized by creative interpretation of Article 59 and 60 of the Statute of the Court.[32]

In this particular issue raised by Judge Xue, creative interpretation is required in relation to the expression "between two parties" in Article 59 of the Statute of the Court.

Although, "the general principle announced in numerous cases... that a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction... cannot be disputed"[33] should be sufficient to ensure finality of judgment, it seems that in conditions of non-existence of a judicial system in international community, as well as proliferation of international court and tribunals, some additional safeguards might be needed.

Exempli causa, to treat States to which the obligation is owed as a collective Applicant on behalf of whom a member State of a group acts as the real applicant, acting in the collective interest "not in its individual capacity by reason of having suffered injury"[34] or, to treat other members of a group as silent intervenor States that do not take an active part in the proceedings but to which provision of Article 63, paragraph 2, of the Statute applies.

In fact, a simple and most effective way to secure the finality of the judgment would be the participation of all States sharing collective interest as Applicants, but such solution would cause practical problems in the functioning of the Court, due to number of members of a group in addition to possible legal ones (for instance, if some member of a group do not accept the jurisdiction of the Court in a concrete matter). Regardless of the interpretation, it is essential to ensure *res iudicata erga omnes partes* effect of judgment on *erga omnes partes* obligations.

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32 In principle two components may be discerned in the substance of *res iudicata* as provided in the Statute of the Court:
(i) Procedural, which implies that: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party" (Art. 60); and
(ii) Substantive, according to which: "The decision of the Court has no binding force except between the parties and in respect of that particular case". (Art. 59).
The primary effect of res judicata in the procedural sense is claim preclusion – meaning that a future lawsuit on the same cause of action is precluded (*non bis in idem*), whereas the effect of *res iudicata* in the substantive sense is mainly related to the legal validity of the Court's decision as an individualization of objective law in the concrete matter – *pro veritate accipitur* – M. Reisman, *Nullity and revision*, Yale University Press, New Haven and London, 1974, p. 341.
It seems clear that revision in accordance with the conditions specified in Article 61 of the Statute "constitutes direct exception to the principle *res iudicata*, affecting the validity of a final judgment". B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 372.

33 *Ibid*., 337.

34 ILC Articles on State Responsibility, Intruction, Text and Commentaries, Introduction by J. Crawford, 2002, p. 275, para. 1.

It is much more difficult, if at all possible, to resolve the issue of inequality in the proceedings in terms of legal impossibility of the Respondent to file a counter claim in the dispute with Applicant which is not injured State.

EVALUATION

It should be kept in mind that the Court's decisions, both the Judgment on Preliminary objections in Gambia v. Myanmar case as well as the orders on provisional measures in both cases, were made in the incidental proceedings, and that as such they do not bind the Court in the merits.[35]

It is to be expected, however, that the Court will maintain the position taken as regards obligations *erga omnes partes*.

The basis for this expectation is the large majority with which the decisions were made,[36] so that even the changes in the composition of the Court (one third of the Court is elected ever three years) that will happen before passing judgments on the merits in both cases, will hardly lead to a change in the position of the Court.

The Court's understanding of obligations *erga omnes partes* is an undeniably important step in the judicial protection of fundamental human rights, both individual and collective rights, as well as rights of States pursuant to the principle of rule of law in the international community.

The essential meaning of the obligations *erga omnes partes*, understood as secondary rules of international law, lies in the horizontal expansion of the jurisdiction of the Court *ratione personae* based on the subject matter of the dispute without deviating from the principle of consent as a fundamental principle on which the ICJ rests.

These obligations deviate from the strict paradigm of bilateralism in the jurisdiction of the International Court of Justice, developed by anology with the solutions from domestic law, expressing the individualistic structure of the international community.

The paradigm has become too narrow with the growing interpendence of States, which is expressed, *inter alia*, in the emergence of group and collective values and interests shared by number or all States in the International Community.

Certain ambiguities and, even, controversies in the application of *erga omnes partes* obligations do not arise from the nature of these obligations, they are not inherent to themselves, but resulted from a traditional concept of a dispute in

35 See M. Kreća, "The res iudicata rule in jurisdictional decisions of the ICJ", *Annals of the Faculty of Law in Belgrade*, 3/2014.

36 Order on provisional measures of 23 January 2024 in Gambia v. Myanmar case was adopted unanimously; Order of 26 January 2024 in South Africa v. Israel case were adopted by votes of 15/16 judges and two/one against. Myanmar case relating to Objection four (obligations *erga omnes partes*) was adopted unanimously and Second Objection (standing of Gambia) by 15 votes, one against.

the Law of the Court between injured State and a State that violates its right or interest embodied.

According to that concept a dispute is basically understood as a conflict of legal views on individual rights or interests between two or more parties in contrast to collective rights and interests underlying obligations *erga omnes partes*.

The Court approached the issue with a reasonable measure of caution so not to come into conflict in the exercise of its judicial task according to which it "cannot make a judgment *sub specie ferende* (under the pretext of law) or anticipate the law before the legislator adopts it.[37]

Novum in the decision of the Court essentially refers to the interpretation of its jurisdiction *ratione personae*, as a primary form of its jurisdiction, in terms that the common interest is superior to a special interest for "if a special interest is required... in many situations no State would be in position to make a claim".[38] Thus the Court distanced itself from the traditional principle *parens patriae* in the case of genocide as a crime under international law in contrast to cases related, *exempli causa*, to diplomatic protection by a State of nationality of injured person.

The Court's distanting from the *parens patriae* principle is not completely unknown in its jurisprudence. It is discretely announced in the Judgment of the Court in so-called Bosnia case, although in cautious and reserved way.

In its Judgment in the case concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR of Yugoslavia) of 2007, the Court under the heading "The Applicant's Claims in Respect od Alleged Committed Outside Its Territory against Non-Nationals" stated *inter alia*, "In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *ius cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations".[39]

In this context it should be noted that the Court did not consider the Applicant's claims to be inadmissible, but found that "the Applicant has not established to the satisfaction of the Court any facts in support of this allegation".[40]

As other cases in this sense are cited counter claims submitted by FR of Yugoslavia against Bosnia and Herzegovina (withdrawn in 1999) and counter claim against Croatia.[41]

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37 Fisheries Jurisdiction (United Kingdom v. Ireland, Merits, ICJ Reports 1974, para. 53; Fisheries Jurisdiction (FR of Germany vs. Ireland), Merits, ICJ Reports 1974, p 45.

38 *Cour Internationale de Justice*, www.icj.org, Case concerning Application of the Convention on the Prevention on the Punishment Crime of Genocide (Gambia v. Myanmar), Second Preliminary Objections of the Republic of Union of Myanmar, para. 108.

39 ICJ Reports 2007, Judgment, Merits, para 185.

40 *Ibid.*, para. 368.

41 A. Gattini, *Actio popularis*, Oxford Public International Law, para 16, 19.
It appears that these two cases could hardly be considered as a deviation from the *parens patriae* principle, since until FR of Yugoslavia applied for membership in the UN

Elements of the conception of obligation *erga omnes partes* in terms of horizontal extension of the jurisdiction of the Court *ratione personae* are also incorporated in Articles 62 and 63 of the Statute of the Court, enabling third States to participate in the proceedings. As such intervention is an exception to the Court's bilateralism.[42]

Moreover, both articles confer the right "to intervene using the term 'any state' meaning it is not necessary that the State seeking to intervene under either of these provisions should be party to the Statute"[43] – if fulfilled conditions provided in Article 35, par. 2 of the Statute.

Obligations *erga omnes partes* eliminate the difference between two forms of intervention – intervention of a third State on the basis of Article 62 of the Statute of the Court,[44] upon the permission of the Court – so-called discretionary intervention[45] – and intervention on the basis of Article 63[46] – intervention as of right.[47]

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in 2000, as a successor state of SFRY, it was in a position of legal continuity with SFRY. As a consequence, the rules of the citizenship of the SFRY were in force especially for parts of Serbian people in the secessionist republics that in addition expressed their will to remain in the common state. Also, the members of those parts of the Serbian people did not even accept the citizenship of the breakaway republics Bosnia and Herzegovina and Croatia in the relevant period.

The legal continuity of the FR of Yugoslavia with SFRY was assumed by the International Court of Justice; for otherwise FR of Yugoslavia (Serbia and Montenegro) could not possess *locus standi in indicio* before the Court either as an Applicant nor as a respondent. As the Court stated in the Legality of Use of Force cases: "The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it".

Only States parties to the Statute of the Court possess the right referred to, being as Members of the United Nations *ipso facto* parties to the Statute of the Court or by accepting conditions pursuant to Article 35, paragraph 2, of the Statute. States non-parties to the Statute can acquire this right on condition that they accept the general jurisdiction of the Court in conformity, with Security Council resolution 9 (1946).

FR of Yugoslavia never accepted conditions pursuant to Article 35, para. 2. of the Statute nor the general jurisdiction of the Court in conformity with Security Council resolution 9 (1954). More detail, *ibidem*, Separate Opinion of Judge Kreća, M. Kreća, "A Few Remarks about the Membership of FR Yugoslavia in the United Nations", *Anals of the Faculty of law in Belgrade*, 6/1994, pp. 594–605. Y. Z. Blum, "Was Yugoslavia a Member od UN in the Years 1992-2000", *AJIL*, vol. 101, 4/2007, pp. 800-818.

42 S. Rosenne, *The Law and Practice of the ICJ 1920-2005*, Fourth Edition, 1439.

43 *Ibid.,* 1472–1473.

44 Article 62 reads as follows:

"1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request".

45 S. Rosenne, *op. cit*., 1472–1473.

46 Article 64:

"1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it".

47 *Ibidem*.

The parties to the Convention like Genocide Convention, have a common interest to ensure its application and on that basis possess the presumed right to intervene pursuant to Article 62 of the Statute. As the Court stated, "The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*.[48]

One of the effects of obligations *erga omnes partes* is that the multilateral convention such as the Genocide Convention are understood as integral one "where the force of the obligation is self-existent, absolute and inherent for each party",[49] both in substantive and procedural terms.

Such an understanding significantly extends the circle of potential applicants as well as interventions as of right in the proceedings before the Court affecting in addition the scope of validity of the rule *res iudicata* in terms of *res iudicata erga omnes partes*.

The concept of obligations *erga omnes partes* is not free from certain risks.

They concerned the attitude of States to the obligatory jurisdiction of the International Court of Justice in terms of Article 36, paragraph 2 of the Statute of the Court and more specifically the compromisory clauses in treaties of universal or quasi-universal character in the view of extension of jurisdiction of the Court *ratione personae*.

In that matter the time, we would say in relatively short time, probably following the judgments *in meritum* in these two cases, will be the ultimate judge.

The ambiguities and controversies are the consequence of current state in international law. The idea promoted by the *dictum* of the Court in Barcelona case is, however, a kind of beacon to which to international law should strive in order to establish the rule of law in international community.

The obligations *erga omnes partes* is a modest[50] and valuable step in that direction.

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48 Case concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Judgement, Preliminary Objections, ICJ Reports 2022, para. 108.

49 Third Report on the Law of Treaties by General Fitzmaurice, UN doc. A/CN.4/115, YILC, 1964, Vol. II, 20, Art. 17, p. 27.

50 As regards the *ratione personae* effects, the concept of so-called objective regimes were more strict. The concept was for the first time elaborated in the decision of the International Committee of Iurists related to the status of Alland Islands 1920. – Alland Islands question, League of Nations Official Journal, Special supplements. No. 3, October 1920. As regards the validity of the 1856. treaties concerning the demilitarization of Islands, the Committee stated: "The provisions were led down in *European Interest*. They constituted a *special international status* relating to military considerations for the Alland Islands. It follows that *until* these provisions are *dully replaces* by others, *every State interested* has the right to insist upon compliance with them. It also follows that any State in possession of Islands must conform to the obligations, binding upon it, arising out of the system of demilitarisation established by these provisions – *ibidem*.

In that frame the obligations *erga omnes* and even *erga omnes partes* could have the proper effect as a processual element of *ius cogens* in *statu nascendi*. As such, they would contribute to the full effects of *ius cogens*, as basis and criteria of substantive legality in the international community. Of highest relevance is the fact that in all judgement and advisory opinions in which it deals with obligations *erga omnes*, the Court referred either directly or indirectly to rules of *ius cogens*, tying its effects both to obligations and rights.[51]

By acting in such a way the Court demonstrated its belief in the unity of primary and secondary rules of international law against its fragmentation.

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Consequently, the Sweden, as a non-signatory of the treaty, by reason of objective nature of the settlement of the Alland Islands question by treaty of 1956... may, as a power directly interested, insist upon compliance with the provisions of these treaty in so far as the contracting parties have cancelled it. *Ibidem*, p. 17.

51 See, p. 7. *infra*.

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