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LINDA INGEBORGA KRONBERGA

GENOCIDE, STATE RESPONSIBILITY,
AND OBLIGATIONS *ERGA OMNES* IN THE
CASE OF *THE GAMBIA V. MYANMAR*
BEFORE THE INTERNATIONAL COURT
OF JUSTICE

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This publication is based on a distinction-awarded Bachelor thesis.

ABSTRACT

The article purports to ascertain the relevance of obligations *erga omnes* in the pending case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* before the International Court of Justice in the light of the unprecedented invocation of State responsibility for genocide by a non-injured State. The study identifies a number of points of interest pertaining to (i) the further development of the concept of obligations *erga omnes*; (ii) the clarification of the nature of the rights and obligations contained in the Genocide Convention; (iii) the mutually complementary regimes of State responsibility *erga omnes* and of provisional measures of protection; (iv) the complementarity of State responsibility for genocide, particularly State responsibility *erga omnes*, and individual criminal responsibility; and (v) the enforcement of obligations *erga omnes*, including the use of countermeasures, all grounded in the emergence of a set of norms shared by the entire international community of States. As the case progresses, these elements will constitute a part of the core of the legal and political questions that are going to define the course of the law of State responsibility more generally and State responsibility for genocide more specifically for decades to come.

Keywords: obligations *erga omnes*, State responsibility, genocide, Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, *The Gambia v. Myanmar*, provisional measures of protection.

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INTRODUCTION

December 2019 saw the Peace Palace in The Hague, the home of the International Court of Justice, host an unprecedented scene. For three consecutive days, the Court heard the oral submissions on the indication of provisional measures of protection from the representatives of The Gambia and Myanmar, the former accusing the latter of genocide against the Rohingya people. The distinctiveness of the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* lies not in the invocation of State responsibility for genocide as such, but in the combination of The Gambia being separated from Myanmar by an ocean and thousands of kilometres and of bringing a genocide claim against it nonetheless. The Gambia is not an injured State; in its application, it relied on obligations *erga omnes*, owed to the entire international community, to secure its legal standing before the Court.

Although the concept of obligations *erga omnes* has met with wide recognition, it has largely escaped application in practice.¹ Even where obligations *erga omnes* have appeared in the judgments of the ICJ, the Court has been reluctant to extensively interpret the concept.² The actual role of obligations *erga omnes* in the modern law of State responsibility and the viability of the legal standing of States that invoke responsibility for the breaches of obligations *erga omnes* is therefore contestable.

For the Rohingya, however, this may be the last resort. Mistreatment of the Rohingya has spanned decades but has been nearly impossible to bring before an international court due to the lack of jurisdiction. Currently, a separate investigation into the situation on the basis of crimes having been partly committed in the neighbouring Bangladesh, which is a party to the Rome Statute, is underway at the International Criminal Court,³ but it will likely not produce any effects for years to come. Provisional measures of protection are therefore a quicker and seemingly more effective way to secure the compliance with the rights in question.⁴ Indication of provisional measures requires the ICJ to determine only that the State in question has *prima facie* standing to submit the claim, and in its order of 23 January 2020 on the indication of provisional measures of protection the Court found that The Gambia does have *prima facie* standing.⁵ However, as the case progresses and the Court finds itself probing deeper, many a change can yet transpire.

¹ Theodor Meron, *The Humanization of International Law* (The Hague: Hague Academy of International Law, 2006), p. 262.

² Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005), p. 179.

³ ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Case No. ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation, Pre-Trial Chamber III, 14 November 2019. Available: https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF. Accessed 14 May 2020.

⁴ UN, *Statute of the International Court of Justice*, 26 June 1945, 1 U.N.T.S. 16, entry into force 24 October 1945, Art. 41.

⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order on the Request for the Indication of Provisional Measures, 23 January

The primary research question that the article sets out to answer is the following: what is the relevance of obligations *erga omnes* in the case of *The Gambia v. Myanmar*? The analysis is conducted by means of doctrinal research with interdisciplinary elements, the latter pertaining to the consideration of political implications of the invocation of responsibility by a non-injured State more generally and in the *cas d'espèce* more particularly. The study relies primarily on the jurisprudence of the ICJ and, to a significant extent, on separate and dissenting opinions of its judges. Where a separate or dissenting opinion constitutes the basis for the analysis, this is a deliberate choice owing either to the absence of a detailed consideration of the aspects of interest in the judgment or to the emphasis on a rationale that bears relevance to the argument in question. It is supplemented by other primary sources such as jurisprudence of other international and domestic courts, treaties, and documents of the UN and its bodies, as well as academic literature. On account of a lack of a corpus of peer-reviewed literature concerning specifically this very recent case at the time of the production of the article, commentary of established academics on reputable platforms has been resorted to where needed.

The article proceeds in three main chapters.

The first chapter considers the normative framework of obligations *erga omnes* in four parts: first, defining the concept of obligations *erga omnes* and tracing its development throughout the past century; second, relating obligations *erga omnes* to obligations arising under the Convention on the Prevention and Punishment of the Crime of Genocide; third, dissecting Article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts on the invocation of responsibility by a State other than an injured State; and, fourth, adding to Article 48 an overview of the resolution of the Institute of International Law on obligations *erga omnes*.

The second chapter is devoted to a twofold examination of the relevance of obligations *erga omnes* in the order on provisional measures of 23 January 2020. The first part is dedicated to the reasoning given by the Court in determining *prima facie* standing of The Gambia and to the separate opinion of Vice-President Xue Hanqin, wherein she criticises the approach of the majority to the question of the invocation of responsibility by a State other than an injured State. The second part, in its turn, concentrates on provisional measures as a mechanism of protection of the vulnerable and the relevance of obligations *erga omnes* in relation to them, using the separate opinion of Judge Cançado Trindade as a starting point.

The third and final chapter ventures beyond the order on provisional measures and considers select implications of the case on the regimes of State responsibility for genocide, individual criminal responsibility, and international relations. It first sets the background of the convergence of State and individual criminal responsibility for genocide and proceeds with an examination of the relevance of the case to each of the regimes through the lens of obligations *erga omnes*. It reserves a subchapter for a point of interest with regard to the bearing on international relations more generally.

2020. Available: <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>. Accessed 14 May 2020.

1. THE NORMATIVE FRAMEWORK OF OBLIGATIONS *ERGA OMNES*

1.1. The concept of obligations *erga omnes*

Obligations *erga omnes* literally translate to obligations “towards all”.⁶ The holder of the rights is therefore the international community of States, and, consequently, the obligations, too, are owed to the international community as a whole.⁷ Although, as Manfred Lachs stated already 30 years ago,

it is difficult [...] in our day to deny the existence of a “juridical international community”, imperfect and incomplete as it may be,⁸

the exact definition of international community is, as of yet, lacking.⁹ Article 53 of the Vienna Convention on the Law of Treaties construes international community as a community of States,¹⁰ in a similar vein, Roberto Ago posited that it “cannot but be a community composed of States”.¹¹ The unifying elements of such a community, as opposed to simply a multitude of States, are, firstly, the collective interest of observance of the rules in question that the States comprising the international community have in common, and, secondly, the legal interest of each member—State—of the community to invoke responsibility in case of non-compliance with those rules.¹²

Apart from obligations *erga omnes* in their purest form, international law also recognises obligations *erga omnes partes*, which are owed to a group of States—in the classical view, to all parties to a treaty, all of which have an interest in the compliance with the obligations under said treaty.¹³ Standing under *erga omnes partes* conceptually differs from standing under *erga omnes* in that the former is constrained, *ratione personae*, to the parties to the treaty, and *ratione materiae* to the norms of the treaty.¹⁴ Both concepts are linked by the underlying the legal indivisibility of the content of the obligation,¹⁵ meaning that this obligation is owed not by each State to any other party to the treaty, but by all in relation to all.

⁶ Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford University Press, 2000), p. 1.

⁷ James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014), p. 362.

⁸ Manfred Lachs, “Quelques réflexions sur la communauté internationale,” in *Le droit international au service de paix, de la justice et du développement*, ed. Michel Virally (Paris: Pedone, 1991), p. 355.

⁹ Anne-Laure Vauris-Chaumette, “The International Community as a Whole,” in *The Law of International Responsibility*, ed. James Crawford et al. (New York: Oxford University Press, 2010), p. 1023.

¹⁰ UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, entry into force 27 January 1980, Art. 53.

¹¹ Roberto Ago, “Communauté internationale et organisation internationale,” in *Manuel sur les organisations internationales*, ed. R-J Dupuy, 2nd ed. (Dordrecht: Martinus Nijhoff Publishers, 1998), p. 3, in *The Law of International Responsibility*, ed. Crawford et al., p. 1023.

¹² Crawford, *supra* note 7, p. 364.

¹³ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 437, para. 68.

¹⁴ Meron, *supra* note 1, p. 263.

¹⁵ Gaetano Arangio-Ruiz, Fourth Report on State Responsibility—Addendum (Doc.A/CN.4/444/Add.1), *Yearbook of the ILC 1992*, Vol. II, no. 1 (1992), para. 92.

There is a distinction to be drawn between obligations *erga omnes per se*, which are owed to the entire international community, and *jus cogens* norms, which impose non-derogable obligations on all States. Broadly speaking, *jus cogens* pertains to the legal status of an international crime, as evidenced by Article 53 of the VCLT, which defines a peremptory norm of general international law as a

norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁶

Obligations *erga omnes*, on the other hand, relate to the legal implications arising out of such a status.¹⁷ The relationship between *jus cogens* and obligations *erga omnes* is, withal, not clear-cut. The predominant view is that *jus cogens* and obligations *erga omnes* do go hand-in-hand,¹⁸ or, at least, that all *jus cogens* norms produce obligations *erga omnes*,¹⁹ as the Constitutional Court of the Federal Republic of Germany has observed, general peremptory norms of international law may only be considered as such where the observance of the norm in question can be required by all members of the international community.²⁰ Indeed, this interchangeability has resulted in swapping violations of *erga omnes* obligations for serious breaches of obligations under peremptory norms of general international law in the final draft of the Articles on the Responsibility of States for Internationally Wrongful Acts.²¹ The idea is that both notions have a common end goal—the prevention of disregard for fundamental values protected by international customary rules,²² the existence of which is contingent on the acceptance and recognition by the international community.²³ Despite this, there is room for criticism of the assumption that the rules of *jus cogens* are equivalent to those that produce obligations *erga omnes*.²⁴ This is especially pertinent to obligations *erga omnes* that do not necessarily result in *jus cogens* norms; e.g. the obligations

¹⁶ VCLT, *supra* note 10, Art. 53.) For an overview of *jus cogens* more generally, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006).

¹⁷ M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*," *Law and Contemporary Problems* 59, no. 4 (1996): p. 63.

¹⁸ Antonio Cassese, "The Character of the Violated Obligation," in *The Law of International Responsibility*, ed. James Crawford et al. (Oxford: Oxford University Press, 2010), p. 417, Paolo Picone, "The Distinction between *Jus Cogens* and Obligations *Erga Omnes*," in *Jus Cogens beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford: Oxford University Press, 2011), p. 411.

¹⁹ Karl Zemanek, "New Trends in the Enforcement of *erga omnes* Obligations," in *Max Planck Yearbook of United Nations Law* 4, eds. Jochen A. Frowein and Rüdiger Wolfrum (Leiden: Brill-Nijhoff, 2000), p. 6.

²⁰ BVerfGE 1965, 411, 7 April 1965, in Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, 1988), p. 271. For an in-depth explanation of the case, see Stefan A. Riesenfeld, "Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court," *The American Journal of the International Law* 60, no. 3 (1966): pp. 511–515.

²¹ Picone, *supra* note 18, p. 411.

²² Cassese, *supra* note 18, p. 418.

²³ Ragazzi, *supra* note 6, p. 189.

²⁴ See, e.g., Stefan Kadelbach, "Jus Cogens, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms," in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, ed. Christian Tomuschat and Jean-Marc Thouvenin (Leiden/Boston: Martinus Nijhoff Publishers, 2006), p. 25. For a detailed discussion on the subject, see Picone, *supra* note 18, in its entirety.

under the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights could be considered to have acquired the status of obligations *erga omnes* to the extent that they have entered the realm of customary international law, but they have not yet risen to the level of peremptory norms.²⁵ That being said, in practice this issue only arises where there is discrepancy between the content of peremptory norms and of obligations *erga omnes*, and genocide is one of the crimes that is widely acknowledged to both constitute a violation of *jus cogens*²⁶ and give rise to obligations *erga omnes*, as exhibited later on.

The classic passage on the concept of obligations *erga omnes* is contained in an *obiter dictum* of the judgment of the International Court of Justice in the *Barcelona Traction* case. It states:

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

34. 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 (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.²⁷

In such a way, the Court severed the obligations of a State towards the international community as a whole from other obligations vis-à-vis another State.

There are two distinguishing features of obligations *erga omnes* identifiable in the *Barcelona Traction* case.²⁸ One is universality in the sense that obligations *erga omnes* are binding on all States and cannot be derogated from; the other is solidarity in the sense that all States have a legal interest in the protection of the rights guaranteed by these obligations.²⁹ These features are indicative of the functions that obligations *erga omnes* fulfil within the framework of responsibility. Both aspects posit the integrity of the rights that are protected by these obligations as sacrosanct but safeguard these values by different means. Whereas solidarity approaches the problem through the prism of legal interest, and therefore of rights—more specifically, universal rights to the invocation of responsibility and of holding the responsible party accountable—universality does so through the lens of obligations, imposing a duty on the States. In a way, solidarity in particular mirrors the concept of universal jurisdiction for international crimes, the idea being that those are atrocities of such scale and

²⁵ Erika de Wet, "Jus Cogens and Obligations *Erga Omnes*," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), p. 555.

²⁶ Ragazzi, *supra* note 6, p. 94.

²⁷ ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, 5 February 1970, I.C.J. Reports 1970, p. 32, paras. 33–34.

²⁸ Ragazzi, *supra* note 6, p. 17.

²⁹ *Ibid.*

gravity that all members of international community have a legal interest in reacting to that, and thus a right to hold the perpetrators accountable.

The concept of obligations *erga omnes*, however, predates *Barcelona Traction*, both in spirit and in form.³⁰ In the *Wimbledon* case, the Permanent Court of International Justice allowed a claim to be brought by the United Kingdom, France, Italy, and Japan against Germany regarding the access rights to the Kiel Canal, despite the fact that Italy and Japan were not individually injured.³¹ It based its reasoning on the clear interest of all States bringing the claim in the compliance with the provisions relating to the Kiel canal, given that all of these involved States were in possession of fleets and merchant vessels flying their respective flags.³² The Court framed freedom of navigation as a what Crawford calls a “communitarian norm” that all States have an interest in protecting.³³

The term “obligations *erga omnes*” itself was used by Schwarzenberger in 1957 and Lachs in the consideration of draft Article 62 on the treaties providing for obligations or rights of third States of the VCLT; the latter is particularly important in light of the fact that Lachs was later one of the judges in *Barcelona Traction*.³⁴ Similarly, Judge Jessup, who too took part in the decision, recognised in his dissenting opinion in the *South West Africa* cases (the decision in which was effectively reversed in *Barcelona Traction*) that there is a general interest amongst States “in the maintenance of an international regime adopted for the common benefit of the international society”.³⁵

Post-*Barcelona Traction*, obligations *erga omnes* have had a recurrent appearance in both the judgments and advisory opinions of the ICJ and the pleadings of parties, as well as in the practice of States (pleadings notwithstanding) and other international courts.³⁶ However, mere acknowledgement of the norms in question as *erga omnes* does not in itself lend the jurisdictional basis to invoke the responsibility for the alleged breach of those obligations. In the *East Timor* case of 1995, Portugal pleaded the rights to self-determination of the peoples as rights *erga omnes*.³⁷ Nevertheless, although the Court did acknowledge that the right in question was of an *erga omnes* character, it held that the *erga omnes* character of a norm should be distinguished from the consent to jurisdiction. It pronounced that

[w]hatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an

³⁰ *Ibid.*, pp. 7–8.

³¹ *SS “Wimbledon”, United Kingdom et al. v. Germany*, Judgment, (1923) P.C.I.J. Series A, no. 1, I.C.G.J. 235 (P.C.I.J. 1923), 17 August 1923.

³² *Ibid.*

³³ Crawford, *supra* note 7, p. 363.

³⁴ Ragazzi, *supra* note 6, p. 8. See footnotes 29 and 30 therein.

³⁵ ICJ, *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, 18 July 1966, dissenting opinion of Judge Jessup, I.C.J. Reports 1966, p. 373. For a discussion on the *South West Africa* cases and obligations *erga omnes*, see Debora Pāvila, “Valsts atbildība pret starptautisko kopienu,” *Jurista Vārds* 25, no. 330 (2004) (cont’d. in the three following issues). Available: <https://juristavards.lv/doc/90682-valsts-atbildiba-pret-starptautisko-kopienu/>. Accessed 14 May 2020.

³⁶ Ragazzi, *supra* note 6, pp. 12–13.

³⁷ ICJ, *East Timor (Portugal v. Australia)*, Application instituting proceedings, 22 February 1991, para. 27. Available: <https://www.icj-cij.org/files/case-related/84/6809.pdf>. Accessed 14 May 2020.

evaluation of 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*.³⁸

It must be noted here that there is a difference between rights *erga omnes* and obligations *erga omnes*. Rights are those that give rise to the obligations, just as some or, arguably, all *jus cogens* norms give rise to obligations *erga omnes*. The ICJ has had a hand in clarifying the difference, in its advisory opinion on the Chagos Islands referring to the obligation *erga omnes* to respect the aforementioned right to self-determination.³⁹ By referring to self-determination as a right *erga omnes* in the *East Timor* case, the Court was defining the nature of the obligations adjoined to the right,⁴⁰ and, by extension, subjected the invocation of obligations *erga omnes* to the jurisdictional constraints which bind the Court.

In the light of the above, it would not be amiss to conclude that the concept of obligations *erga omnes* has become a permanent, if not common, fixture within the landscape of international law. Its scope as a source of legal standing, however, is considerably limited by the requirement of consent to jurisdiction necessitated to bring the case before the ICJ.

1.2. Obligations *erga omnes* and genocide

Genocide is the second of the examples generating *erga omnes* obligations given by the ICJ in its *Barcelona Traction* dictum.⁴¹

Article I of the Convention on the Prevention and Punishment of the Crime of Genocide sees the contracting parties “confirming” genocide as a crime under international law.⁴² Whilst the drafters of the Convention took care to avoid any explicit references to the Nuremberg principles,⁴³ an examination of the preparatory stage indicates that the choice of the word “confirm” was intentional, suggesting that at the time of the drafting of the Convention prohibition of genocide was already firmly established as a customary rule.⁴⁴

³⁸ ICJ, *East Timor*, Judgment, I.C.J. Reports 1995, p. 102, para. 29. See also Christine M. Chirkin, “East Timor Moves into the World Court.” *European Journal of International Law* 4 (1993): pp. 206–222.

³⁹ ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para. 180. Available: <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>. Accessed 14 May 2020.

⁴⁰ Richard Burchill, “The ICJ Decision in the Case Concerning East Timor: The Illegal Use of Force Validated?” *Journal of Armed Conflict Law* 2, no. 1 (1997): p. 4.

⁴¹ *Barcelona Traction*, *supra* note 27, para. 34.

⁴² UN, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, U.N.T.S., vol. 78, p. 277, entry into force 12 January 1951, Art. I.

⁴³ The seven principles determining what constitutes a war crime as established by the ILC to codify the legal principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. See “Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, with commentaries,” in UN, *Yearbook of the International Law Commission 1950*, Vol. II (New York: United Nations, 1957), pp. 171–195.

⁴⁴ The initiative was introduced by France. See UN GA Official Records, Third Session, Part 1, Legal Questions, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, pp. 49–53 (68th meeting) and pp. 480–481 (108th meeting). In literature, *per contra*, this view is contended;

Genocide Convention imposes a number of wide-ranging obligations on the contracting States, both explicitly laid down in the text and through the interpretation by the ICJ. Besides the obligation not to commit genocide,⁴⁵ States are also obligated to prevent genocide, which is an obligation of an extraterritorial scope,⁴⁶ to punish it,⁴⁷ to enact the necessary legislation to give effect to the provisions of the Convention,⁴⁸ to provide effective penalties for the perpetrators of genocide,⁴⁹ to try persons charged with genocide by a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal that has jurisdiction,⁵⁰ and to grant extradition for genocide charges in accordance with the rules that bind the contracting State in question.⁵¹ The preparatory works also saw the inclusion of universal jurisdiction, but, as Article VI makes clear, this proposal was unsuccessful. That being said, State practice appears to indicate that universal jurisdiction for genocide is widely accepted as customary law.⁵² The concept of obligations *erga omnes* has also been said to facilitate the expansion of the area of universal jurisdiction;⁵³ as has already been noted, both represent an expanded model of holding perpetrators of mass atrocities accountable.

However, the classification of the aforementioned obligations that arise out of the Genocide Convention as obligations *erga omnes* is not straightforward. Prohibition of acts of genocide is unassailably an obligation *erga omnes*,⁵⁴ but the attribution of the *erga omnes* character to the rest of the obligations arising under the Genocide Convention is less certain.

In its judgment on the fifth preliminary objection in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. The Former Republic of Yugoslavia)* case, the ICJ ruled that the rights and obligations contained in the Genocide Convention are rights and obligations of an *erga omnes* nature.⁵⁵ It then went on to state, expressly, that the obligation to prevent

Cassese, for example, sees the emergence of customary law in this matter only after the establishment of the Genocide Convention. *For the discussion, see* Ragazzi, *supra* note 6, p. 94.

⁴⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, I.C.J. Reports 2007, pp. 113–114, paras. 166–167.

⁴⁶ *Genocide Convention, supra* note 42, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. The Former Republic of Yugoslavia)*, Judgment, Preliminary Objections, I.C.J. Reports 1996, pp. 615–616, para. 31.

⁴⁷ *Genocide Convention, supra* note 42.

⁴⁸ *Ibid.*, Art. V.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, Art. VI.

⁵¹ *Ibid.*, Art. VII.

⁵² Ragazzi, *supra* note 6, p. 95.

⁵³ Ragazzi, *supra* note 6, p. 95.

⁵⁴ Final Report of the Commission of Experts, attached to the "Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council" (Doc.S/1994/674), p. 24, para. 88: "In view of the rights involved, the legal obligation to refrain from genocide are recognised as *erga omnes*."

⁵⁵ CIJ, *Application de la convention pour la prévention et la répression du crime de génocide, exceptions préliminaires, arrêt (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, C.I.J. Recueil 1996, p. 616, para. 31. The French authoritative text reads: "les droits et obligations consacrés par la convention [sur la génocide] sont des droits et obligations *erga omnes*. La Cour constate que

and punish genocide is not territorially limited by the Convention.⁵⁶ It can therefore be concluded that obligations to prevent and punish genocide are included within the scope of *erga omnes* obligations,⁵⁷ but it is less clear whether the *erga omnes* character attaches to *all* rights and obligations enshrined by the Convention.

There is another aspect of interest in the Court's consideration of the fifth preliminary objection. In his declaration, dissenting Judge Oda agreed that obligations to prevent and punish genocide are *erga omnes* obligations in the relations of each contracting State with all other contracting States, or, even, with the international community as a whole, but are not in relation to any one contracting State.⁵⁸ He argued that State's failure to prevent and punish acts of genocide could only be remedied by recourse to a competent organ of the UN or an international penal tribunal, and not by invoking State responsibility in interstate relations before the Court.⁵⁹ It is in this way that the enforcement of obligations *erga omnes* is hindered, raising the question of whether the intended aim of these obligations corresponds to the mechanisms of their implementation and possibly even to the consequences for the breach of such obligations.

The Court reaffirmed the *erga omnes* nature of the obligations condemning genocide in the (second) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* case. Pursuant to the DRC's submission that the norms contained in the substantive provisions of the Genocide Convention are *jus cogens* and give rise to rights and obligations *erga omnes*, the Court recognised that the consequence of the peremptory character of the principles underlying the Convention is

the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).⁶⁰

Having said that, the Court also reiterated the point made in the *East Timor* case: that the *erga omnes* nature of the norm and the rule of consent to jurisdiction are two separate entities.⁶¹ It also extended this juxtaposition to norms of a *jus cogens* character.⁶² The crux of this, as it was in *East Timor*, is that rights and obligations *erga omnes* (or peremptory norms) as such do not in themselves constitute a basis of jurisdiction where it has not been established by other means, and in *Armed Activities on the Territory of the Congo* the Court, in a logical transposal of findings applicable

l'obligation qu'a ainsi chaque Etat de prévenir et de réprimer le crime de génocide n'est pas limitée territorialement par la convention."

⁵⁶ *Ibid.*

⁵⁷ Ragazzi, *supra* note 6, p. 96. Cf. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. The Former Republic of Yugoslavia)*, Preliminary Objections, Judgment, Dissenting Opinion of Judge *ad hoc* Kreca, I.C.J. Reports 1996, p. 765, para. 101.

⁵⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. The Former Republic of Yugoslavia)*, Preliminary Objections, Judgment, Declaration of Judge Oda, p. 626, para. 4.

⁵⁹ *Ibid.*, p. 627–628, para. 5.

⁶⁰ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, I.C.J. Reports 2006, pp. 31–32, para. 64.

⁶¹ *Ibid.*

⁶² *Ibid.*

to one kind of *erga omnes* norms to another, confirmed that this applies to cases of genocide as well.

1.3. Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts

Codified rules of State responsibility are to be sought in the Articles on Responsibility of States for Internationally Wrongful Acts. The Draft Articles on Responsibility of States for Internationally Wrongful Acts, including their commentaries, were adopted by the International Law Commission on 9 August, 2001, a result of a work nearly 40 years in the making.⁶³ They were taken note of and commended to the attention of States by the UN General Assembly by means of Resolution 56/83, adopted without a vote, "without prejudice to the question of their future adoption or other appropriate action".⁶⁴ Although there were proposals to incorporate Articles into a treaty, it was ultimately agreed that ILC texts in themselves possess a sufficient influence—especially in an area customarily characterised by State practice and case law—and that in the present case it was further solidified by UN Resolutions and was under the risk of losing that standing should a convention be put on the table.⁶⁵ Nevertheless, the UN General Assembly has called for the adoption of a convention on several occasions since 2001, leaving the door open for a future treaty on State responsibility.

The 59 Articles regulate exclusively secondary rules of State responsibility, meaning that they determine only the legal consequences of failure to fulfil obligations under international law and do not provide substance to the violations giving rise to that responsibility.⁶⁶

Invocation of State responsibility by a State other than an injured State is provided for in Article 48 of the ARSIWA.⁶⁷ It states that a State may invoke responsibility on the grounds not of it being the State that has suffered injury, but of acting in the capacity of a member of either a group of States to which the obligation breached is owed, or the international community as a whole.⁶⁸ The common denominator for both of these alternatives is the option to invoke the responsibility for breaches of certain obligations when the State invoking it is not itself injured in the meaning of Article 42.⁶⁹ That being said, the wording of Article 48 is not identical to the one used by the ICJ in *Barcelona Traction*, where it qualified the rights in question as those which "all States can be held to have a legal interest in"; this is because

⁶³ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), p. ix.

⁶⁴ UN GA, *Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly*, 28 January 2002, A/RES/56/83.

⁶⁵ Alain Pellet, "The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts," in *The Law of International Responsibility*, ed. James Crawford et al. (Oxford: Oxford University Press, 2010), p. 97.

⁶⁶ Eric David, "Primary and Secondary Rules," in *The Law of International Responsibility*, ed. James Crawford et al. (Oxford: Oxford University Press, 2010), p. 27.

⁶⁷ ARSIWA, *supra* note 64, Annex: Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 48.

⁶⁸ Crawford, *supra* note 63, p. 276.

⁶⁹ *Ibid.*

injured States in the sense of Article 42 also have legal interests.⁷⁰ Article 48 also avoids the use of term “*erga omnes*” – primarily due to the fact that this expression was thought to provide less certainty than the reference to the international community as a whole.⁷¹

Article 48 should not be confused with Articles 40 and 41 of the ARSIWA. Apart from Articles 40 and 41 being applicable to situations of serious breaches of obligations under peremptory norms of general international law as opposed to breaches of *erga omnes* obligations, their effect is that of consequences, i.e., co-operation between States to bring an end to the situation and non-recognition of its lawfulness, whereas Article 48 is geared towards the invocation of responsibility.

Article 48 is structured in three paragraphs. The first paragraph defines the categories of obligations from which stems the right to the invocation of responsibility by a third State. The second paragraph lays down the forms of responsibility these third States may claim. The third paragraph applies the requirements for the invocation of responsibility prescribed by Articles 43, 44, and 45 to invocation under Article 48(1).⁷²

The second paragraph gives rise to three kinds of possible consequences: cessation of the unlawful situation, guarantee of non-repetition, and performance of the obligation of reparation, the latter in accordance with the preceding articles. These forms of reparation are oriented at the reinstatement of *status quo ante* of the collective goods and values and of the respect for the absolute nature of the norm inflicting the primary obligation breached.⁷³ It is only in this manner that these collective goods and values may be enjoyed by the international community.⁷⁴ The cessation of the unlawful situation and the guarantee of non-repetition emerge as universal rights that may be invoked by any State, regardless of whether it is directly injured by the breach of the obligation and even where the State directly injured neglects to invoke the responsibility itself. In this regard, then, the function of these forms of reparation is preventive and therefore specific, contrasting with the function they fulfil within the traditional framework of State responsibility.⁷⁵ The importance of prevention lies in the fact that any infringement upon the values protected by said rights poses danger or “irreparable prejudice” to these values.⁷⁶ The special character of the norms in which those values are enshrined is therefore defined by reference to the distinguishing features of the international community– the collective interest of compliance with the regime and the individual legal interest of invocation in order to ensure that compliance.

In addition to the three types of possible consequences arising under Article 48, Article 54 stipulates that any State other than the injured State that is entitled to invoke the responsibility of another State under Article 48, paragraph 1, may take lawful

⁷⁰ *Ibid.*, pp. 277–278.

⁷¹ *Ibid.*, p. 278.

⁷² *Ibid.*, p. 277.

⁷³ Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États* (Paris: PUF, 2005), p. 250, in Vaurs-Chaumette, *supra* note 9, p. 1025.

⁷⁴ *Ibid.*

⁷⁵ Vaurs-Chaumette, *supra* note 9, p. 1027.

⁷⁶ *Ibid.*

measures against the offending State to ensure cessation of the breach of the obligation in question and reparation –either in the interest of the injured State or on behalf of the States to which the obligation is owed.⁷⁷ Article 54 is therefore concerned not with the legal standing of the State invoking the responsibility for the breach of obligations *erga omnes*, but with the enforcement of compliance with those obligations, in a similar vein that paragraph 2 of Article 48 is.

1.4. Resolution “Obligations *erga omnes* in international law” of the *Institut de Droit International*

In addition to the ARSIWA, in 2005 *Institut de Droit International* (The Institute of International Law) at its session in Krakow adopted a resolution on the obligations and rights *erga omnes*, appropriately titled “Obligations *erga omnes* in international law”.⁷⁸ Although the resolutions of the IIL have no binding force, its authoritative position in the promotion of the progress of international law lends significant weight to its recommendations.⁷⁹

In its preamble, the Resolution takes note of the general consensus on a number of obligations as reflecting fundamental values of the international community, the maintenance of which requires certain obligations binding on all States, and names the prohibition of genocide as one of such obligations.⁸⁰ Albeit the preamble does not include normative provisions, this is in contrast to the ARSIWA, which comprises exclusively secondary rules of State responsibility and does not contain any references to specific examples of the content of primary rules.

Article 1 of the Resolution, just as Article 48, paragraph 1, of the ARSIWA, takes a bifurcated approach to the definition of the obligations *erga omnes*. It defines it as

(a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or

(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.⁸¹

By reiterating the elements of obligations *erga omnes* as laid down by the ILC in Article 48, the IIL could be considered to have added credence to the form in which obligations *erga omnes* were codified in the ARSIWA, particularly since the Resolution was adopted in the early years following the endorsement of the Articles.

The consequences of a breach of *erga omnes* obligations are determined by Article 2 of the Resolution. It provides for two options: the cessation of the wrongful

⁷⁷ ARSIWA, *supra* note 67, Art. 54.

⁷⁸ *Institut de Droit International*, Fifth Commission, “Obligations *erga omnes* in international law,” Resolution, 27 August 2005.

⁷⁹ See, e.g., Alfred E. von Overbeck, “*Renvoi* in the Institute of International Law,” *The American Journal of Comparative Law* 14, no. 4 (1963): p. 544.

⁸⁰ *Institut de Droit International*, *supra* note 78, preamble.

⁸¹ *Ibid.*, Art. 1.

act and the performance of the obligation, including restitution, if not materially impossible, in the interest of the specially affected party, be it a State, entity, or an individual.⁸² This is already a departure from the framework of the ARSIWA; for one, the Resolution does not count guarantee of non-repetition amongst the available options, just as Article 48 does not expressly name restitution. However, the latter can be derived from the overall objectives of the forms of reparation offered by Article 48. Restitution is, by its very essence, the reinstatement of the *status quo ante* that cessation of the unlawful situation, guarantee of non-repetition, and performance of the obligation of reparation seek.

The Resolution of the IIL goes a step further in explicitly stating that a jurisdictional link between the State allegedly in breach of an obligation *erga omnes* and a State to which the obligation in question is owed enables the State to which the obligation is owed to bring a claim in relation to the alleged non-compliance with that obligation to the ICJ or other international judicial institution.⁸³ In addition, it bothers to establish that the Court or the relevant institution should give the State to which the obligation is owed the possibility to participate in the proceedings pertaining to that obligation before the corresponding judicial organ.⁸⁴ The ARSIWA do not contain any provision of a similar sort. They deal with invocation of responsibility, but do not spell out the forum in which this may be done, although the available options can be well inferred from the general structure of international dispute resolution. Crucially, the Resolution of the IIL also mentions the requirement of the jurisdictional link, which is in line with the findings of the Court in the *East Timor* case.

The Resolution additionally lists the consequences "should a widely acknowledged grave breach of an *erga omnes* obligation occur".⁸⁵ These comprise the measures equivalent to those prescribed by the Article 54 of the ARSIWA (referred to as countermeasures as opposed to simply "lawful measures" in the Article 54, but effectively the same) as well as consequences that the ARSIWA reserve for serious breaches of obligations under peremptory norms of general international law. If the obligation *erga omnes* in question simultaneously constitutes a *jus cogens* norm, and the breach of the obligation is considered as a serious breach of peremptory norm, then these consequences do attach to breaches of *erga omnes* obligation under the ARSIWA as well, but that is not always the case.

The Resolution of the IIL therefore echoes the sentiments of the ARSIWA, but, given that, albeit brief, it is in its entirety devoted to obligations *erga omnes*, whereas the Articles have to encompass an immeasurably broader range of rules, it is more detailed on the subject. For all intents and purposes, however, the Resolution does not introduce any new ideas, and the concept of obligations *erga omnes* remains cohesive.

⁸² *Ibid.*, Art. 2.

⁸³ *Ibid.*, Art. 3.

⁸⁴ *Ibid.*, Art. 4.

⁸⁵ *Ibid.*, Art. 5.

2. OBLIGATIONS *ERGA OMNES* IN THE CASE OF APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (*THE GAMBIA V. MYANMAR*)

2.1. Obligations *erga omnes*

On 11 November 2019, The Gambia filed an application instituting proceedings and requesting provisional measures at the ICJ.⁸⁶ The order on the indication of provisional measures was the first opportunity for the Court to give an assessment, even if *prima facie*, of whether The Gambia can invoke the responsibility of Myanmar for the alleged breaches of obligations *erga omnes*. The order was issued on 23 January 2020.⁸⁷

In its request for the indication of provisional measures, The Gambia contends that prohibition of genocide is a *jus cogens* norm, and obligations under the Genocide Convention are obligations of an *erga omnes* and *erga omnes partes* character; therefore, The Gambia is entitled to hold Myanmar accountable for the breach of these obligations.⁸⁸ As has already been established, prohibition of genocide does, indeed, qualify as a *jus cogens* norm, and the ICJ has confirmed that rights and obligations contained in the Genocide Convention are of an *erga omnes* nature.⁸⁹ The assertion of The Gambia—that these obligations are owed both to the group of States, i.e. the States parties to the Convention, and to the international community as a whole—effectively mirror both subparagraphs of Article 48, paragraph 1, of the ARSIWA.

Myanmar, in its turn, argues that whilst The Gambia has an interest in Myanmar's compliance with its obligations under the Genocide Convention by virtue of the *erga omnes* nature of some of these obligations, it is not specially affected by the alleged breach of these violations and thus does not have the standing to bring a claim against Myanmar.⁹⁰ Myanmar claims that with regard to the contested situation Bangladesh is the specially affected State which has the primary right to invoke the responsibility of another State—Myanmar—but that it is prevented from doing so by its interpretative declaration with regard to Article IX of the Convention.⁹¹

In its determination on the indication of provisional measures, the Court addressed four principal questions: firstly, jurisdiction of the Court to hear the case, including the existence of a dispute relating to the interpretation, application, or fulfilment of the Genocide Convention and the reservation of Myanmar to Article VIII of the Convention; secondly, the standing of The Gambia; thirdly, the rights whose protection is sought and the link between these rights and the provisional measures requested by The Gambia; and, fourthly, the risk of irreparable prejudice and urgency posed to the aforementioned rights, needed to indicate provisional measures.⁹² It is

⁸⁶ ICJ, *Application instituting proceedings and Request for the indication of provisional measures (The Gambia v. Myanmar)*, 11 November 2019. Available: <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf>. Accessed 14 May 2020.

⁸⁷ *The Gambia v. Myanmar*, *supra* note 5.

⁸⁸ *The Gambia v. Myanmar*, *supra* note 86, paras. 15 and 20.

⁸⁹ *Bosnia and Herzegovina v. The Former Republic of Yugoslavia*, *supra* note 46, pp. 615–616, para. 31.

⁹⁰ *The Gambia v. Myanmar*, *supra* note 5, para. 39.

⁹¹ *Ibid.*

⁹² *The Gambia v. Myanmar*, *supra* note 5.

the question of the standing of The Gambia that primarily pertains to the obligations *erga omnes*.

In the judgment on the request for provisional measures, the Court's reasoning in providing an answer to the question of the standing of The Gambia is contained in a single paragraph. The Court recalls the advisory opinion on the reservations to the Genocide Convention that it gave in 1951, more particularly, the observation that the contracting States have no separate interests of their own, but only a common interest in the attainment of the purposes of the Convention, and that the "high ideals" which underpin for the Convention form the foundation and measure for all its provisions.⁹³ The Court states that this common interest implies that the obligations in question are owed by each State party to the Convention to all other States parties, and compares the *cas d'espèce* to that of *Belgium v. Senegal*, relied upon by The Gambia in its application, in which the relevant provisions were discerned to be similar to those of the Genocide Convention and to result in obligations *erga omnes partes*.⁹⁴ Based on these observations, the Court concludes that any State party to the Genocide Convention—and that State need not be a specially affected State—is entitled to invoke the responsibility of another State party for the alleged breach with its obligations *erga omnes partes*.⁹⁵

Considering the fact that the Court need only satisfy itself that The Gambia has *prima facie* standing, this reasoning is, perhaps, understandably brief. At the same time, there are several aspects worth addressing, or that have been addressed in a separate opinion.

Notably, in its application instituting the proceedings The Gambia submits that obligations under the Genocide Convention are both *erga omnes* and *erga omnes partes*, but only the latter is named by the Court in its answer.⁹⁶ It is most likely that in giving its reasoning the Court only touched upon obligations *erga omnes partes* due to the fact that the dispute concerns the provisions of a treaty, and both States are States parties to the Convention, which is why there is no need to address whether these obligations are owed to the international community as a whole—more so because the status of the prohibition of genocide as an obligation *erga omnes* appears to be well-established. That being said, this does evoke the question of whether there would be a substantial difference in the findings of the Court between obligations *erga omnes* and *erga omnes partes* if the dispute were to fall outside the scope of a treaty.

Whilst the decision on the indication of preliminary measures was adopted unanimously,⁹⁷ Vice-President of the Court Xue Hanqin exhibits a considerable departure from the reasoning given by the Court and the conclusion reached. Although supportive of the indication of the provisional measures, in her separate opinion she

⁹³ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23, in *The Gambia v. Myanmar*, *supra* note 5, para. 41.

⁹⁴ *Belgium v. Senegal*, *supra* note 13, p. 449, para. 68, in *The Gambia v. Myanmar*, *supra* note 5, para. 41.

⁹⁵ *The Gambia v. Myanmar*, *supra* note 5, para. 41.

⁹⁶ *Ibid.*

⁹⁷ *The Gambia v. Myanmar*, *supra* note 5.

raises a number of objections on the point of the possibility of invocation of responsibility by a State other than the injured State.⁹⁸

As a starting point, she draws a distinction between the facts of the present case and that of *Belgium v. Senegal*, on which the Court bases its reasoning.⁹⁹ She recalls that the latter case concerned Belgium acting as a requesting State for legal assistance and extradition from Senegal, and that the institution of proceedings was grounded not only in Belgium sharing an interest in the compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pursuant to which the legal assistance and extradition was requested, with all other States parties to the Convention, but also in Belgium being the injured State by virtue of being specially affected by Senegal's supposed non-compliance with the obligation *aut dedere aut judicare* laid down in Article 7 of the Convention.¹⁰⁰

In the case of *The Gambia*, *per contra*, the State instituting proceedings is not specially affected; therefore, the entitlement of *The Gambia* to make a claim against Myanmar should not have, at the very least, been based on *Belgium v. Senegal*. That being said, the difference in factual circumstances does not invalidate the conclusion of the Court in that case that the common interest in the compliance with the obligations bestowed by the treaty is *sufficient* for a State to be entitled to invoke the responsibility of another State for the alleged breach of those obligations, even though this point does not clearly come across in the reference to it made by the Court in the order on the indication of the provisional measures.¹⁰¹ It is therefore difficult to see how the fact that Belgium was, in addition, an injured State, negates the separately made point that, even if it was not, the status of a State party under the Convention that imposes obligations *erga omnes partes* in itself imparts on all States the right to bring a claim against any other offending State party.

Vice-President Xue then reiterates her disagreement with the conclusion of the Court in *Belgium v. Senegal*, according to which common interest in compliance with certain obligations under the Convention against Torture entitles any State party to institute proceedings against another State party for the alleged breach of the obligations, and that a requirement of a special interest would, in many cases, negate the possibility of making the claim by any State.¹⁰² In her view, the rules of treaty law do not permit such a hasty and indiscriminate interpretation, common interest not equating the entitlement of any State party to make a claim against the offending State. She extends this conclusion to all human rights treaties, including the Genocide Convention, arguing that the principles underlying the Genocide Convention in themselves do not confer upon each State party a jurisdictional basis and legal standing before the Court.¹⁰³ She then breaks the link between the commitment to the objectives of the Convention and the option of the recourse to the Court in cases of

⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order on the Request for the Indication of Provisional Measures, 23 January 2020, Separate Opinion of Vice-President Xue. Available: <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-01-EN.pdf>. Accessed 14 May 2020.

⁹⁹ *Ibid.*, para. 4.

¹⁰⁰ *Ibid.*

¹⁰¹ *Belgium v. Senegal*, *supra* note 13, p. 449, para. 67.

¹⁰² Separate Opinion of Vice-President Xue, *supra* note 98, para. 5.

¹⁰³ *Ibid.*, paras. 5–6.

disputes regarding the Convention by referring to the possibility of making reservations to Article IX.¹⁰⁴

This latter consideration is particularly notable in the light of the advisory opinion on the reservations to the Genocide Convention. In it, the Court stated that permissible are only those reservations which are compatible with the object and purpose of the Convention.¹⁰⁵ The Court concluded that since the Convention was adopted for a “purely humanitarian and civilising purpose”, the intention was for as many States as possible to become parties to the treaty, sacrificing its integrity.¹⁰⁶ It is likely that Vice-President Xue had this in mind when noting that States that choose to make a reservation to Article IX of the Convention are no less committed to its objectives.

That being said, the conclusion in the advisory opinion was reached by a bare majority, four of the five dissenting judges attaching a joint dissenting opinion, which finds the result reached by the majority inconsistent with the existing body of international law; moreover, it pointedly comments that if the negotiators of the Convention had had such an intention that reservations be governed by the criterion of compatibility, they would have simply included a provision that states so.¹⁰⁷ In addition, the four dissenting judges came to a conclusion that the rule would be neither easily applicable nor calculated to produce final and consistent results.¹⁰⁸ The outcome of this was the pronouncement that universality of the acceptance of the Convention should not be the guiding principle; rather, it is the integrity that should be of the foremost consideration.¹⁰⁹ The following passage embodies the spirit of that idea:

if the Genocide Convention is in any way unique, its uniqueness consists in the importance of regarding it as a whole and maintaining the integrity and indivisibility of its text.¹¹⁰

The fifth dissenting judge, Judge Alvarez, similarly categorised the Genocide Convention as a special sort of law that seeks to establish new principles orienting the legal conscience of the nations and that thus differs from ordinary multilateral treaties, being, in a sense, the “Constitution of international society” that imposes on the States only obligations and no rights.¹¹¹ Consequently, the Genocide Convention and other conventions of such nature must be interpreted differently from anything that has preceded them and treated as a distinct category.¹¹² He then stated, categorically, that by reason of this special nature these conventions, including the Genocide Convention,

¹⁰⁴ *Ibid.*, para. 6.

¹⁰⁵ *Reservations to the Genocide Convention*, *supra* note 93, pp. 23–24.

¹⁰⁶ *Ibid.*, p. 24.

¹⁰⁷ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, Joint Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo, I.C.J. Reports 1951, p. 43.

¹⁰⁸ *Ibid.*, pp. 44–46.

¹⁰⁹ *Ibid.*, p. 47.

¹¹⁰ *Ibid.*

¹¹¹ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, Dissenting Opinion of Judge Alvarez, I.C.J. Reports 1951, p. 51.

¹¹² *Ibid.*, p. 53.

constitute in themselves an “indivisible whole”, and must not be subject to reservations; otherwise, the purposes of the Convention are defeated.¹¹³

In addition, the United Kingdom (amongst other States) submitted a written statement regarding the question of reservations to the Genocide Convention, wherein it observed that there are treaties that are “contractual” both in terms of their operation and by giving rise to mutual, separate bilateral obligations between each party to the treaty and each of the other parties, but that the Genocide Convention is contractual only by the method of the assumption of the obligations contained therein— the nature of these obligations, indivisible and absolute, is such that they are “assumed for all and towards all” parties to the treaty, not to any one State specifically, and their operation is not contingent on the existence of a contractual tie with other States.¹¹⁴ This notion clearly embodies the spirit of the obligations *erga omnes partes*, framing the compliance with the obligations as unconditional.

The arguments presented in the dissenting opinions and the United Kingdom’s written statement go to show that there was a strong feeling that the Genocide Convention is distinct from regular multilateral treaties, and that reservations made to it are or most likely would be contrary to its object and purpose. The importance of these findings lies in the link to the Vice-President Xue’s argument that States that choose to make a reservation to Article IX of the Convention are equally committed to its purpose; therefore, bringing the case before the Court is not a requirement for the fulfilment of the objectives of the Convention, meaning that the Convention in itself does not give rise to the jurisdictional basis and legal standing of *each* State party. In the light of the considerable pushback from the dissenting judges on the question of reservations, basing this claim on the premise that the invocation of the option not to subject the disputes regarding the Convention to the jurisdiction of the ICJ does not negatively affect the shared interest in the accomplishment of the purposes of the Convention seems, at the very least, flawed. To be sure, reservations to the Genocide Convention are now accepted, and, if one follows that logic, they therefore must, as the majority held in the advisory opinion, be compatible with the object and purpose of the treaty. However, it would be inconsiderate of a significant stream of thought in international law and the jurisprudence of the Court more specifically.¹¹⁵ With that in mind, it is not only possible, but even plausible that Article IX with its delegation of disputes to the Court forms an integral part of the Convention, and that, in turn, it is possible for the Convention to afford each State party a jurisdictional basis and legal standing before the Court in disputes with any other State party. This is not negated by Vice-President Xue’s subsequent statement that the Court is not the only

¹¹³ *Ibid.*

¹¹⁴ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Written Statements, pp. 64–65. Available: <https://www.icj-cij.org/files/case-related/12/11767.pdf>. Accessed 14 May 2020.

¹¹⁵ See, e.g., ICJ, *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1987, p. 31, para. 49: “In order to interpret or elucidate a judgement it is both permissible and advisable to take into account any dissenting or other opinions appended to the judgement.” See also ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, Separate Opinion of Judge de Castro, I.C.J. Reports 1972, p. 116: “Separate opinions provide a means for making known the reasons for the votes of members of the majority and this may be useful for the purposes of critical studies by commentators.”

mechanism for the protection of the shared interest vested in the Convention;¹¹⁶ if the Convention is perceived as a whole, then recourse to the Court, embedded in Article IX, is indivisible from the rest of the treaty. Moreover, Vice-President Xue refers to other UN organs and the national legal system of criminal justice of the State concerned as alternatives for the Court, but, whilst they do contribute to the attainment of the purposes of the Convention, they fulfil different functions than the Court, which is seised with the question of State responsibility: another matter entirely.

What Vice-President Xue states last in her separate opinion is illustrative of the long-term challenges facing the concept of obligations *erga omnes* in practice. She acknowledges that even under her stringent interpretation of treaty law, the entitlement of a State party to act on behalf of all States parties to safeguard the common interest “bears on international relations, as well as on the structure of international law”.¹¹⁷ Furthermore, she adds that

[t]he position taken by the Court in this Order, albeit provisional, would put to a test Article 48 of the ILC’s [ARSIWA]. How far this unintended interpretation of the Convention can go in practice remains to be seen, as its repercussions on general international law and State practice would likely extend far beyond this particular case.¹¹⁸

These potential implications of the *cas d’espèce* for the regime of State responsibility and of accountability for genocide more generally reach beyond the interpretation of the concept of obligations *erga omnes* in the case and will be dealt with in the last chapter.

2.2. Provisional measures

Whilst the *erga omnes* nature of the standing of The Gambia is expressly addressed in paragraph 41 of the order, the subject matter of the particular order on the indication of the provisional measures—predictably, provisional measures to be indicated in the case—bear another sort of relevance for State responsibility *erga omnes*.

Provisional measures refer to the same concept as interim measures of protection, which can be found in the Rules of the PCIJ and the ICJ’s rules from 1946.¹¹⁹ Indication of provisional measures is prescribed by Article 41 of the ICJ Statute, pursuant to which provisional measures necessary for the preservation of the respective rights of either party to the dispute may be indicated by the Court where the circumstances so require.¹²⁰

In its application, The Gambia requested five provisional measures,¹²¹ adding a sixth during the oral hearings.¹²² The five originally requested measures were for

¹¹⁶ Separate Opinion of Vice-President Xue, *supra* note 98, para. 7.

¹¹⁷ *Ibid.*, para. 6.

¹¹⁸ *Ibid.*, para. 8.

¹¹⁹ Andreas Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012), p. 1142.

¹²⁰ *Statute of the ICJ*, *supra* note 4.

¹²¹ *The Gambia v. Myanmar*, *supra* note 86, para. 132.

¹²² ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Public Sitting, Verbatim Record, 10 December 2019, pp. 66–67. Available:

Myanmar to take all measures within its power to prevent all acts amounting to or contributing to genocide; to ensure that any military, paramilitary, or irregular armed units, organisations, and persons directed, controlled, supported, or influenced by it do not commit any act of genocide, of conspiracy to commit genocide, of incitement to genocide, of attempt to commit genocide, or of complicity in genocide; to abstain from destructing or rendering inaccessible any relevant evidence; to abstain—on the part of both Myanmar and The Gambia—from taking any action that could aggravate or extend the existing dispute; and to provide—again on both sides—a report to the Court on the measures taken.¹²³ The sixth measure related to Myanmar granting access to, and cooperating with, the relevant UN fact-finding bodies.¹²⁴

In its order, the Court indicated four of these: all except non-aggravation of the dispute and cooperation with the UN fact-finding bodies.¹²⁵ In the first of the two parts devoted specifically to provisional measures, it noted the obligations arising under the Genocide Convention, including prohibition of conspiracy to commit genocide, of direct and public incitement to genocide, of attempt to commit genocide, and of complicity of genocide, and in the light of the objective of the Convention to protect the members of a national, ethnical, racial, or religious group from acts of genocide or any other acts provided for in Article III of the Convention considered the facts of the case to conclude that the rights for which The Gambia seeks protection are plausible and that the first three measures requested are sufficiently linked to the rights for which the protection is sought.¹²⁶

Despite this, the measures ordered by the Court do not, for all intents and purposes, impose any new obligations on Myanmar in addition to those by which it was already bound. The principal of the measures indicated—prevention of acts of genocide and control over armed forces and groups ensuring that they do not commit any such acts—replicate the obligations already contained in the Genocide Convention.¹²⁷ This raises two questions: firstly, what is the added value of the provisional measures indicated in the *cas d'espèce*, and, secondly, in the light of the unprecedented nature of The Gambia's request, what is the relevance of the provisional measures with respect to State responsibility *erga omnes* for genocide more generally.

The relevance of the provisional measures is deliberated in detail by Judge Cançado Trindade in his separate opinion, wherein he considers the role of provisional measures in the protection of the vulnerable persons and groups from grievous human rights abuses, and concludes that it is imperative that the determination and ordering

<https://www.icj-cij.org/files/case-related/178/178-20191210-ORA-01-00-BI.pdf>. Accessed 14 May 2020.

¹²³ *The Gambia v. Myanmar*, *supra* note 86.

¹²⁴ *The Gambia v. Myanmar*, *supra* note 122, p. 67.

¹²⁵ *The Gambia v. Myanmar*, *supra* note 5, para. 86.

¹²⁶ *Ibid.*, paras. 43–63.

¹²⁷ Marko Milanovic, "ICJ Indicates Provisional Measures in the Myanmar Genocide Case," *EJIL: Talk!* 23 January 2020, <https://www.ejiltalk.org/icj-indicates-provisional-measures-in-the-myanmar-genocide-case/>. Accessed 14 April 2020.

of provisional measures under the Genocide Convention be undertaken from a humanist and not State-centric viewpoint.¹²⁸

Judge Cançado Trindade has a track record of contending the importance of provisional measures in battling human vulnerability and of rejecting a voluntarist approach in establishing jurisdiction in such cases where the provisional measures concern violations of human rights. He has stressed the point in several other separate and dissenting opinions, including a separate opinion attached to the order on the indication of provisional measures in the case of *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*,¹²⁹ three dissenting opinions in the cases of the *Obligation of Nuclear Disarmament*,¹³⁰ and two separate opinions attached, respectively, to the order on the indication of provisional measures¹³¹ and the judgment¹³² in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Ukraine v. Russian Federation)*, amongst other accounts highlighting judicial and other measures needed to ensure the protection of the vulnerable and of the social milieu as such.¹³³

In his separate opinion attached to the Court's order of the provisional measures in the *Ukraine v. Russian Federation* case, Judge Cançado Trindade argues that provisional measures have assumed a status of jurisdictional guarantees of a

¹²⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order on the Request for the Indication of Provisional Measures, 23 January 2020, Separate Opinion of Judge Cançado Trindade. Available: <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-02-EN.pdf>. Accessed 14 May 2020.

¹²⁹ ICJ, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order on the Request for the Indication of Provisional Measures, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2014, p. 167.

¹³⁰ ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment, Dissenting Opinion of Judge Cançado Trindade, I.C.J. Reports 2016, p. 321, ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Judgment, Dissenting Opinion of Judge Cançado Trindade, I.C.J. Reports 2016, p. 615, ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. the United Kingdom)*, Judgment, Dissenting Opinion of Judge Cançado Trindade, I.C.J. Reports 2016, p. 907.

¹³¹ ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Ukraine v. Russian Federation)*, Order on the Request for the Indication of Provisional Measures, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2017, p. 155.

¹³² ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Ukraine v. Russian Federation)*, Judgment, 8 November 2019, Separate Opinion of Judge Cançado Trindade. Available: <https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-03-EN.pdf>. Accessed 14 May 2020.

¹³³ See, e.g., ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010, p. 523, ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, Dissenting Opinion of Judge Cançado Trindade, I.C.J. Reports 2012, p. 179, ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 19 June 2012, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2012, p. 347, ICJ, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran versus United States)*, Order on the Request for the Indication of Provisional Measures, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010, p. 654.

preventive, tutelary character.¹³⁴ In addition, they fulfil a function of continuous monitoring in situations where a great risk is posed to vulnerable persons and groups, more so than anything during prolonged periods of time.¹³⁵ This monitoring function is also evident in the measures indicated by the Court in the *cas d'espèce*, requiring Myanmar to submit periodical reports. The mandatory nature of the provisional measures, explicitly reaffirmed first by the Inter-American Court of Human Rights¹³⁶ and subsequently by the ICJ in the *LaGrand* case,¹³⁷ (referred to in the order by the Court also in the *cas d'espèce*)¹³⁸ in the view of Judge Cançado Trindade thereby enables the provisional measures to constitute an autonomous legal regime that gives rise to obligations and responsibility of States separate from the obligations grounded in the judgment on the merits of the case.¹³⁹ It is this autonomous legal regime that serves as a framework and as an instrument for the protection of fundamental human rights, including *jus cogens*, amongst which, as has been established heretofore, counts the prohibition of genocide.¹⁴⁰

For Judge Cançado Trindade, the preservation of human rights is an overarching objective, and "the realisation of justice, with the judicial recognition of the sufferings of the victims, is an imperative"¹⁴¹—he thereby contends the recently introduced in the *Belgium v. Senegal* case criterion of plausibility of rights needed for the indication of provisional measures of protection and proposes that vulnerability of victims be the main indicator in granting provisional measures, abiding by the established criteria of the gravity of the situation, the urgency of needs for such measures, and the probability of irreparable harm.¹⁴² The principle of humanity is therefore conceived to permeate the very fabric of the regime of protection of human beings, expressly so where those in need of protection are in a particularly vulnerable position.¹⁴³

It is on the basis of these considerations that the provisional measures of protection assume their importance. Where there are persons or groups in a position of vulnerability and a subsequent imperative to take positive action to provide those persons or groups with the protection necessary, provisional measures are one way of bringing about the realisation of that action. They are part and parcel of the international human rights protection regime, and, since their indication intrinsically

¹³⁴ Separate Opinion of Judge Cançado Trindade, *supra* note 131, p. 157, para. 4.

¹³⁵ *Ibid.*, para. 5.

¹³⁶ IACtHR, *Constitutional Tribunal v. Peru*, Order on Provisional Measures of Protection, 14 August 2000. Available: http://www.corteidh.or.cr/docs/medidas/ceshurtado_se_06_ing.pdf. Accessed 14 May 2020.

¹³⁷ ICJ, *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466. See also Xiaodong Yang, "Thou Shalt Not Violate Provisional Measures," *The Cambridge Law Journal* 60, no. 3 (2001): pp. 441–446.

¹³⁸ *The Gambia v. Myanmar*, *supra* note 5, para. 84.

¹³⁹ See, e.g., IACtHR, *Peace Community of San José of Apartadó regarding Colombia*, Order on Provisional Measures of Protection, 2 February 2006, Concurring Opinion of Judge Cançado Trindade, paras. 6–7. Available: http://www.corteidh.or.cr/docs/medidas/votos/apartado_vse_06_cancado_ing.doc. Accessed 14 May 2020.

¹⁴⁰ Separate Opinion of Judge Cançado Trindade, *supra* note 128, para. 81.

¹⁴¹ Separate Opinion of Judge Cançado Trindade, *supra* note 132, para. 71.

¹⁴² Separate Opinion of Judge Cançado Trindade, *supra* note 131, p. 170, para. 43.

¹⁴³ Separate Opinion of Judge Cançado Trindade, *supra* note 132, para. 72.

produces distinct obligations and distinct responsibility of States, they serve a separate purpose within it, i.e. a primarily preventive one.

However, given the near replication of the obligations already provided for by the Genocide Convention in the *cas d'espèce*, the mere fact that provisional measures are aimed at the protection of the vulnerable and are preventive in nature does not answer the question of the added value of indicating provisional measures where the initial obligations have been allegedly breached. The ICJ has been previously seised with the indication of provisional measures in a dispute concerning the application of the Genocide Convention in the cases of *Bosnia and Herzegovina v. Yugoslavia* in April¹⁴⁴ and September of 1993.¹⁴⁵ Presented with a risk of genocide occurring, the Court issued two provisional measures identical to the primary ones ordered in the case of *The Gambia against Myanmar*, i.e. the prevention of acts of genocide and control over armed forces and groups ensuring that they do not commit any such acts, as well as another of a more general nature pertaining to the non-aggravation or extension of the existing dispute.¹⁴⁶ However, it subsequently found that the development of the situation warranted a consideration of another request for the indication of provisional measures; and, albeit it could not justify ordering 10 additional provisional measures requested by Bosnia and Herzegovina, it made two significant observations. Firstly, it reiterated that both Yugoslavia and Bosnia and Herzegovina were already under a clear obligation to do all in their power to prevent the commission of any acts of genocide under the Genocide Convention as such, and under an obligation not to take any action and to ensure that no action is taken to aggravate or extend the existing dispute under the provisional measures previously indicated.¹⁴⁷ Secondly, it found that it was not satisfied that even after the indication of the first round of provisional measures all that might have been done had been done to prevent genocide and ensure that the dispute is not aggravated, extended, or rendered more difficult of solution, and that there was a need not for additional provisional measures, but for immediate and effective implementation the measures already indicated.¹⁴⁸

The Court thus used provisional measures to reaffirm the already existing obligations and took the opportunity to reassert the gravity of the obligations to prevent and punish genocide.¹⁴⁹ The actual compliance with such measures is infinitely

¹⁴⁴ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order on the Request for the Indication of Provisional Measures, 8 April 1993, I.C.J. Reports 1993, p. 3.

¹⁴⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order on the Request for the Indication of Provisional Measures, 13 September 1993, I.C.J. Reports 1993, p. 325.

¹⁴⁶ *Bosnia and Herzegovina v. Yugoslavia*, *supra* note 144, p. 24, para. 52.

¹⁴⁷ *Bosnia and Herzegovina v. Yugoslavia*, *supra* note 145, pp. 346–347, para. 46.

¹⁴⁸ *Ibid.*, pp. 349–350, para. 61.

¹⁴⁹ *Ibid.*, p. 348, paras. 51–52. The Court recalled to its previous findings that the crime of genocide “shocks the conscience of mankind, results in great losses to humanity ... and is contrary to moral law and to the spirit and aims of the United Nations”, referring to the UN GA Resolution 96 (I) of 11 December 1946 on “The Crime of Genocide”. See also C. J. Warbrick, “Interim Protection from Genocide,” *The Cambridge Law Journal* 52, no. 3 (1993): pp. 367–371, Alison Wielback, “Genocide in Bosnia and Herzegovina? Exploring the parameters of interim measures of protection at the ICJ,” *The Comparative and International Law Journal of Southern Africa* 28, no. 1 (1995): pp. 83–106, Christine Gray, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Orders of Provisional Measures of 8

important, but it is essential to make a distinction between the objectives of judicial mechanisms, their potential effects, and the consequences arising out of the inability to enforce them. The line between the latter two in particular is especially thin, but it is there and it should not be neglected in favour of making overly sweeping conclusions about the role of measures ordered by an international court. As Ben-Naftali asserts,

law can facilitate, but cannot substitute for sound policy, let alone the solidarity required for the eradication of genocide. It does not, of course, follow that normative developments are therefore meaningless.¹⁵⁰

The Genocide Convention itself has been criticised for being removed from its own objectives, disappointing in its ability to curb genocide and practically non-enforceable,¹⁵¹ but it is by reason of its existence that the ICJ has been able to build on it and expand its interpretation, filling the gaps between the rhetoric of the Convention and the nature of obligations that the Convention gives rise to.¹⁵²

It can therefore be surmised that provisional measures can, at least on a normative level, be an instrument for securing the integrity of the rights of those for whom they are at risk. However, the indication of provisional measures is conditional upon a number of criteria, of which the first and foremost is the jurisdictional basis, and, by extension, the legal standing of the applicant State for the Court to hear the dispute in the first place. Judge Caçado Trindade's separate opinion in the *Ukraine v. Russia* case is of an additional interest here by virtue of his particular attention to the nexus between the basis of jurisdiction and the protection of the vulnerable under human rights conventions.¹⁵³ It is here that the question of equilibrium between the humanist and voluntarist outlook becomes relevant; or, in other terms, between the jusnaturalist and positivist line of thinking. Attribution of a greater weight to any side inherently requires making certain choices in favour of one and in opposition to another, and the best that can be done is an effort made to justify those choices by recourse to the immediate sources of the norms in question—in this case, the Genocide Convention. The argument of Judge Caçado Trindade extensively postulates that human rights conventions, such as the Convention on the Elimination of All Forms of Racial Discrimination, and certainly such as the Genocide Convention, are founded on the basis of rights so indispensable and so universal, their very character requiring such a high standard of protection, that the rationale behind those conventions and their ultimate objective cannot but be the realisation of those rights, superseding the consent of States.¹⁵⁴ It would be nonsensical to argue that the Genocide Convention does not belong to the category of such conventions and does not aim at preserving the

April 1993 and 13 September 1993," *The International and Comparative Law Quarterly* 43, no. 3 (1994): pp. 704–714; for a more recent view on the role of provisional measures, see Kate Parlett, "A Role for the ICJ in Ongoing Armed Conflict: Provisional Measures," *The Cambridge Law Journal* 68, no. 1 (2009): pp. 4–6, and Dino Kritsiotis and Malcolm D. Evans, "Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*): Provisional Measures," *The International and Comparative Law Quarterly* 50, no. 3 (2001): 662–670.

¹⁵⁰ Orna Ben-Naftali, "The Obligations to Prevent and Punish Genocide," in *The UN Genocide Convention—A Commentary*, ed. Paola Gaeta (New York: Oxford University Press, 2009), p. 56.

¹⁵¹ Yuval Shany, "The Road to Genocide Convention and Beyond," in *The UN Genocide Convention—A Commentary*, ed. Paola Gaeta (New York: Oxford University Press, 2009), pp. 10–14.

¹⁵² *Ibid.*

¹⁵³ Separate Opinion of Judge Caçado Trindade, *supra* note 131, paras. 4–5.

¹⁵⁴ Separate Opinion of Judge Caçado Trindade, *supra* note 132, paras. 49–51.

most basic of human rights: the right to life. As to whether the rights protected by it can be conceived to surpass the will of States, it is first worth noting that in the joint dissenting opinion to the advisory opinion on the reservations to the Genocide Convention of judges Guerrero, McNair, Read, and Hso Mo, referred to previously, it is asserted that

the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation.¹⁵⁵

With that in mind, at least a partial answer to the question of supremacy of the principle of humanity may be inferred precisely from the link with State responsibility *erga omnes*.

The emergence of the concept of obligations *erga omnes* is a prime example of the shift towards the humanisation of international law and the law of State responsibility in particular. Although the ILC has made attempts to correlate obligations *erga omnes* with a specific right of any other State, it is more in line with the special nature of these obligations to view them as corresponding not to subjective rights of each State, but to shared community values.¹⁵⁶ Similarly, the jurisprudence under both the European and the American human rights regimes sees human rights violations as an encroachment on the integrity of the international public order and not as breaches of obligations owed to any one State.¹⁵⁷ It is this idea of a prevailing *collective* interest that links obligations *erga omnes* with the humanist approach towards the issue of jurisdiction, and it is at this junction that the obligations *erga omnes* and provisional measures of protection intersect.

Put differently, the quintessence of the foregoing deliberation of the role of the provisional measures and the diversion into the principle of humanity as the compass in applying the regimes of protection is the following. Provisional measures are a means of ensuring protection where it is needed in compliance with that principle—it is on this account that they epitomise an interest of the international community in assuring fundamental human rights. Obligations of an *erga omnes* nature arising out of the regime outlawing genocide, too, are an embodiment of a shared interest of the international community (or, narrowly construed, obligations of *erga omnes partes* nature are an embodiment of a shared interest of the States parties). The standing of States on the basis of obligations *erga omnes*, grounded in the idea of a fuller, stricter, more encompassing kind of a regime of protection, is directly complemented by the provisional measures, which serve as a device of exercising the possibility to guarantee that protection. Provisional measures bestow value upon the ability of States to invoke responsibility of another State for the breach of *erga omnes* obligations; not exclusively, for provisional measures are not the only way to assert rights when responsibility has been invoked, but perhaps most accurately representing the functions of obligations *erga omnes*. It must be recalled here that the forms of reparation available under Article 48 of the ARSIWA serve a predominantly preventive purpose, as do the provisional measures. In such a way, the aim and the method align

¹⁵⁵ Joint Dissenting Opinion of Judges Guerrero, McNair, Read, and Hso Mo, *supra* note 107, p. 47.

¹⁵⁶ Meron, *supra* note 1, p. 248.

¹⁵⁷ *Ibid.*, p. 249.

themselves along the axis of the preventive function in a near-perfect mirror image, complementing and reinforcing.

3. SELECT IMPLICATIONS OF THE CASE OF *THE GAMBIA V. MYANMAR* FOR STATE RESPONSIBILITY FOR GENOCIDE, INDIVIDUAL CRIMINAL RESPONSIBILITY, AND INTERNATIONAL ORDER

The unprecedented nature of the case of *The Gambia v. Myanmar* in itself gives an indication that the findings of the Court—those that have already been made and those that will be made in due time—have the potential of having far-reaching repercussions for the regime of State responsibility for genocide. It is also clear that State responsibility for genocide does not exist in a vacuum but affects and is affected by the entirety of the system of international law designed to regulate accountability for the crime of genocide, which includes individual criminal responsibility. The following examination of the hypothetical effects on either regime of responsibility is not concerned with an all-encompassing compilation of the implications that the *cas d'espèce* might possibly have on finding State or individual responsibility for genocide; that would be beyond the scope of this study and would have little to no relevance to the concept of obligations *erga omnes* and the research question at stake. Instead, a selection of aspects that hold the most relevance with respect to the invocation of State responsibility on the basis of obligations *erga omnes* is made.

3.1. The convergence of State responsibility for genocide and individual criminal responsibility

Genocide is one of several acts that gives rise to both State and individual responsibility. Other such acts include the crime of aggression, crimes against humanity, killings of protected persons in an armed conflict, torture, and terrorism.¹⁵⁸ The same act of an international crime can thus give rise to both State responsibility and individual criminal responsibility,¹⁵⁹ but they are not, strictly speaking, contingent upon each other, in that the finding of individual criminal responsibility is not a legal requirement for the determination of State responsibility, and vice versa.¹⁶⁰ The act of an agent of a State may be attributable to a State, but it does not have to be; where it is, the two forms of responsibility run in parallel.¹⁶¹ The question of attribution was addressed by the ICJ in the case of *Bosnia and Herzegovina v. Serbia*, where it—controversially—rejected the ICTY standard of attributability of conduct to a State and held that the test of attributability may differ between international criminal law and law of State responsibility.¹⁶²

There is cogency in the view of individual criminal responsibility, primarily on account of efficacy of international law.¹⁶³ This notion is reflected in a judgment of the Nuremberg Tribunal, which declared that

¹⁵⁸ Andre Nollkaemper, "Concurrence between Individual and State Responsibility," *The International and Comparative Law Quarterly* 52, no. 3 (2003): p. 618.

¹⁵⁹ E.g. ICTY, *Furundžija* (IT-95-17/1-T), Trial Judgment, TC II, 10 December 1998, para. 142.

¹⁶⁰ Nollkaemper, *supra* note 158, p. 616.

¹⁶¹ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 4th ed. (Cambridge: Cambridge University Press, 2019), p. 16.

¹⁶² *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 45, p. 210, para. 405.

¹⁶³ Nollkaemper, *supra* note 158, p. 618.

[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹⁶⁴

On an international plane, individualisation of responsibility for international crimes serves the purpose of replacing collective responsibility.¹⁶⁵ Retribution stemming out of holding specific individuals accountable has been said to promote group reconciliation by means of establishing the truth together with the acceptance of responsibility.¹⁶⁶ However, it has been argued that reconciliation is not necessarily always in agreement with truth-telling; Damaška, for example, points to the example of Rwanda, which saw the prosecution of select number of nationalist leaders in contrast to the estimated total of more than a million people that perpetrated the atrocities, most likely due to the leaders' appeal to the already pent-up animosity.¹⁶⁷ As such, there appear to be contrasting views on, firstly, whether the prosecution of individuals results in reconciliation in the first place, and, secondly, whether it is an accurate reflection of history.

Whilst the involvement of State organs in the perpetration of genocide is not a legal requirement, it is a characteristic feature of international crimes,¹⁶⁸ particularly for genocide.¹⁶⁹ Generally, States are the ones at whose disposal are the resources, such as personnel and organisational resources, necessary for the commission of a crime capable of affecting international community as a whole.¹⁷⁰ Perhaps even more importantly, it is States that bear the onus of the responsibility to protect their populations from mass atrocities.¹⁷¹

Within the regime of accountability for genocide, State responsibility and individual criminal responsibility are fundamentally compatible. Sanctions in

¹⁶⁴ IMT, Judgment, 1 October 1946, p. 41. Available: https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf. Accessed 14 May 2020.

¹⁶⁵ Mirjan R. Damaška, "What is the Point of International Criminal Justice?" *Chicago-Kent Law Review* 83, no. 1 (2008): p. 331. This is in contrast to the national criminal justice view, where individualisation relates to the adjustment of the punishment to the degree of individual culpability; see, e.g., Raymond Saleilles, *L'individualisation de la peine* (Paris: F. Alcan, 1898).

¹⁶⁶ ICTY, *Plavšić* (IT-00-39&40/1-S), Sentencing Judgment, TC III, 27 February 2003, para. 80, Damaška, *supra* note 165, p. 332, Antonio Cassese, "Reflections on International Criminal Justice," *Modern Law Review* 61, no. 1 (1998): pp. 1–10, in Dixon, *Cases and Materials*, pp. 537–538, see also (*incl. cf.*) Cryer et al., *supra* note 161, pp. 41–42.

¹⁶⁷ Damaška, *supra* note 165, p. 333.

¹⁶⁸ Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2014), p. 32.

¹⁶⁹ William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000). During the negotiations of the Genocide Convention, several States raised the point that genocide is a collective crime. See *the position of the United Kingdom at p. 419 and of Denmark at p. 442*.

¹⁷⁰ Werle and Jessberger, *supra* note 168.

¹⁷¹ Gentian Zyberi, "Responsibility of States and Individuals for Mass Atrocity Crimes," in *The Practice of Shared Responsibility in International Law*, ed. Andre Nollkaemper et al. (Cambridge: Cambridge University Press, 2017), p. 238, see also Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008), pp. 28–31 for the relationship of States to prosecution of individuals more generally.

international criminal law have a punitive, deterrent, and preventive purpose,¹⁷² whereas the traditional form of State responsibility envisages a principally remedial and reparational dimension.¹⁷³ However, as has been made clear earlier, State responsibility *erga omnes*, whilst providing for the option of reparation on behalf of the victims of the responsible State, is mostly preventive in character, being aimed at compliance and reinstatement of *status quo ante* above anything else, as the forms of reparation offered by Article 48(2) of the ARSIWA make clear.¹⁷⁴ With respect to the functions in regard to acts under the dual model of attribution of responsibility, these may also be divided in reparatory and systemic functions of State responsibility.¹⁷⁵ Where reparatory functions concern both less serious breaches of international law and those generating aggravated responsibility under Article 40 of the ARSIWA, systemic functions pertain exclusively to functions arising under aggravated responsibility.¹⁷⁶ Nollkaemper remarks that in their most extreme form these systemic functions may resemble the legal consequences of individual criminal responsibility, the objective being to put an end to the violations of fundamental norms of international law and to ensure that no repeated transgressions may transpire.¹⁷⁷ In this sense, State responsibility, particularly State responsibility *erga omnes*, and individual criminal responsibility are immanently harmonious on account of the emergence of a hierarchy of norms that is shared by the entire international community; and it is on the basis of those underlying principles that

[t]he main features of the concurrence of individual and state responsibility, notably the (semi) transparency of the state, the role of the international community in defining and implementing responsibility and the potentially systematic consequences of state responsibility can indeed only be understood as a function of the recognition of a category of peremptory norms in international law and their *erga omnes* character.¹⁷⁸

These coinciding features lay the foundation for the exploration of implications of the case of *The Gambia v. Myanmar* for the regimes of State responsibility for genocide and individual criminal responsibility.

3.2. The implications of the case of *The Gambia v. Myanmar* for State responsibility for genocide

It bears repeating that in the course of indicating the provisional measures the Court did not have to definitively decide whether The Gambia has the legal standing to make

¹⁷² Andrea Bianchi, "State Responsibility and Criminal Liability of Individuals," in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), p. 24, Marko Milanovic, "State Responsibility for Genocide," *EJIL* 17 (2006): p. 561.

¹⁷³ Milanovic, *supra* note 172, p. 561. For the interplay between State and individual responsibility for specifically genocide, see Philippa Webb, "Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide," in *The Diversification and Fragmentation of International Criminal Law*, ed. Larissa van den Herik and Carsten Stahn, pp. 117–148. Brill: Nijhoff, 2012, and, more generally, Marina Spinedi, "State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur?*" *The European Journal of International Law* 13, no. 4 (2002): pp. 895–899.

¹⁷⁴ Villalpando, *supra* note 73, Vaurs-Chaumette, *supra* note 9, p. 1027.

¹⁷⁵ Nollkaemper, *supra* note 158, p. 622.

¹⁷⁶ *Ibid.*, p. 624.

¹⁷⁷ *Ibid.*, p. 625.

¹⁷⁸ *Ibid.*, p. 631.

a claim; it needed only satisfy itself that The Gambia has standing *prima facie*. Therefore, the Court may yet find that obligations *erga omnes* do not suffice to entitle The Gambia to bring the case against Myanmar, and the separate opinion of Vice-President Xue is one example of arguments that could be brought forward. That being said, regardless of what the position of the Court ends up being, there are two possible outcomes: either it embraces the standing of States under obligations *erga omnes* and contributes to a broad interpretation of the *Barcelona Traction* dictum, or it construes obligations *erga omnes* narrowly and adds to the doctrine of restrictive reading of the *Barcelona Traction*, currently represented by the 1966 *South West Africa* judgment, Judge de Castro in his dissent in *Nuclear Tests*, and Judge Oda's declaration in the *Genocide* case.¹⁷⁹

The choice made by the Court in addressing the distinction between obligations *erga omnes* and obligations *erga omnes partes* could prove to be decisive. As has been pointed out above, in its application The Gambia has relied on both obligations *erga omnes* and *erga omnes partes*, but in the order on provisional measures the Court has only acknowledged the latter—a safer option and sufficient for the present purposes.¹⁸⁰ It has already been remarked that the distinction between obligations *erga omnes* and obligations *erga omnes partes*, clear *in abstracto*, is not as well-defined *in concreto*.¹⁸¹ Based on the dictum in *Barcelona Traction* and the following acknowledgments of genocide as a breach of obligations *erga omnes* as well as on the conclusion of the Court in the order on provisional measures in *The Gambia v. Myanmar*, at the very least the prohibition and prevention of genocide belong to this category of obligations where the concepts of *erga omnes* and *erga omnes partes* overlap. Taking into account the submissions of The Gambia, the Court now has an opportunity to go beyond the comparatively more convenient concept of obligations *erga omnes partes* and interpret the rights arising out of “high” obligations *erga omnes*, including those pertaining to the legal standing of a State. In this regard, the “special nature” of the Genocide Convention, discussed above, could play a role—the problem of the reach of obligations *erga omnes* could hardly have been bestowed upon a more grateful subject, what with the gravity of the crime of genocide and the universality of its prohibition. If the Court does opt for an interpretation of the matter, the practical effects of a clarification on whether such a standing exists and in which cases it is germane would be, put mildly, major: a modern reading of the *Barcelona Traction* dictum in every way.

Having said that, the order on provisional measures does not seem to encourage the thought that the Court will venture beyond obligations *erga omnes partes*. If that turns out to be the case, the question will remain open for the Court to address at a later point.

Besides that, a major potential point of interest is the clarification of obligations under the Genocide Convention. The Court has reaffirmed that obligations to prevent

¹⁷⁹ Tams, *supra* note 2, pp. 192–193.

¹⁸⁰ *The Gambia v. Myanmar*, *supra* note 5, para. 41.

¹⁸¹ Linos-Alexander Sicilianos, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility,” *EJIL* 13, no. 5 (2002): p. 1136.

and punish genocide are obligations *erga omnes*,¹⁸² but, as has already been pointed out, its formulation with respect to the rest of the obligations provided for by the Convention has been less clear. Whether the Court will elaborate the content of the obligations and their respective character as *erga omnes* (or lack thereof) is anyone's guess, but it would be a more than welcome contribution. In this respect, the fact that The Gambia invoked the responsibility of Myanmar on the basis of obligations *erga omnes* could be the loose thread on which the Court pulls to unravel a more thorough examination of obligations *erga omnes* under the Genocide Convention.

3.3. The implications of the case of *The Gambia v. Myanmar* for individual criminal responsibility

The most impactful effect the findings in the *cas d'espèce* could potentially have on the determination of individual criminal responsibility for genocide would be a judgment acknowledging that genocide against the Rohingya was perpetrated, directly facilitating the conviction of the accused in criminal trials.

Although the determination of either State or individual criminal responsibility is not conditional on the finding of the other, there are mutually reinforcing links between the two. Nollkaemper asserts that the pronouncement of individual responsibility may help establish State responsibility through use of findings of fact, or fact together with law, as proof or evidence in separate proceedings.¹⁸³ This seems to work both ways; although he points out that the judicial procedures in the Security Council and other multilateral frameworks which may serve as the arena for implementation of certain kinds of State responsibility are undeveloped in comparison to judicial procedures applicable to individuals,¹⁸⁴ the ICJ does not belong to this category of enforcement mechanisms with lax procedural rules.

In the proceedings recently instituted before the ICC, the Court has authorised an investigation into the situation of the Rohingya on the basis of crimes having been partly committed in the neighbouring Bangladesh, which is a party to the Rome Statute.¹⁸⁵ In such a way, the Prosecution has circumvented the impediment of Myanmar not being a State party to the Rome Statute. However, this necessity to focus geographically on Bangladesh and on the crimes of which at least one element has been committed on its territory means that the scope of crimes that the Prosecutor is authorised to investigate is limited—and, in this case, it is limited to crimes against humanity, more specifically, deportation, persecution on grounds of ethnicity or religion, and other inhumane acts, which are, arguably, of a cross-border nature.¹⁸⁶ Therefore, the ICC has, at present, no authority to declare that genocide against the Rohingya has taken place. Similarly, a case against several top Myanmar officials has

¹⁸² Final Report of the Commission of Experts, attached to the "Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council" (Doc.S/1994/674), p. 24, para. 88.

¹⁸³ Nollkaemper, *supra* note 158, pp. 628–629.

¹⁸⁴ *Ibid.*, p. 631.

¹⁸⁵ *Bangladesh/Myanmar*, *supra* note 3.

¹⁸⁶ Thomas Van Poecke et al., "The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya," *EJIL: Talk!* 21 November 2019, <https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmars-alleged-genocide-against-rohingya/>. Accessed 14 April 2020.

been brought in Argentina under the principle of universal jurisdiction, but the absence of provisions on genocide in the penal code of Argentina precludes genocide charges in these proceedings as well.¹⁸⁷ In contrast, proceedings before the ICJ on the basis of obligations *erga omnes* allow for such a possibility.

If the Court reaches a conclusion that genocide of the Rohingya has taken place, it would provide the prosecution in criminal trials in the ICC and elsewhere with proof of unmatched authority. Albeit there is no hierarchy of international courts in the sense that the ICC, for example, would have to follow the pronouncement made by the ICJ,¹⁸⁸ it would be in the interests of the Prosecution to refer to it, and it is doubtful that the judges at the ICC would choose not to take the decision of the ICJ into account. However, it is unlikely that the evidence presented by The Gambia will succeed in meeting the exceedingly high evidentiary standard for the Court to find that genocide has been committed; it must be recalled here that in the Bosnian and the Croatian cases even an international criminal tribunal, established expressly for that purpose, was unable to do so, and the ICJ is in a comparatively much weaker position in this regard.¹⁸⁹ This opens the door for the discussion on the enforcement of obligations *erga omnes*.

3.4. The implications of the case of *The Gambia v. Myanmar* for the international order

It should not be neglected that the invocation of responsibility of Myanmar by The Gambia has wider political implications besides the purely legal dimension. International law *per se* is highly politicised, and nowhere else is this more apparent than in the invocation of State responsibility, especially so with respect to the alleged breaches of obligations which the entire international community have in common.

A derivative issue that commands particular attention by virtue of its substantial effect on international relations is the right to take countermeasures against the State that has committed a breach of obligations *erga omnes*. The inclusion of this question in the present analysis is not intended to suggest that in the case of *The Gambia v. Myanmar* the Court is preparing itself to decide on what countermeasures The Gambia may take against Myanmar, but it is indicative of the debate on the subject and its particular relevance to obligations *erga omnes*, which define the case.

In general, the views on whether countermeasures in response to violations of obligations *erga omnes* are allowed differ, especially because Article 54 of the ARSIWA deliberately does not elaborate on whether countermeasures protecting obligations *erga omnes* classify as lawful measures in the meaning of Article 54.¹⁹⁰ Crucially, such

¹⁸⁷ Agence France-Presse, "Myanmar's Aung San Suu Kyi faces first legal action over Rohingya crisis," *The Guardian*, 14 November 2019, <https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-suu-kyi-faces-first-legal-action-over-rohingya-crisis>. Accessed 4 May 2020.

¹⁸⁸ Jonathan Charney, "Is international law threatened by multiple international tribunals?" *Recueil des cours* 271 (1998): pp. 356–363.

¹⁸⁹ Milanovic, *supra* note 127.

¹⁹⁰ Tams, *supra* note 2, pp. 198–200. Tams particularly remarks that whilst the adoption of Article 54 in its current form is understandable given the pressure from the governments exerted on the ILC, the

countermeasures would not be restricted by the requirement of consent to jurisdiction that checks the invocation of responsibility before the ICJ, meaning that any State could resort to countermeasures against any other State.¹⁹¹ In addition, it would mean that States could suspend the performance of a broad range of obligations without an independent assessment of the offending State's conduct.¹⁹² It is evident that this would heavily affect the structure of the international order by giving a massive leeway for the States to enforce compliance with obligations *erga omnes*. Critics of a right to take countermeasures have dubbed it as a pathway to the "rule of the jungle" and vigilantism, whereas supporters argue that effective means of enforcement are an indispensable corollary of a multilateral public order.¹⁹³ The Court's position on the matter is inconclusive,¹⁹⁴ and there are a number of States that have actively opposed legitimising the use of countermeasures in cases of breaches of obligations *erga omnes*,¹⁹⁵ but the government comments on the draft of Article 54 suggest that more States were supportive of the right than not.¹⁹⁶ This is additionally reinforced by State practice in cases of large-scale or systematic breaches of obligations *erga omnes*.¹⁹⁷ All in all, the conduct of States seems to lean towards the acceptance of countermeasures in response to the infringements of obligations *erga omnes*.

There are several conclusions that can be drawn from this with respect to the case at hand. Firstly, there is a lack of certainty as to the status of countermeasures against violators of obligations *erga omnes*, and the Court is yet to clarify its position, which means that a case concerning obligations *erga omnes* could potentially contribute to the development on this front. Secondly, the absence of a solid stance of the ICJ on the matter has not precluded an advancement of the recognition of the concept by States. Lastly, despite the what at a first glance could appear to be a somewhat anarchical nature of such countermeasures, the tendency has been to embrace them, signalling that there has indeed been a shift in the international system towards a hierarchy of absolute and universal norms.

Article thus lacks the legal clarity and predictability for the provision of which codification efforts tend to be undertaken.

¹⁹¹ *Ibid.*, p. 198.

¹⁹² *Ibid.*, pp. 198–199.

¹⁹³ *Ibid.*, p. 199, Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge: Cambridge University Press, 2017), p. 11.

¹⁹⁴ See, e.g., (inconclusively) *East Timor*, *supra* note 38, and Dissenting Opinion of Judge Weeramantry thereof (in the light of his criticism of the use of countermeasures), I.C.J. Reports 1995, p. 139, and ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 126, amongst others. For a detailed discussion, see Tams, *supra* note 2, pp. 202–207.

¹⁹⁵ E.g. Japan during both readings; Algeria, Botswana, China, Israel, Jordan, Mexico, the United Kingdom, during the second reading. For a detailed discussion, see Tams, *supra* note 2, pp. 241–249.

¹⁹⁶ E.g. then both parts of Germany, Indonesia, the Netherlands, and, tentatively, the US during the first reading; Argentina, Austria, Brazil, Costa Rica, France, Italy, New Zealand, and the Netherlands during the second reading. For a detailed discussion, see Tams, *supra* note 2, pp. 241–249.

¹⁹⁷ E.g. the response of Western States against the regime of Idi Amin in Uganda in the 1970s, that of the European countries following a military coup in Liberia in 1980, Western countries after the invasion of the Falklands/Malvinas islands in 1982, various countries in response to Iraq in 1990, European countries in response to Yugoslavia in 1998, and many more. For a detailed discussion, see Tams, *supra* note 2, pp. 207–241.

To add to the novel challenges accompanying the invocation of responsibility for the breach of obligations *erga omnes*: they can also serve as an opportunity for a sort of a forum shopping, choosing the State that is best suited for bringing a particular claim. Economic or regional organisations and other multilateral arenas of shared values in the protection of which there is a legal interest are one kind of entities that can benefit from legal standing under obligations *erga omnes*. In the case of The Gambia, it submitted the request for the indication of provisional measures with the backing of the Organisation of Islamic Cooperation, of which it is a member.¹⁹⁸ (The Rohingya are a chiefly Muslim ethnic group in a predominantly Buddhist Myanmar.)¹⁹⁹

In essence, there was no particular reason for The Gambia to be the one State that takes Myanmar to the ICJ; it could have just as well been any other member State of the OIC. The only justifiable argument is that The Gambia's attorney general assumed leadership at a series of meetings of the OIC due to his background in the ICTR, and so the share fell to him.²⁰⁰ This could seem almost crude for a crime as serious as genocide, but in reality, the opposite is true. The lack of need for a particular link in order to invoke the responsibility of the offending State is precisely the idea underlying obligations *erga omnes*. It would be naïve to think that there are no transactional costs involved, because for all the horrors of genocide States are primarily concerned with their own interests—one need only consider the exposure that The Gambia receives from these proceedings.²⁰¹ Nevertheless, liberation from the constraints of the idea of an injured State and the ability for any State to act as a guardian of the interest shared by the entirety of the international community is the very purpose of obligations *erga omnes* as such. In a world where genocide is still on the rise, "trivialisation" of "pure" State responsibility is a small price to pay.

¹⁹⁸ UN Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, Thirty-ninth session, 10–28 September 2018, A/HRC/39/CRP.2. Available: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf. Accessed 14 May 2020.

¹⁹⁹ *The Gambia v. Myanmar*, *supra* note 86, para. 26.

²⁰⁰ Marlise Simons, "Myanmar Genocide Lawsuit Is Filed at United Nations Court," *The New York Times*, 23 January 2020, <https://www.nytimes.com/2019/11/11/world/asia/myanmar-rohingya-genocide.html?searchResultPosition=1>. Accessed 5 May 2020.

²⁰¹ For a realist perspective on international relations, *see, e.g.*, Paul R. Viotti and Mark V. Kauppi, *International Relations Theory*, 5th ed. (New York: Pearson, 2011), pp. 43–75.

CONCLUSION

Obligations *erga omnes* comprise an integral part of the case of *The Gambia v. Myanmar*. It is obligations *erga omnes* that, together with the jurisdictional link, enable The Gambia to invoke the responsibility of Myanmar for the breach of those obligations before the ICJ. The form of the particular obligations invoked is attached to the provisions of the Genocide Convention, which gives rise to their *erga omnes* nature through the interpretation by the Court.

The principal issue associated with obligations *erga omnes* as such and which constitutes the main question for the Court to address is the legal standing of the State invoking the responsibility of the other State for the breach of obligations *erga omnes*. Although a preliminary examination upon the indication of provisional measures has yielded a *prima facie* approval of The Gambia's right to invoke the responsibility of Myanmar, the question will not be resolved until the definitive pronouncement by the Court in the later stages of the proceedings. For this reason, the arguments raised by the Vice-President Xue in her separate opinion attached to the order on the indication of provisional measures retain their significance, being symptomatic of the arguments that the Court may raise in its later assessment.

In accepting the *prima facie* standing of The Gambia, the Court has not yet ventured beyond the framework set by *Belgium v. Senegal*. It remains to be seen whether the Court continues to stick to this reading of its earlier decision and its applicability to the *cas d'espèce*, or differentiates on the basis of Belgium having also been an injured State. More importantly, the Court will have to decide whether the Genocide Convention in itself confers upon the States the legal standing necessary for any one State party to invoke the responsibility of another State party. In the event that it is indeed found to be so, this can mean either of two things: that the fact that the principles underlying the Convention in themselves bestow legal standing upon States parties means that they are, by extension, applicable to *all* human rights treaties, in contrast to what Vice-President Xue argues in her separate opinion, or that the Court confirms the special status of the Genocide Convention and the unique legal consequences thereof.

Regardless of whether the Court eventually finds that The Gambia has the standing or not, if the Court follows its earlier findings in the cases of *Bosnia and Herzegovina v. Yugoslavia* and *DRC v. Rwanda*, *The Gambia v. Myanmar* should solidify the obligations under the Genocide Convention as obligations *erga omnes*. An important question for the Court to resolve, however, is whether all obligations contained therein are of *erga omnes* nature, and, if not, whether there are any that are *erga omnes* in addition to the prohibition and prevention of genocide.

Furthermore, although, practically speaking, in this case there is no need for the Court to stray from the concept of obligations *erga omnes partes*, the reliance of The Gambia not only on obligations *erga omnes partes*, but also on obligations *erga omnes per se* gives the Court the opportunity to interpret the rights arising out of the latter and elucidate the corresponding legal consequences, if any. This would have far-reaching repercussions for the entire regime of State responsibility, possibly harking back to the special nature of the Genocide Convention.

The relevance of obligations *erga omnes* in the case of *The Gambia v. Myanmar* takes on an additional dimension through the indication of provisional measures. Similarly to obligations *erga omnes*, provisional measures have a primarily preventive character, albeit the latter normally come into play at a later stage compared to the former. The core that both obligations *erga omnes*, specifically those pertaining to the elimination of genocide and those arising under other relevant human rights conventions, and provisional measures share is the protection from grave violations of human rights. It is through provisional measures being one of the instruments for implementing the compliance with the principles underlying obligations *erga omnes* in such cases that these obligations can be safeguarded. Contrariwise, indication of provisional measures is subject to the existence of a dispute with an established jurisdictional link and the legal standing of the applicant State before the ICJ. Where normally this would not be the primary issue, in the *cas d'espèce* it is one of the main points of discord. Therefore, in the case of *The Gambia v. Myanmar* the relationship between obligations *erga omnes* and provisional measures can be characterised as that of mutual contingency.

From a normative point of view, obligations *erga omnes* have already justified their existence by securing a degree of protection for the Rohingya through the provisional measures indicated; in addition, there is a possibility that they will continue to do so, depending on how the Court continues to interpret the case and what the forms of reparation sought by The Gambia will be. That being said, the binding nature of the provisional measures is unlikely to force Myanmar to observe them. It is for this reason that due attention must be paid to the enforcement of obligations *erga omnes*. Although the normative framework and its successful implementation is a mandatory condition for the effects of the norms in question to materialise, without proper enforcement procedures they are limited to the juridical realm in its strictest form: infinitely important, but in itself not enough to bring about the realisation of the functions that these norms are aimed at. With that in mind, the methods of enforcement of obligations *erga omnes* should be reviewed, taking into account the efficiency of the institutions and the means employed. A question that warrants the most careful of considerations is that of the right to take countermeasures in cases of breaches of *erga omnes* obligations. Genocide in particular is a crime so grievous in character that the focus should be first and foremost on its prevention, which is in line with the *erga omnes* character of the obligation to prevent genocide contained in Article I of the Genocide Convention and with the preventive function of provisional measures.

It is in this light that the implications for the determination of individual criminal responsibility have considerable bearing on the relevance of finding of State responsibility under obligations *erga omnes*. If The Gambia succeeds and the Court finds that genocide has been committed, which, in turn, facilitates the establishment of individual criminal responsibility, even if for crimes which do count genocide amongst them, the prosecution of individual perpetrators by "pointing of fingers" could, theoretically, foster the compliance with obligations imposed by the ICJ. However, it is highly improbable that this alone would be enough to compensate for the inefficiency of other preventive mechanisms, because even the ICC lacks its own enforcement force and has no real means of ensuring respect for its decisions; if

anything, the ICJ commands a greater respect than the much newer, jurisdictionally more limited, and of political bias more frequently accused ICC does. It may be that proceedings before the Argentinian or other courts yield better results, but even those rely on cooperation between States.

These considerations, however critical, should not serve as a deterrent for the pursuit of State and individual responsibility for the commission of what may amount to genocide and other international crimes, not least because there is still a lengthy legal battle to win. Above anything else, however, it is because the obligations imposing that responsibility will be ever void of compliance with if they do not command enough respect to be invoked in the first place—and if obligations *erga omnes* with all their respective implications are illustrative of anything, it is that there are norms of such paramount importance that they are not only universal, but also universally categorical throughout the entire international community of States.