More than Just Wishful Thinking? Existence and Identification of Environmental Obligations *Erga Omnes*

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Abstract

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Abstract

The concept of erga omnes, as introduced in the 1970 Barcelona Traction dictum, encompasses obligations of general international law, which – contrary to the traditional reciprocal understanding of the law of State responsibility – are owed to all States, and consequently, all States have the legal right of enforcement if a State breaches its erga omnes obligation. Although the known and recognized obligations erga omnes have been in the fields of human rights and humanitarian law, this master’s thesis takes the ambitious goal of analysing the legal framework for applying the concept of erga omnes to global environmental issues, since they too are a concern to all States and affect the international community as a whole. The greatest task in an analysis of erga omnes obligations is their identification. I argue that there are two ways in which an obligation may emerge as erga omnes: firstly, the material approach, according to which the importance of the obligation is the determining factor in distinguishing erga omnes obligations from ordinary customary obligations. If a norm is jus cogens, that is, a non-derogable rule of international law protecting some of the most fundamental values of the international community, it is also necessarily erga omnes, although it is not excluded that an obligation may be important enough to be erga omnes without being jus cogens. Secondly, this thesis establishes the hybrid approach: for those obligations which are structurally non-bilateralizable, that is, they do not emerge responsibility in reciprocal relations between States (for example, no-harm rule towards areas outside of national jurisdiction), the determining factor for erga omnes status is the binding customary nature of the obligation. This is due to necessity: responsibility is the necessary corollary of an obligation, and without de jure enforcement right there is no obligation at all. As a result of the analysis on international environmental case law, this thesis concludes that there has not been any recognized environmental erga omnes obligations, neither through the material approach or by recognizing the customary character of a non-bilateralizable obligation. However, authoritative recognition has to be distinguished from the existence of such obligations. Increasing valuation of the global environment may emerge recognition of environmental erga omnes in the future.

Key words
Erga Omnes, International Environmental Law, Hybrid Approach, State Responsibility, Jus Cogens, Erga Omnes Partes
We all know here that the law is the most powerful of schools for the imagination. No poet ever interpreted nature as freely as a lawyer interprets the truth. – Jean Giraudoux, a French novelist

But with all due deference to Giraudoux, law is whatever we want, but surely not the "best school of the imagination" – Alain Pellet, Emeritus Professor and a former member and chairperson of the ILC
## CONTENTS

REFERENCES ......................................................................................................................... VI

ABBREVIATIONS ............................................................................................................. XXIV

1 INTRODUCTION ............................................................................................................... 1

  1.1 Introduction .................................................................................................................. 1

  1.2 Background of *Erga Omnes* and State Responsibility ........................................... 2

  1.3 What is the Relevance to Environmental Issues? ....................................................... 5

  1.4 Research Questions, Method and Outline .................................................................. 7

  1.5 Preliminary Notions on State Responsibility ............................................................. 9

2 STANDING TO ENFORCE *ERGA OMNES* OBLIGATIONS ....................................... 12

  2.1 Outline of the Chapter ............................................................................................... 12

  2.2 Enforcement Through ICJ Proceedings and Countermeasures ................................. 12

    2.2.1 Outline .................................................................................................................. 12

    2.2.2 ICJ Proceedings in Contentious Cases and Advisory Opinions ....................... 13

    2.2.3 On “Lawmaking” by the Court, Avoiding Decisions and Dissenting/Separate Opinions .......................................................... 18

    2.2.4 Countermeasures ................................................................................................. 22

  2.3 Standing ...................................................................................................................... 24

    2.3.1 The Basis of Standing ......................................................................................... 24

    2.3.2 Restrictive Approaches before the Barcelona Traction Dictum .......................... 26

    2.3.3 Expansive Approaches before the Barcelona Traction Dictum .......................... 32

3 SOURCES OF *ERGA OMNES* OBLIGATIONS AND THEIR IDENTIFICATION .... 37

  3.1 Background Information and Outline ...................................................................... 37

  3.2 Other Uses and Meanings of the Concept of *Erga Omnes* ..................................... 37

    3.2.1 Traditional Use of *Erga Omnes* Terminology .................................................. 37

    3.2.2 *Erga Omnes* Denoting Territorial Limitation of Obligations .......................... 39
3.2.3 Descriptive Use of \textit{Erga Omnes} ......................................................... 40

3.3 The Sources and Identification of \textit{Erga Omnes} Obligations ..................... 40

3.3.1 Barcelona Traction and \textit{Erga Omnes} .................................................. 40

3.3.2 \textit{Erga Omnes} Parties and the Question of Sources ................................ 41

3.3.3 \textit{Erga Omnes} Obligations as Rules of Customary International Law....... 46

3.4 Identifying Obligations \textit{Erga Omnes} ....................................................... 51

3.4.1 General Remarks and Outline ................................................................. 51

3.4.2 Structural Approach .................................................................................. 52

3.4.3 Material Approach .................................................................................... 55

3.4.4 Hybrid Approach ...................................................................................... 56

3.4.5 Interim Conclusions: Two Patterns of \textit{Erga Omnes} Identification ....... 62

3.5 Peremptory Norms (\textit{Jus Cogens}) ............................................................. 63

3.5.1 The Legal Basis of \textit{Jus Cogens} and the Ontological Questions Surrounding it ........................................................................................................... 63

3.5.2 Are \textit{Jus Cogens} Necessarily \textit{Erga Omnes}? .............................................. 68

3.5.3 Dispositive \textit{Erga Omnes} ......................................................................... 69

4 ENVIRONMENTAL \textit{ERGA OMNES} .................................................................. 71

4.1 Preliminary Notions and the No-Harm Rule ................................................. 71

4.2 Environmental \textit{Jus Cogens} ........................................................................ 77

4.3 Dispositive Environmental \textit{Erga Omnes} In International Practice ........... 81

4.3.1 Preliminary Notions on the lack of Practice on Environmental \textit{Erga Omnes} ........................................................................................................................................... 81

4.3.2 Areas and Entities Outside National Jurisdiction .................................... 82

4.3.3 Environment Under National Jurisdiction .............................................. 91

4.3.4 Some Concluding Remarks ...................................................................... 99

5 CONCLUSIONS .................................................................................................. 103
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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ARSIWA</td>
<td>Articles on the Responsibility of States for Internationally Wrongful Acts</td>
</tr>
<tr>
<td>Asst. ed.</td>
<td>Assistant Editor</td>
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<tr>
<td>CAT</td>
<td>Convention against Torture</td>
</tr>
<tr>
<td>Cf.</td>
<td>Confer/conferatur (compare)</td>
</tr>
<tr>
<td>CSD</td>
<td>Commission on Sustainable Development</td>
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<tr>
<td>Doc.</td>
<td>Document</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>EChHR</td>
<td>European Court of Human Rights</td>
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<td>Exempli gratia (for example)</td>
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<td>Et seq.</td>
<td>Et sequens (and the following pages)</td>
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<tr>
<td>GA</td>
<td>General Assembly</td>
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<td>Ibid.</td>
<td>Ibidem (in the same source)</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>I.e.</td>
<td>Id est (that is)</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>LNOJ</td>
<td>League of Nations Official Journal</td>
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<tr>
<td>Ltd</td>
<td>Limited company</td>
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<tr>
<td>No.</td>
<td>Number</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>UK</td>
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1 INTRODUCTION

1.1 Introduction

Writings on the concept of *erga omnes* and general interest of the international community are numerous and diverse: as noted by Byers, “[f]ew concepts in international law have attracted as much attention or created as much controversy as *jus cogens* and *erga omnes* rules.”\(^1\) Regardless of these efforts, the exact scope, contents and implications of the concept of *erga omnes* remain unclear. This is mostly because the full potential of the concept has not yet been realized in practice: for example, authoritative pronouncements by the International Court of Justice (ICJ or the Court\(^2\)) are few in number.\(^3\) Consequently, “it may be no coincidence that its implementation has proven tortuous.”\(^4\)

Yet this thesis takes the ambitious goal of bringing something fresh to the scene through environmental law perspective. As such, applying *erga omnes* to environmental issues is nothing new: some of the most renowned international lawyers in history and contemporary writers have discussed the topic since its introduction to international law.\(^5\) This thesis aims at building on their existing theoretical framework and findings on the nature of international law by presenting, *inter alia*, my explanation why the contemporary international environmental law has not confidently adopted customary environmental rules outside transboundary relations.\(^6\)

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\(^1\) *Byers* 1997, p. 211.

\(^2\) When this thesis refers to “the Court” or “the ICJ” in discussion of case law, it denotes the majority of the ICJ. This majority can range from unanimous to being decided by the President of the Court when there is a tie in a vote by the judges.

\(^3\) This issue is returned to several times during this study, but it should already be mentioned that there are only few judgments where the ICJ has confidently identified certain obligations as *erga omnes*: see e.g. the *Barcelona Traction (erga omnes* obligations included in the judgment are discussed below e.g. in chapters 1.2 and 1.3), see *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment, ICJ Reports 1970, p.3, at p. 32, paras. 33–34, *East Timor* (recognizing self-determination as *erga omnes*), see *East Timor* (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 90, at p. 102, para. 29, *Israeli Wall Advisory Opinion* (again self-determination and unspecified humanitarian obligations), see ICJ Reports 2004, p. 136, at p. 199, paras. 155–157 and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, ICJ Reports 2015, p. 3, at p. 47, para. 87 (unspecified *erga omnes* obligations which “the Genocide Convention contains”, making it unclear if this was *erga omnes* in the Barcelona Traction sense, or the “territorial restriction” *erga omnes* discussed in chapter 3.2.2, or even *erga omnes* parties, a concept discussed in chapter 3.3.2.

\(^4\) *Tams* 2005, p. 4.


\(^6\) This deduction is presented under the title of “hybrid approach”, and as the name suggests, it combines elements from existing theories to give an explanation on how certain rules may emerge as *erga omnes*. Tentative
New and speculative discussion on the theoretical scope and possibilities of *erga omnes* is enabled by the fact that – as mentioned – jurisprudence on the topic is scarce. As for environmental obligations, in the ICJ jurisdiction there is none, and consequently the topic is judicially unmarked territory. However, there are enough cases in international courts and tribunals where the topic has been brought up – as well as other authoritative sources – to enable one to draw conclusions on the possible existence of environmental *erga omnes*. Also, the lack of jurisprudence does not mean that something does not exist\(^7\): instead, the situation should be seen as an opportunity and a duty of formulating and exploring the legal implications of the concept.

But before further discussion, we need to answer what *erga omnes* is and what it is not as discussed in this study. After introducing the concept in the next chapter, I will briefly justify its application to environmental issues in chapter 1.3. Finally, the method, outline and key findings of the study are presented in chapter 1.4 and preliminary notions on State responsibility and International Law Commissions’ work on the topic in chapter 1.5, before turning to the main discussion.

### 1.2 Background of *Erga Omnes* and State Responsibility

On 5 February 1970 the International Court of Justice delivered a judgment concerning a dispute between Belgium and Spain on damages that Belgium claimed to have been caused to its nationals, the shareholders in the Barcelona Traction, Light and Power Company Ltd, by acts of the organs of the Spanish State which Belgium argued to be breaches of international law.\(^8\) One part in that *Barcelona Traction* judgment, known as the dictum,\(^9\) took a life of its own and became arguably more significant to international law than the main merits of the case. In the dictum the Court stated that

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\(^7\) See e.g. Hännikäinen 1988, p. 15, pointing this out in relation to *jus cogens*.

\(^8\) ICJ Reports 1970, at p. 6, paras. 1–2.

\(^9\) *Obiter dictum* (roughly translating to “a remark in the passing” or “by the way”) is a concept borrowed from the common law systems, meaning “[s]omething said by a judge while giving judgment that was not essential to the decision in the case.” In common law systems, such statements are “part of the *ratio decidendi* of the case and therefore creates no binding precedent, but may be cited as persuasive authority in later cases”, see Law 2015, obiter dictum. However, international law, or at least the judicial system under the ICJ, does not work like this through precedents: *obiter dicta* are not necessarily less significant for subsequent jurisprudence than *ratio*, which is shown by the remarkable weight of the Barcelona Traction dictum itself. See Tams 2005, pp. 167–173 discussing criticism against the concept of *erga omnes* based on the fact that it was given as *obiter dictum*. 

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“[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. - 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.”

The Court thus acknowledged a category of obligations, which, in view of their importance, can be enforced by all States. The Court distinguished a contrario diplomatic protection – which was the issue in the case – from obligations erga omnes by defining what the latter concept was. This was the first time the Court confirmed the existence of such concept of general international law. Prior to Barcelona Traction judgment, the traditional view in international law had a tendency of being restrictive towards the concept of standing: as a rough simplification, only the directly or tangibly injured States could invoke the responsibility of the wrongdoing State. The possibility of actio popularis – of which the erga

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11 The material approach discussed in chapter 3.4.3 is strongly based on this “importance” statement by the Court. However, the importance given to the obligation is a necessary element in the emerging of any erga omnes obligation, as will be shown in chapter 3.4.4. In this respect, it should already be noted that erga omnes and jus cogens, i.e. peremptory norms of international law as representing some of the fundamental values of the international community, overlap to certain extent, an issue which will be discussed in chapter 3.5.
12 In paragraph 35 the Court stated, inter alia, that “[o]bligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. - .”
13 See e.g. Root stating in 1916 that “[u]p to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. There has been no general recognition of the right of other nations to object”, in view that the international community should change in this respect after the experiences of the First World War, see Root 1916, pp. 7–8. However, this does not mean that actio popularis or general standing was unheard of or never suggested: for example, Hugo Grotius argued in 1625 that kings had the right
omnes is a manifestation of\textsuperscript{14} – was not recognized in international law before the Barcelona Traction, although there were several conventional international instruments recognizing general interest long before the dictum.\textsuperscript{15} As defined in the dictum, all States can be held to have a legal interest in the protection of obligations \textit{erga omnes}. By definition, \textit{erga omnes} is therefore closely related to enforcement of international law.

Enforcement of international law concerns “attempts to induce a State to cease its wrongful conduct and to remedy its consequences”,\textsuperscript{16} and the concept of \textit{erga omnes} suggests that for certain obligations the right of enforcement belongs to all States. Thus, although it is clear that \textit{erga omnes} and enforcement are interrelated, it is not excluded here that the \textit{erga omnes} status of an obligation may also imply other legal effects.\textsuperscript{17} However, similarly to Tams, it is assumed here that the concept is mostly linked to enforcement, and in this relation two measures are focused on in this thesis: ICJ proceedings and countermeasures.\textsuperscript{18}
Consequently, enforcement of *erga omnes* obligations is linked to the question of who has standing to invoke the responsibility of the wrongdoing State. Therefore, the philosophy behind the concept is to ensure effective protection for obligations which – in view of their importance – are not just subject to any interest, but *legal* interest of all States.

**1.3 What is the Relevance to Environmental Issues?**

In the dictum, the Court stated that *erga omnes* derive 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.” Later the Court has confirmed self-determination of peoples as *erga omnes*.¹⁹ These obligations strongly relate to human rights and humanitarian law and form their most fundamental part: all of the listed obligations are also usually considered to be *jus cogens*, that is, peremptory norms from which no derogation is allowed.²⁰

So, what is the relevance of environmental obligations to the concept of *erga omnes*? The connection is clear: *erga omnes* obligations protect the collective interest of the international community, and global environmental problems are certainly a concern of all humanity. For example, biodiversity and the ozone-layer are crucial to life on earth, and climate change with its resulting and possibly devastating effects affect us all. These resource, entities and phenomena are fundamentally shared by all peoples and they do not follow national borders: the global environment and human well-being are interdependent with each other and affected by actions of all.²¹ These objective values of the environment, our subjective valuation of it and the fact that in many cases of environmental harm or its risk there is no tangibly injured State, all contribute to the potential that the concept of *erga omnes* entails for environmental law. Consequently, the environmental matters are brought up as possible and exemplary candidates for *erga omnes* status not only in legal literature²² but by, for example,

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¹⁹ See *East Timor and Israeli Wall* as referred to above in footnote 3.

²⁰ See chapter 3.5 for *jus cogens*.

²¹ One interesting aspect – environmental rights as human rights and relation to *erga omnes* – is left out of the scope because of length restriction and since the topic would most likely take a thesis of its own to be discussed comprehensively. The issue was brought up in then discontinued (as the parties reached an agreement before ICJ made its judgment) Aerial Herbicide case between Ecuador and Colombia, where Ecuador in its memorial, with reference to *erga omnes* character of fundamental human rights, argued that Colombia with its actions endangered the communities that are dependent on the long-term well-being of the environment, and their livelihood. As such, the question may pose interesting effects on their potential *erga omnes* character, see *Aerial Herbicide Spraying* (Ecuador v. Colombia), Memorial of Ecuador Vol. 1, 28 April 2009, pp. 5–7, paras. 1.7–1.10.

²² As already noted in chapter 1.1.
the ILC and other institutions. However, what is missing—unfortunately—is an unambiguous recognition by the ICJ or other international courts.

But do we need environmental *erga omnes*? At present, States may be more willing to establish and lean on treaties containing liability regimes for narrowly defined areas or activities. But these treaties and their liability regimes do not provide a complete or even satisfactory system of protection or legal consequences for severe environmental harm. Further, in many cases States have been inclined to avoid discussing the complicated issues surrounding environmental responsibility altogether, partly because there have been no effective enforcement mechanisms. Therefore, we also need effective judicial means and possibly countermeasures to answer severe environmental harm. This is especially in relation to areas and entities outside national jurisdiction, since at least in the sphere of customary obligations, they cannot be effectively protected without them having an *erga omnes* character, as will be demonstrated below in chapter 3.4.4. This necessity is created by the fundamental characteristics of international law: the absence of any centralized international law enforcement bodies or official “world police”. Therefore, for the most part, States are considered to be responsible for the enforcement of international law, including invoking of each other’s responsibilities and implementation of judicial decisions.

And of course, as will be shown in chapter 3.5.2, *jus cogens* norms are necessarily *erga omnes*. If an environmental obligation was to achieve the status of *jus cogens*, it would be also *erga omnes*, which as such already justifies speculating the topic: after all, “massive

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23 See e.g. ILC Commentaries on the Draft ARSIWA p. 127, para. 10. This and other examples are presented in more detail in chapter 4.
24 When this thesis refers to “environmental *erga omnes*”, it does not suggest that there is *erga omnes* in the environmental law that is different from the general concept: general international law applies to environmental law as much as it applies to human rights or humanitarian law or other branches of international law. Therefore, the term is only used to indicate “*erga omnes* concept applied to the environment”.
26 In an often-cited example, when the Chernobyl nuclear accident took place, no State invoked the responsibility of the Soviet Union in an international court. This was partly because there were no effective mechanisms for enforcement, and partly because States were concerned with possible legal consequences, since they were themselves polluting other countries, see e.g. *Malone* 1987, p. 207.
27 In Shabtai Rosenne’s words, “[a] major feature of all international litigation is that unlike national courts, international law has no standing machinery available to the judgment creditor for the enforcement of the decisions of international courts and tribunals, except where this is specifically addressed in the constituent instrument of the court or tribunal.”, see *Rosenne* 2006, p. 194. Also, when describing “lessons learned” after the South West Africa cases, *Gross* stated that “[t]here is not, and cannot be, an effective substitute for the willingness of members of the international community to enforce, with vigor and conscience, the principles of their own [UN] Charter, the dictates of their own decrees and the plain terms of their own undertakings.”, see *Gross* 1966, p. 48.
pollution” was included in the “candidate list” of international crimes – that is, the Article 19 – for a long time in the draft ARSIWA among obligations of which many are also listed in the Barcelona Traction dictum and are usually understood as *jus cogens*. And finally, it is not excluded that customary obligations of certain type may emerge as *erga omnes* because of their importance, as laid down in the dictum, without them being necessarily *jus cogens*. Therefore, it can be argued that if the environment was to become valued as important enough by the international community, it may consequently achieve *erga omnes* status.

### 1.4 Research Questions, Method and Outline

This study explores the existence and possibility of environmental *erga omnes* obligations in contemporary international law. To do so, the following questions needs to be answered: what the legal basis and source of these obligations are, and most importantly, how can obligations *erga omnes* be identified. Further, this study aims at identifying the possible *erga omnes* character of the no-harm rule. To answer these questions, the study applies traditional doctrinal legal method, as its object is to answer what the law *is*. However, discussion on such a complex concept also necessarily involves speculation on the development of law. When this thesis discusses theoretically delicate topics such as *jus cogens* and legitimization of customary international law, legal and – to certain extent – moral theory treatment will be given in order to justify the slightly critical approach in these parts. However, this criticism should not be taken as a foe to constructiveness on the issue: the critical approach is simply justified by the inner pragmatism of this thesis so as to anchor *erga omnes* to something concrete and theoretically as firm as possible basis, and therefore to avoid becoming a utopian take on contemporary international law.

In an often-quoted foreword Humphrey once observed that “[h]uman rights lawyers are notoriously wishful thinkers”. Such “wishful thinking” – that is – taking aspiration for certain emerging trends in international law as facts cannot lead to a desirable result in research and poses a pitfall to environmental lawyers as much as it does to human rights lawyers. Therefore, instead of applying the concept of *erga omnes* unjustifiably as a legal panacea to global environmental problems, I aim at taking a pragmatic view on the issue and admit that

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28 This material approach and dispositive *erga omnes* are presented in chapters 3.4.3 and 3.5.3 respectively.  
29 Therefore, although the analysis in this study relates to *erga omnes* as an enforcement method (secondary rule), it also attempts to assess if the no-harm rule (a primary rule) has such status. For explanation of secondary and primary rules, see next chapter 1.5.  
31 Pellet 2000, p. 5.
we do not really know if any environmental obligation has _erga omnes_ status in contemporary international law: instead, I pursue the legal framework itself and analyse existing case law through it to analyse what is the state of _recognition_ of the concept.

Chapter 2 lays the necessary framework for consequent discussions. Chapter 2.2 presents the main enforcement measures for obligations _erga omnes_: ICJ proceedings and countermeasures. In addition, Chapter 2.2.3 presents some preliminary points on the working and possible failings of the ICJ. In Chapter 2.3 I will first introduce the theoretical notion of standing, after which I will present how the concept of standing was seen before the Barcelona Traction judgment in (occasionally) competing _restrictive_ and _expansive_ approaches.

Chapter 3 will then turn the focus on _erga omnes_ itself. First, in Chapter 3.2, I outline some other ways in which _erga omnes_ has been used in international law to avoid any confusion in subsequent chapters. In the similar vein, Chapter 3.3.2 discusses _erga omnes partes_, which is sometimes called “the treaty-counterpart” of _erga omnes_. However, as will be shown, the concepts are decidedly different from each other: this relates to the question of sources of _erga omnes_ obligations, that is, mostly customary law, which will be presented in chapter 3.3.3.

Chapter 3.4 will then turn to one of the main questions in this study: how obligations _erga omnes_ are identified. Until this point, the discussion in this study follows a rather similar frame to Tams’ 2005 book on the topic and uses it as a support to lay the groundwork for my own findings, since the book is perhaps the most comprehensive study available on enforcement of _erga omnes_ at the moment. However, as the focus turns more towards the environment in chapter 3.4.4 on the _hybrid approach_, I will take off from these theoretical shoulders, and present my own deductions on the topic. Chapter 3.5 will finalize the discussion on identification of _erga omnes_ obligations by presenting _jus cogens_ as one of its recognized basis.

Finally, in Chapter 4.1, I will first present some preliminary notions on the no-harm rule and global environmental problems. Chapter 4.2 will discuss the possibility of environmental _jus cogens_ norms. Lastly and most importantly, Chapter 4.3 presents existing case law and analyses it by applying findings in earlier parts of the study, including the _material_ and _hybrid_ approaches.
As a result of these chapters I ultimately argue that there are encouraging cases for confirming the existence of the concept of international environmental *erga omnes*, but not to the extent that this could be done decidedly. The case law discussed in chapter 4.3 shows that the Court has not – intuitively or consciously – pronounced anything decisive on the matter, including on areas outside national jurisdiction. However, one must distinguish existence from authoritative recognition.

### 1.5 Preliminary Notions on State Responsibility

Before moving on to the main discussion, an essential element of international law relating to the *erga omnes* concept, *State responsibility*, needs to be presented. General rules on State responsibility, as it is understood in contemporary international law, are neatly codified in the International Law Commission’s (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).\(^{32}\) Since the subsequent discussion is considerably based on the ARSIWA, their most relevant rules and concepts for the present study ought to be presented here.

Firstly, according to Article 1, every internationally wrongful act of a State entails the international responsibility of that State. States do not commit crimes: instead, acts in breach of international law are called *internationally wrongful acts*.\(^{33}\) According to Article 2, internationally wrongful act of a State consists of an action or omission which is a) attributable to the State under international law, and b) constitutes a breach of an international obligation

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\(^{32}\) As included in YbILC 2001, Vol. II Part Two and taken note of in GA Res. 56/83. The ARSIWA has not been officially adopted by the GA. In resolution 56/83 it simply took “note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission - - and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action”, see p. 2 para. 3. In annex to decision 55/488 the GA stated that “while reaffirming paragraph 28 of annex VI to its Rules of Procedure, reiterates that the terms “takes note of” and “notes” are neutral terms that constitute neither approval nor disapproval”, see p. 92. However, the ARSIWA is widely considered to be an accurate codification of the existing general rules concerning State responsibility, although now, 17 years later, they may not be completely up to date.

\(^{33}\) The notion of “international crimes” was included for a long time in the draft ARSIWA but was eventually dropped. This issue is discussed in chapter 4.2 in relation to environmental *jus cogens*, since there was a clear overlap between the proposed international crimes and the concept of *jus cogens*, and “massive pollution” was included in the list of international crimes. Further, the fact that any State may invoke the responsibility of the wrongdoing State in case of a breach of an *erga omnes* obligation seems to imply somewhat penal nature to the concept of responsibility: civil responsibility is conceptualized as individuals protecting their individual rights. Therefore, it is perhaps best to see State responsibility as “neither civil [n]or criminal”, but as a separate “international responsibility”, see *Peller* 2017, p. 232.
of the State. Therefore general rules of State responsibility – as codified in the ARSIWA – do not necessarily require any tangible “damage”: all that is needed is for a State to breach its obligation.

Secondly, the ARSIWA differentiate between primary and secondary rules of international law. Primary rules consist of the substantive rules of international law and the specific obligations of States arising from them, whereas secondary rules stipulate when there is a breach of an international obligation and what are the consequences of such breach. ARSIWA focus on the secondary rules: the articles do not define the content of the international obligations breach of which gives rise to responsibility.

Thirdly, erga omnes is itself also codified in the ARSIWA. Article 48(1)(b) states that “[a]ny State other than an injured State is entitled to invoke the responsibility of another State - - if - - the obligation breached is owed to the international community as a whole.” The Article thus does not expressly mention erga omnes, but its substance is the same with the Barcelona Traction erga omnes.

In this relation it is necessary to tentatively make a certain distinction to certain, somewhat similar concept, since the terminology of erga omnes is often used in international law to describe it. Article 48(1)(a) stipulates that the entitlement to invoke responsibility by “non-injured State” also exists when “the obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group”. This is effectively the codification of what is known as erga omnes partes, a very similar yet

34 Article 3 states a further condition that “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

35 Of course, as pointed out by Crawford, if the source of the obligations is e.g. of conventional origins, that source may require tangible damage for a responsibility to emerge, see the ILC Commentaries on the Draft ARSIWA, p. 36, para. 9. However, the fact is that the ARSIWA does not require damage, which Pellet sees as meaning that “[f]law must be respected per se, in itself, not only because of a violation has caused an injury to another State”, see Pellet 2017, p. 233.

36 This distinction should not be confused with the one made by H. L.A. Hart in The Concept of Law (1905) or other meanings in which the terms have been used, see Crawford 2002, p. 14 on this.

37 The ILC Commentaries on the Draft ARSIWA, p. 31, paras. 1–3. As noted by Crawford, the codification of the primary rules “would involve restating most of substantive international law, customary and conventional.” Secondary rules may be seen as having the role of establishing the “formal unity” of international law, see Goargourinis 2011, p. 1016, referring to Dupuy, who points out that there also exists substantial unity in international law based on certain primary rules, see Dupuy 1999, pp. 793–794.

fundamentally different concept from *erga omnes*: as will be shown below, *erga omnes* obligations emerge from general international law, whereas *erga omnes partes* seems to concern expansive treaty interpretation.\(^{39}\)

Insofar as the ARSIWA are concerned in this thesis, the focus is on the main general rules of responsibility and their relationship with *erga omnes*. The above described articles do not form the whole picture, but for convenience, other articles are discussed as they naturally come under scrutiny below. However, some issues are outlined altogether to meet the length requirement and other limitations of a master’s thesis: for example, consequences of breaches, such as cessation and reparation are not discussed.\(^{40}\) Further, I will not discuss the complex topics of attribution to a State and causality.\(^{41}\) The discussions from here on assume that for each individual case it can be shown that a State has not acted according to its international obligation.

Lastly, in the context of international environmental law, State responsibility must be distinguished from State liability.\(^{42}\) Firstly, in the context of law of State responsibility, “responsibility” is used to refer to *bearing* the responsibility after a wrongful act has taken place, not as meaning “a responsible way of acting”. Liability, on the other hand, as codified for example in the ILC’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,\(^{43}\) applies to acts which are *lawful* under international law (Article 1). They concern “responsibility for the risk” that is involved in hazardous activities and compensation if that risk was to be realized.\(^{44}\) Further, the “day-to-day” pollution caused by States does not fall under either when the pollution remains under certain threshold. Thus, the system is not strict.

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\(^{39}\) The question of sources is discussed in chapters 3.3.2–3.3.3. It is shown there that drawing a plain parallel between the two is not unambiguous. Further, in chapter 3.3.3, the customary character of *erga omnes* obligations is discussed in more depth: however, it is not excluded that *erga omnes* obligations may also emerge from “general principles of law recognized by civilized nations”, as stipulated in Article 38(1)(c) of the ICJ Statute, at least if we accept the possibility of *jus cogens* norms emerging from these general principles (see chapter 3.5.1 for discussion on the source(s) of *jus cogens* norms).

\(^{40}\) These are codified in Part Two Chapter I of the ARSIWA.

\(^{41}\) The main rules of attribution of conduct to a State are in Part I Chapter II of the ARSIWA. Causality is often related to attribution and in reality may prove to be difficult, depending on the circumstances and the type of pollution or harm in question.

\(^{42}\) A more detailed description is given below in chapter 4.1, including the “due-diligence” nature of environmental obligations.

\(^{43}\) As appearing in ILC Report A/56/10, YbILC 2001 Vol. II(2).

\(^{44}\) See e.g. Johnstone 2014, p. 192 for discussion on the confusion this terminology may cause, especially since different languages use “liability” and “responsibility” very differently.
2 STANDING TO ENFORCE ERGA OMNES OBLIGATIONS

2.1 Outline of the Chapter

This chapter introduces the main enforcement measures for obligations *erga omnes*: ICJ proceedings and countermeasures. The focus is on when and who can use these measures to enforce international law. Chapter 2.2.3 also presents some issues surrounding the jurisprudence of the ICJ which are necessary to get a comprehensive understanding of the discussion surrounding the concept of *erga omnes*.

Since the focus of this study is on the notion that all States have standing to enforce obligations *erga omnes*, chapter 2.3 explains what “having a standing” exactly encompasses and introduces the somewhat competing approaches to standing – restrictive and expansive – to root the concept of *erga omnes* in the long-standing development of international law on State responsibility.

2.2 Enforcement Through ICJ Proceedings and Countermeasures

2.2.1 Outline

Before discussing ICJ proceedings and countermeasures, other enforcement measures need to be outlined from the discussion first. The Barcelona Traction dictum suggests that obligations *erga omnes* have a special status *vis-à-vis* other obligations, such as those in the field of diplomatic protection. Therefore, the enforcement mechanisms available to States are somehow enhanced and thus must be something that are not usually available to all States in case of a breach, that is, lawful measures such as protests, verbal condemnations and re-torsions, which do not require any special justifications.45

However, leaving out measures which are always available to all States still leaves a considerable variety of enforcement measures: for example, States may in cases relating to general interest take such measures as exercising national jurisdiction or use force.46 However, the legality of measures involving the use of force are mainly governed by the Charter of the United Nations,47 including in the field of humanitarian intervention where *erga omnes* also

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46 Ibid. p. 9
47 Charter of the United Nations and Statute of the International Court of Justice, 24 October 1945, 1 UNTS XVI (later the “UN Charter” and “ICJ Statute”).
applies. Thus, the question of permissibility of the use of force is almost exclusively dis-
cussed in relation to Article 2(4) of the UNC, and State practice from relevant cases shows
that *erga omnes* is of limited relevance in that area. Further, there is no evidence in the
Court’s jurisprudence or State practice that the *erga omnes* concept would form a basis for
extra-territorial application of national jurisdiction.48

2.2.2 ICJ Proceedings in Contentious Cases and Advisory Opinions

The ICJ is often seen as the “gatekeeper of international law”,49 available to effectively all
States in “all cases which the parties refer to it”50 and consequently it can be assumed to be
the most likely forum where environmental *erga omnes* obligations may be invoked. It is
another question to pronounce on the *erga omnes* status of a certain obligation than it is to
invoke such obligation in a concrete case, and therefore it is not excluded that such pro-
nouncements can also be made by, for example, the International Tribunal for the Law of
the Sea (ITLOS) and arbitral tribunals.51 However, as the main forum for invocation of *erga
omnes* obligations, the jurisdictional rules of the ICJ ought to be presented in more detail.

Pursuant to Article 93(1) of the UN Charter all members of the UN are *ipso facto* parties to
the ICJ Statute. Article 93(2) stipulates that a State which is not a member of the UN may
become a party to the ICJ Statute on conditions to be determined in each case by the General
Assembly upon the recommendation of the Security Council.52 However, being a party to
the Statute does not automatically render the Court with jurisdiction in contentious cases.
Jurisdiction of the Court is based on rules in the ICJ Statute as well as being developed in
the Court’s jurisprudence itself.53 Basic conditions are laid down in Articles 34 and 35 of
Statute, providing *inter alia* that only States may be parties in cases before the Court. Most

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48 *Tams* 2005, p. 10–11. *Pellet* argues that there has to be a tangible link (e.g. territorial, nationality or a treaty)
before a State may exercise national jurisdiction, including in breaches of fundamental human rights, but if
they have such title, they should be obliged to do so, see *Pellet* 2017, p. 238.
49 *Tams* 2013, pp. 387–388.
50 Article 36(1) of the ICJ Statute.
51 For this reason, the discussion on environmental *erga omnes* in chapter 4 will also include cases from the
ITLOS and arbitral tribunals.
52 There are several States which had previously become party to the ICJ Statute through Article 93(2), but
have since become members of the UN and thus become *ipso facto* parties to the ICJ Statute under Article
93(1). For example, Switzerland finally joined the UN in 2002 (See GA Res. 57/1), but it had already become
a party to the ICJ Statute in 1946 (for Switzerland’s conditions on becoming a party, see GA Res. 91(I), and
acceptance of those conditions in 17 UNTS, p. 111). Also, Japan, Liechtenstein, Nauru and San Marino have
followed a similar path, see 61 YbICJ 2006–2007, pp. 107–108. At the time of writing this study, no State is
party to the Statute through Article 93(2).
53 *Tams* 2005, p. 22.
importantly, the Court’s jurisdiction is dependent on the consent of the parties (Article 36), which can be given in advance or when a dispute has already arisen. In the latter instance, there are two options: either a *compromis*\textsuperscript{54} or the *forum prorogatum* rule, where the State against which the application is made consents to the Court’s jurisdiction for the purposes of the case (Article 38(5) of the Rules of Court\textsuperscript{55}).

There are two ways in which consent can be given in advance: by declaration as stipulated in Article 36(2) of the ICJ Statute (known as the optional clause) and compromissory clauses.\textsuperscript{56} Declarations made under the optional clause are referred to as giving consent to “compulsory jurisdiction of the Court”, which is terminologically quite confusing since the clause is optional and under Article 36(3) possibly subordinate to several restrictions, and therefore it is perhaps better to use terms such as “general jurisdiction of the Court”.\textsuperscript{57} At the time of writing this master’s thesis, a total of 73 States have given such declarations, many of them with reservations of different grades.\textsuperscript{58}

Thus, what is obvious from the wide requirement of consent is that it restricts the effectivity of judicial law enforcement, including the availability of litigation and legal rules which may be the subject of it.\textsuperscript{59} This is something that must be bore in mind when analysing the effectiveness of *erga omnes*: the Court stated in *East Timor* that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things”.\textsuperscript{60}

Consent however is not the only fundamental rule governing the jurisdiction of the Court: The Court has stated that the consent of a State has to be distinguished from the right of a party to appear before the Court.\textsuperscript{61} The rules as to its personal jurisdiction are matters of

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\textsuperscript{54} A special agreement between the parties to submit the dispute to the Court, see article 40(1) of the ICJ Statute.

\textsuperscript{55} Rules of the Court are based on Article 30 of the ICJ Statute and are to supplement and provide more detailed information of the Articles of the Statute.

\textsuperscript{56} Compromissory clauses are usually included in treaties by submitting disputes concerning e.g. treaty application and interpretation under the Court’s jurisdiction. There are also general dispute settlement conventions with reference to the ICJ, such as the European Convention for the Peaceful Settlement of Disputes, ETS No. 023, in force 30 April 1958 (see Article 1 of the Convention).

\textsuperscript{57} See e.g. *Tams* 2005, p. 22–23.

\textsuperscript{58} See *International Court of Justice* Declarations Recognizing the Jurisdiction of the Court as Compulsory.

\textsuperscript{59} *Tams* 2005, p. 23.

\textsuperscript{60} ICJ Reports 1995, p. 102, para. 29. In the same paragraph, the Court further noted 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 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*.”

\textsuperscript{61} *Legality of Use of Force* (Serbia and Montenegro v. Belgium), ICJ Reports 2004, p. 279, at p. 295, para. 36.
international public policy (ordre public), and therefore they are independent of the will or an agreement between the parties.\textsuperscript{62} This has to be distinguished from the notion of standing used in this paper: the ordre public criterion concerns the question of a State being a party of the “public order” under which the ICJ has judicial power, whereas standing qualifies the relation between the State seeking to respond against a violation of the law and the legal rule against whose violation the response is directed,\textsuperscript{63} being therefore independent from the rules governing the jurisdiction of the Court.

Also, standing and jurisdiction must be distinguished from admissibility. In short, there are certain legal rules which may prevent the case from being received by the Court.\textsuperscript{64} In addition to establishing that there exists consent by the parties to the jurisdiction of the Court and its entitlement to present an international claim (standing), a State has to prove that the case is still viable, e.g. on procedural grounds. Depending on the case, these may include, for example, exhaustion of local remedies,\textsuperscript{65} nationality of the claim,\textsuperscript{66} acquiescence,\textsuperscript{67} having a legal interest in the case and the monetary gold rule.\textsuperscript{68} As can be seen, admissibility and standing cannot always be distinguished unambiguously: for example, in the Barcelona Traction the claimant had no standing based on nationality of the corporation, and having a legal interest in the case is essentially uniform with standing.\textsuperscript{69} In sum, inadmissibility may

\textsuperscript{62} Kolb 2013, p. 274.
\textsuperscript{63} Tams 2005, p. 26, see also chapter 2.3.1 of this paper.
\textsuperscript{64} In domestic legal systems, admissibility is usually considered in relation to “admissibility of evidence” (e.g. in relation to the merits of the case), but here it relates to the admissibility of the case. The topic is also important in relation to the distinction between preliminary and non-preliminary character of objections, discussed in chapter 2.2.3 in relation to the issue that the Court may avoid considering the merits on the preliminary objections.
\textsuperscript{65} Exhaustion of local remedies relates to diplomatic protection as opposed to direct injury to the State: for practical and political reasons, the individual alien or corporation has to exhaust the legal remedies available in the State which is alleged to be the author of injury before it is admissible on the international plane, see Crawford 2012, pp. 710–711.
\textsuperscript{66} Nationality of claims concerns the legal interest of a State when nationals, including corporations, suffer injury or loss at the hands of another State, see Ibid., p. 702.
\textsuperscript{67} Acquiescence is silence or absence of protest in a situation calling for a positive reaction in case of an infringement of State’s rights, i.e. thus giving tacit assent.
\textsuperscript{68} According to the rule established in the classic Monetary Gold case (see Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and USA), Preliminary Question, ICJ Reports 1954, p. 19, at pp. 32–33), a case is inadmissible unless the necessary third state is joined as a full party to the proceedings. See also Crawford 2012, p. 698.
\textsuperscript{69} See chapter 2.3.1.
result in a State having no standing, or stand as a separate procedural obstacle preventing the Court from deciding on the case even if it has the jurisdiction to do so.\textsuperscript{70}

According to Crawford, the preliminary proceedings in the Court can be generalized as follows: first, the Court considers objections to its jurisdiction in the case. If these objections are successful, all the proceedings will stop, since in that case the Court would not have jurisdiction to decide on the admissibility or substance of the case. Secondly, the Court will consider possible objections to the admissibility of the case: if such objections are successful, it does not mean that the Court lacks authority; it only limits the Court’s possibility or propriety of it deciding on the case at the particular time.\textsuperscript{71}

In reality, considerations in the Court on jurisdiction, admissibility and standing often overlap, and they are only separated into logical order in the final decisions by the court. However, in a single case the order may make all the difference, as the Court is sometimes suggested to avoid making decisions on political grounds by, for example, deciding in the preliminary phase that a State does not have standing, even when the standing may be so important for the case itself that it should be considered in the merits of the case.\textsuperscript{72} Consequently, the issue of the order in which the Court is supposed to consider each element of the case is often under scrutiny by scholars and dissenting opinions by judges.\textsuperscript{73}

With relation to admissibility, in contentious cases the Court is limited to only decide on disputes, which the ICJ itself has interpreted as meaning that there has to be a “disagreement

\textsuperscript{70} Uchkunova argues in relation toProsecute or Extradite judgment (see chapter 3.3.2 of this paper for analysis of the case), that “... the Court decided to deal with the question of Belgium’s standing under the heading of admissibility. The problem with this approach is that the Court may act \textit{proprio motu} on issues relating to its jurisdiction (Article 36(6) of the ICJ Statute). On the other hand, issues of \textit{admissibility} (such as the exhaustion of local remedies, nationality of claims, etc.) cannot be dealt with \textit{proprio motu} but depend on an objection being raised by the party concerned. The importance of \textit{jus standi} is such that it must fall for consideration \textit{sua sponte}, see Uchkunova 2012. With this kind of fluidity between the notions of admissibility, jurisdiction and standing in legal literature, it is necessary to establish as clear definition for standing as possible, which will be done in chapter 2.3.1 below.

\textsuperscript{71} This is the order of proceedings in an ordinary case. Also, as already indicated above on the relation of standing and admissibility, issues of admissibility may be so closely connected with the merits of the case so as to justify joining them together, see Crawford 2012, p. 693.

\textsuperscript{72} See especially discussion on the\textit{ South West Africa} case in chapter 2.3.2 below. The issue of “avoiding decisions” is discussed in more detail in chapter 2.2.3 below.

\textsuperscript{73} The whole question has had a very important role in procedural decisions of the Court: for example, in the\textit{ Northern Cameroons} case judges gave a wide variety of opinions on the questions e.g. which should be considered first, the existence of a dispute (admissibility) or the jurisdiction of the Court, and also the distinction between jurisdictional and admissibility questions as well as their clear cut from the consideration of the merits. For brief overview, see Prutt 1976, p. 437.
on a point of law or fact, a conflict of legal vies or interests” between the parties.\textsuperscript{74} The dispute has to exist at the time of the decision, and the dispute may not be merely hypothetical in nature.\textsuperscript{75} However, Court’s jurisprudence on the definition of “dispute” is not completely unanimous.\textsuperscript{76}

Public international organizations, such as UN organs, cannot be parties to a contentious case in the ICJ since Article 35 of the Statute limits this to only State parties.\textsuperscript{77} However, these organizations can request \textit{advisory opinions} from the Court, a procedure not directly available to States: the procedure is reserved by Article 96 of the UN Charter to General Assembly, Security Council and other organs of the United Nations and specialized agencies. Therefore, States can ask for example the General Assembly to request advisory opinion on a certain topic. Advisory opinions may be requested on controversial topics, which would be unlikely to reach the Court as a contentious case for jurisdictional reasons.\textsuperscript{78} Therefore, Advisory Opinions often include wide-ranging and often bolder statements by the Court than would be given in contentious cases. For example, the \textit{Legality of the Threat or Use of Nuclear Weapons} Advisory Opinion was a somewhat landmark for international environmental law.\textsuperscript{79}

\textsuperscript{74} \textit{Mavrommatis Palestine Concessions}, PCIJ Series A No. 2 1924, p. 11 and \textit{Tams} 2005, p. 23.

\textsuperscript{75} \textit{Tams} 2005, p. 23 and footnote 19 on the same page, referring to the \textit{Case concerning the Northern Cameroons (Cameroon v. United Kingdom)}, Preliminary Objections, ICJ Reports 1963, p. 15, at pp. 33–34, as well as the \textit{Nuclear Tests} case, where the Court found that the case had become moot. The latter case is discussed in more detail in chapters 2.2.3, 3.2.3 and 4.3.2 below.

\textsuperscript{76} In a recent controversial decision, the Court stated that a dispute exists when it can be shown that the “respondent was aware, or could not have been unaware, that its views were “positively opposed” by the applicant”, which seemed to be against some of the earlier definitions of a dispute by the Court, see \textit{Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)}, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833, at p. 850, para. 41. The case is discussed in more detail in chapter 4.3.2.

\textsuperscript{77} However, there may be a trend towards a more inclusive international community. The ARSIWA Article 48 on \textit{erga omnes} uses the formulation “international community as a whole” instead of “international community of States as a whole”, as was suggested by some States during the formulation of the Articles. This is in line with the Article 53 VCLT on peremptory norms, where a similar formulation is used. The more inclusive formulation in the ARSIWA takes into account the growing importance of e.g. international organizations in the international community, see \textit{Crawford} 2002, pp. 40–41.

\textsuperscript{78} E.g. In the \textit{Israeli Wall Advisory Opinion}, referred below in this paragraph, Palestine was not considered to be a State (at the time Palestine was not even an observer State), and Israel did not participate in the proceedings, and most probably would have not accepted the jurisdiction of the Court in the situation where the case would have reached the Court as a contentious case. In its advisory opinion the Court argued that the case in fact was not contentious, but of concern to the whole UN, and because it was not a contentious case, Israel’s participation in the proceedings was not required, see ICJ Reports 2004, p. 157–159, paras. 46–50.

\textsuperscript{79} The Opinion is discussed in more detail in chapter 4.3.2. The Advisory Opinion was requested by the General Assembly and the World Health Organization (WHO), although only the request of the General Assembly was admitted.
2.2.3 On “Lawmaking” by the Court, Avoiding Decisions and Dissenting/ Separate Opinions

The issue of alleged avoidance of making a decision by the Court in certain cases was already briefly touched upon in the previous chapter. This chapter digs deeper into the questions of political tendencies by applying what d’Aspremont calls “the cult and contempt of the Court” and the “respective suspicion” in between,\(^{80}\) as well as discussing the development of international law by the Court and the role of dissenting opinions in legal development and research.

It was stated by the Court itself in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion that “[i]t is clear that the Court cannot legislate.”\(^{81}\) International law is, for the most part,\(^{82}\) based on the consent of States, and the sources of international law listed in Article 38(1) of the ICJ Statute all derive from States in one way or the other. The Court can, however, take part in the development of international law, and it is the degree of this “development” which determines if the Court is *ipso facto* making law, and where the Cult puts its hopes and the Contempt its fears.\(^{83}\)

In many cases the Court goes further than to just determine the true meaning of legal rules: it shapes international law to the extent that it may in reality be called lawmaking. Thus, it seems, the “permissible” development of international law cannot be categorically and unequivocally distinguished from “forbidden” lawmaking.\(^{84}\) For example, Alain Pellet well defines this “cherry-picking” – also often applied by the Cult or wishful thinkers – in stating that “I would suggest that you will name “legislation” a legal reasoning you disapprove of

\(^{80}\) The Cult gives a very high appreciation to ICJ decisions, even to the extent that d’Aspremont calls it “worship” and interpretation of the “holy scriptures”. On the other end, the Contempt over-emphasizes the (negative) political aspect of the Court, even to the extent that the Court deserves no special attention at all in international law, see d’Aspremont 2017, p. 117.

\(^{81}\) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, at p. 237, para. 18. The Court’s jurisdiction was contested on the grounds that it would be involved in law creation. However, as noted by the Court, this suggestion was based on the assumption that the existing *corpus juris* did not include relevant rules for the case. If there exist relevant rules, the Court does not “make law”; however, the line between law-making and interpretation can be vacillating at times.

\(^{82}\) This question is of particular importance in relation to customary international law (discussed in chapter 3.3.3), which is universal yet can be effectively objected to through a certain procedure, and especially to *jus cogens* (chapter 3.5), universal and non-derogable norms of international law which seem to not require any consent.

\(^{83}\) The “Contempt” for example is not a unified group, but their criticism may derive from various different reasons and motivations, see d’Aspremont 2017, p. 124–128. The distinction between the Cult and the Contempt have an interesting resemblance to the Idealists and Sceptical approach described by Tams: the former put too much hope and weight on the concept of *erga omnes*, and the latter have unjustified fears or downplay the concept altogether, see Tams 2005, p. 306–307.

\(^{84}\) Tams 2013, pp. 4–5.
but you will call that same reasoning “progressive development” when you favor it.” In regards of the “invention” of the *erga omnes* concept in the Barcelona Traction, it may at first seem closer to lawmaking than development: the Court “redeemed itself” after the failure in the *South West Africa* judgment of 1966 to recognize general interest in questions of elevated importance. The Court in Barcelona Traction dictum thus arrived at a completely opposite conclusion than the judges in the *South West Africa* did in regards of the substance of the applicable rule of general international law. However, as will be shown below in chapter 2.2.3, the turn that took place in the Barcelona Traction was not as dramatic as it may seem, since the concept was based on previous developments in international law.

However, these issues only highlight the discretion open to the Court, and the human error element obviously attached to any institutional proceedings. The Court certainly has a strong influence on international law, including the concept of *erga omnes* and substance of State responsibility, and therefore deserves close attention by international lawyers studying these fields. At the same time, too much “wishful thinking” cannot be put on the Court to fix any wrong one considers important: after all, the Court is dependent on States and cannot pull legal concepts out of a “magician’s hat”.

The available degree of development to the Court depends on opportunity (number of cases brought to the Court), receptiveness of the relevant area of law of development and competition or cooperation with other institutes and courts in said area. These characteristics, for example the dependence on fragmented treaty law in international environmental law, is

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85 Pellet 2010, p. 1075.
86 The dictum has been seen as the ICJ redeeming itself after its shocking decision in the *South West African* 1966 (second judgment) case to reverse its previous judgment from 1962, where it had accepted the standing of the applicants (Ethiopia and Liberia) in the case, see Tams 2005, p. 15 & 65.
87 See chapter 2.3.3 below.
88 On this, see e.g. Tams 2013, pp. 9–14.
89 See e.g. Judge ad hoc Sur in his Dissenting Opinion in relation to application of *erga omnes partes* in the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, p. 618, para. 44, stating that the concept was “produced like a rabbit from a magician’s hat” by the majority of the Court.
90 Tams 2005, pp. 21–25. The Court cannot institute proceedings and is limited by the *ne ultra petita* rule, see Tams 2013, p. 21. This affects significantly on what areas the Court may influence international law. Environmental law has remained one such area where States have been somewhat reluctant to institute ICJ proceedings, which consequently means that the case law available is scarce. To compare, maritime delimitation has been for the most part developed in the ICJ case law, see Fietta & Cleverly 2016, p. 4. In the context of transboundary pollution, the law is dependent on selected cases and customary international law and is therefore very much open to development by the Court. Further, questions of State responsibility in overall have been strongly developed by the Court, see Tams 2013, p. 23.
something that has to be taken into account when assessing its future developments, including *erga omnes*. However, as will be seen in chapter 4.3, the Court has certainly had its opportunities to make bold pronouncements on international environmental law.

The Court has been accused of avoiding a decision on the merits of the case on political reasons, or in other words, “skirted around the difficult issues that really mattered, in the face of political divisions.” It is, for example, suggested that the excessive number of preliminary objections to the consideration of merits may allow the Court a possibility to avoid decisions on procedural reasons. In *Nuclear Tests* the Court decided that it could not consider the case since there was no dispute between the Respondent (France) and the Applicants (Australia and New Zealand) anymore at the time of the proceedings. The judgment has been described as “an ingenious, if not wholly convincing, way of avoiding an assessment of Australia’s and New Zealand’s factual and legal claims.” The Court in fact turned into answering the question of avoiding a decision after dismissing the case, perhaps showing the concerns the Court had in this respect towards public reactions. Also, the 1966 *South West Africa* judgment has been criticized with claims that the Court avoided a decision in fear of political outcomes, as will be discussed below.

The question also relates to the long-lasting discussion on the order in which the Court should consider different elements of cases. For example, some have suggested that the existence of a dispute should be considered in the merits, and the Parties should be thus given a possibility to make arguments on the merits. According to Article 79(9) of the Rules of Court, the ICJ can “declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”, effectively giving the ICJ the possibility to join

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91 However, treaties do not supersede *erga omnes* as an enforcement measure if they do not clearly exclude other enforcement measures, see *Tams* 2005, pp. 304–305.
92 *Sands* 2017, p. 115.
94 *Stephens* 2009, p. 144.
95 The Court stated that “[t]his is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others”, before proceeding to further justify dropping the case, see ICJ Reports 1974, p. 271, para. 57. The Court stated that the adjudication was “devoid of purpose” and “fruitless”, and even went on to state that the “needless continuance of litigation is an obstacle to such [international] harmony”, see para. 58.
96 This issue has already been touched upon above in chapter 2.2.2 in the discussion relating to distinction between jurisdiction, admissibility and standing.
97 In their Joint Dissenting Opinion on the *Nuclear Tests* case Judges Onyeama, Dillard, Jiménez De Arechaga and Sir Humphrey Waldock criticized the Court’s decision to decide *ex proprio motu* that there was a discontinuity of dispute, without joining the question with the merits and giving a possibility for pleadings, see ICJ Reports 1974, p. 253, at pp. 363–364.
the preliminary objection(s) with the merits of the case. Of course, the question of the preliminary character of the objections can be quite complicated in a complex case.

The fact that politics affect the Court is a two-edged sword. It may lead to some unfortunate decisions from time to time, but at the same time it means that the Court is also open to changes in public opinion and international community. And of course, it can be always contested if any court of national or international origin is ultimately unaffected by politics or non-legal circumstances.

Finally, it is also necessary to underline the importance of dissenting and separate opinions by judges to ICJ judgments. As stated by then Chief Justice of the United States Charles Evans Hughes, “[a] dissent in a court of last resort is an appeal to the brooding spirit of law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting justice believes the court to have been betrayed.”98 This also applies to the ICJ proceedings, and opinions can serve as a window into the underlying legal arguments and implications of judgments, as well as to the development of international law in overall. Thus, these opinions are a great tool in academic discussions on ICJ’s jurisprudence and international law, and accordingly form a significant part of the analysis of case law throughout this paper. However, equally important is to not put too much weight on dissenting opinions, or overly “cherry-pick” those which fit one’s agenda with the cost of losing a truthful take on the legal issue at hand.

To conclude, this paper attempts to take the “respectable suspicion” approach to the ICJ jurisprudence, as well as a “dose of pragmatism” to the concept of erga omnes.99 And similarly to Koskenniemi, although the ICJ jurisprudence is not “the “ultimate” source of law”, “the need for consistency and clarity in judicial argument allows better than isolated statements in legal writing to extract the assumptions which go to constitute the discourse about custom.”100

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98 Hughes 1936, p. 68.
100 Koskenniemi 2006, p. 397.
2.2.4 Countermeasures

Countermeasures (formerly known as reprisals) are a “possibility for a State to resort to private justice” when its demands for cessation of an illegal conduct and/or adequate reparation are not met by the wrongdoer.” Countermeasures therefore consist of actions that would otherwise violate State’s own obligations to the wrongdoing State, but are considered lawful as countermeasures, which is also what differs countermeasures from retorsions. The legitimacy of countermeasures as a response to prior unlawful conduct by another State has been declared by the ICJ as well as in arbitral decisions.

As a form of private justice or self-help, countermeasures are prone to be used unfairly and abused, especially by more powerful States. Thus there exists exhaustive set of conditions and limitations to their use. For one thing, the action taken must have some appropriate relationship to the act or omission provoking it, but they are not “limited to suspension of performance of the same or a closely related obligation”: in fact, for example in human rights or environmental violations it is impossible for the answering State to take reciprocal action.

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101 The vocabulary of “reprisals” used to encompass also the use of force, but has been since replaced by two concepts: self-defence (ARSIWA Article 21) and countermeasures (ARSIWA Article 22), see Crawford 2012, p. 586. This is because the Article 2(4) of the UN Charter prohibits the use of force, and thus armed reprisals during peacetime became illegal under international law. It was noted by the ILC that “[m]ost members felt that the term "countermeasures" - - should be given preference over the term "reprisals", which conveyed an idea of retribution and, inasmuch as it had often been associated with the use of force, had acquired a pejorative connotation with the emergence in international law of the prohibition of the use of force”, see ILC Report A/47/10, p. 22, para. 139. Nowadays, the term “reprisals” refers specifically to reprisals during armed conflicts, see the ILC Commentaries on the Draft ARSIWA, p. 128, para. 3.

102 Crawford 2012, p. 585. In addition to demand for cessation/compliance, attempts to negotiate are required before a State may take countermeasures, see Tams 2005, p. 20. ARSIWA Article 52(1) requires that the State has to formally notify the responsible State of the decision to take countermeasures, along with requiring the mentioned offer to negotiate, see Crawford 2012, p. 587.

103 This relates to the fact that in the absence of compulsory jurisdiction (or compulsory centralized enforcement bodies) the enforcement of international law is ultimately dependent on the States themselves, and they can therefore “take justice into their own hands”, see Crawford 2012, p. 586.

104 Retorsions are unfriendly acts, taken in response of a similar act by another State, that do not affect the rights of the target State and are therefore always lawful. However, the distinction between countermeasures and retorsions is not static: whether an act is in violation of international law or “unfriendly but lawful” is often a question of interpretation of the treaty terms, and customary international may change over time, see Tams 2005, p. 208.

105 See e.g. ICJ Reports 1997, p. 7, at p. 55, para. 83, and arbitral decisions Naulilaa (II RIAA 1928 p. 1011) at pp. 1025–1026, Cysne (II RIAA 1930, p. 1035) at p. 1052, and Air Service Agreement (XVIII RIAA 1979, p. 417) at p. 443, para. 81. See also the ILC Commentaries on the Draft ARSIWA, p. 75, para. 2.


107 Following limitations are also codified in articles 49–53 of the ARSIWA.

108 This follows the rule in the Air Service Agreement arbitration, where this requirement was found to be “a well-known rule”, see Air Service Agreement, at p. 443, para. 83.
violating the same rights.\textsuperscript{109} Countermeasures must end when the violation ends, and have to be reversible. Further, countermeasures may not involve violations of \textit{jus cogens} rules,\textsuperscript{110} or affect obligations to settle disputes by pacific means.\textsuperscript{111} Countermeasures must not violate rights of other States and may only be justified if they are directed at the wrongdoing State.\textsuperscript{112} As for the relationship between ICJ proceedings and countermeasures, countermeasures must not be taken while a dispute is pending before an international adjudicative organ.\textsuperscript{113} Also, since States are ultimately responsible for the enforcement of international law, it is accepted in general that the State favoured by the ICJ decision may take coercive measures to enforce the decision if the other State does not comply with the decision, and these measures may include countermeasures.\textsuperscript{114} Of course, under Article 94(2) of the UN Charter, States also have the option to recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.\textsuperscript{115}

\textsuperscript{109} The ILC Commentaries on the Draft ARSIWA, p. 129, para. 5. However, some relationship to the provoking act helps fulfil the requirement that the countermeasure must be proportionate or commensurate in its effects and must be limited to what is necessary to redress the unlawful act/omission of the wrongdoing State, see e.g. Fourth report of \textit{Fitzmaurice} 1959, p. 67, para. 85, \& \textit{Crawford} 2012, pp. 587–588.
\textsuperscript{110} Notably the prohibition against the use of force.
\textsuperscript{111} \textit{Tams} 2005, pp. 20–21, referring to e.g. Article 50 ARSIWA and ICJ judgments \textit{ICAO}, (Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), ICJ Reports 1972, p. 53) and \textit{Hostages case} (United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Reports 1980, p. 3) at p. 28, para. 53.
\textsuperscript{112} \textit{Tams} 2005, p. 21, \& \textit{Air Service Agreement}, p. 445, para. 96, where the tribunal stated that “[t]o the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears.”
\textsuperscript{113} \textit{Crawford} 2012, p. 587.
\textsuperscript{114} For example, after the Corfu Channel judgment, the United Kingdom, in order to enforce the judgment first attempted to seize Albanian property in the United Kingdom. When it found out that there were not any seizable property, it later held back gold (later adjudicated in the famous \textit{Monetary Gold} judgment, or rather not adjudicated due to jurisdictional reason) allegedly belonging to Albania in order to enforce Albania to pay for the damages in the Corfu Channel. The case was ultimately settled in 1992 between the United Kingdom and Albania, 46 years after the original incident, see \textit{Rosenne} 2006, pp. 233–239.
\textsuperscript{115} This recourse may be considered e.g. in cases of severe breaches of human rights, as the procedure may ultimately lead to taking forceful action against the wrongdoing State. The Security Council has such power under the Article 42 of the UN Charter. For example, Article 94(2) was considered as the main deterrent in \textit{South West Africa} dispute against South Africa after a contentious case, see \textit{Gross} 1966, p. 42, at least from the African point of view (excluding, of course, that of South Africa), hoping that a favorable decision by the ICJ would force powers such as the US and UK into action through the Security Council, see \textit{Irwin} 2010, p. 7. However, under Article 94, the Security Council may act only if it deems it necessary, Cf. \textit{Irwin} p. 13 \& pp. 50–51.
Along with being rigorously covered by conditions and limitations, the exact measures that may be counted as countermeasures can take many forms. These include, for example, embargoes, and withdrawal of development aid.\textsuperscript{116} Countermeasures are therefore a very flexible and broad group of measures, and for this reason it is sometimes hard to distinguish them, especially in practice,\textsuperscript{117} from other justifications for non-compliance.\textsuperscript{118}

The codification in ARSIWA seems to suggest that countermeasures are only available to an injured State. Article 49 refers only to “injured State”, and Article 54, when referring to Article 48(1), talks about “lawful measures”. The final ARSIWA left open the question if countermeasures were contained in these “lawful measures”,\textsuperscript{119} although countermeasures were included in the “last-minute” draft of 2000.\textsuperscript{120} However, the comprehensive look at State practice and other evidence by Tams suggests that States may enforce \textit{erga omnes} obligations by countermeasures, at least when the breach is systematic and large-scale.\textsuperscript{121} This makes countermeasures an extremely strong enforcement mechanism, since it is not diminished by the same jurisdictional limitations as ICJ proceedings.\textsuperscript{122}

\section*{2.3 Standing}

\subsection*{2.3.1 The Basis of Standing}

As stated in the Barcelona Traction judgment, “[r]esponsibility is the necessary corollary of a right”,\textsuperscript{123} This is a basic tenet of international law, and has also been codified in Article 1

\begin{footnotes}
\item[116] Tams 2005, p. 210. The ILC Commentaries on the Draft ARSIWA, p. 128, para. 3 lists some similar examples, although there used to give examples of retorsions. This is because many of the listed acts may be considered either countermeasure or retorsion: the \textit{ipso facto} acts overlap, but the legal grounds justifying the act differ between the two, as in countermeasures the act has to affect the right of the target State. See footnote 104 above for further description on retorsions.
\item[117] States rarely expressly state the legal grounds which they are acting on, see Tams 2005, p. 22.
\item[118] These occasionally overlapping justifications include the use of force in self-defence in case of an armed attack, and suspension or termination of a treaty in response to a prior \textit{material} breach of the same treaty (Article 60 VCLT). However, in theory they can be distinguished in that countermeasures aim at \textit{enforcing} international law against the wrongdoing State, whereas self-defence and treaty suspension or termination are protective reactions aimed at \textit{re-establishing} a certain contractual or military balance between the States. Further, self-defense may consist of forcible or non-forcible measures. Non-forcible measures can be justified as countermeasures, but forcible cannot. see Tams 2005, p. 21–22 and pp. 208–209 for more rigorous outlining.
\item[119] Tams 2005, p. 201, seemingly as a result of political pressure by certain States, see ibid, pp. 241–249.
\item[120] See ILC Report A/55/10, pp. 70–71, containing “Article 54. Countermeasures by States other than the injured State”.
\item[121] Tams 2005, pp. 249–251.
\item[122] Ibid., p. 198. See chapter 2.2.2 above for explanation on the jurisdictional limitations.
\item[123] Barcelona Traction, ICJ Reports 1970, p. 33, para. 36.
\end{footnotes}
of the ARSIWA.\textsuperscript{124} Therefore, if a State wants to invoke the responsibility of another State, it needs to show that there exists either an individual right belonging to the invoking State corresponding to the allegedly breached obligation, or the breached obligation is \textit{erga omnes}.\textsuperscript{125} If a State can establish this, it has standing in the case.

There is no uniform understanding on the concept of standing in international law.\textsuperscript{126} It is usually read as meaning the right to bring an action or challenge some decision,\textsuperscript{127} often in relation to court proceedings, or the right to enforce a duty.\textsuperscript{128} As a more detailed definition, this study will use the one formulated by Tams: “standing - - is a condition qualifying the relation between the State seeking to respond against a violation of the law and the legal rule against whose violation the response is directed. It can be defined as the requirement that a State seeking to enforce the law establishes a \textit{sufficient link} between itself and the legal rule that forms the subject matter of the enforcement action.”\textsuperscript{129}

The criteria of standing have to be objective, and the relevant test is that of distinguishing between interests which are \textit{legally protected} and those which are not: this can be deduced from ICJ jurisprudence,\textsuperscript{130} and for example the Barcelona Traction dictum explicitly refers to \textit{legal} interests of States. And as was worded by Willem Riphagen, every State has an interest in the observance of any rule of international law, but this does not mean that all States have the legal right to invoke responsibility of another State\textsuperscript{131}: this would make the notion of standing “trivial or meaningless”.\textsuperscript{132} Standing is therefore a normative concept.\textsuperscript{133} Standing is also a flexible concept. As the terms of rights and legal interests do not have a fixed meaning, it is not predetermined in which situations States may have standing. Virtually any interest may at some point of time become legally protected, and ultimately the issue

\begin{itemize}
\item \textsuperscript{124} \textsuperscript{See chapter 1.5 above. The concept can also be phrased “responsibility is the necessary corollary of an obligation”. The right and corresponding obligation are two sides of the same coin, and the “right” phrasing used by the Court does not include any specific legal implications.}
\item \textsuperscript{125} A non-injured State may also have standing if the obligation is \textit{erga omnes partes}. However, this concept seems to be more linked to expansive treaty interpretation than general rules of standing, see chapter 3.3.2.\textsuperscript{Del Vecchio 2010 & Tams 2005, p. 26.}
\item \textsuperscript{126} \textsuperscript{Law & Martin 2015, Locus standi.}
\item \textsuperscript{127} \textsuperscript{Tams 2005, p. 25, referring to \textit{Black’s Law Dictionary}.}
\item \textsuperscript{128} \textsuperscript{Ibid., p. 26.}
\item \textsuperscript{129} \textsuperscript{Ibid., pp. 28–30.}
\item \textsuperscript{130} \textsuperscript{Fourth Report of Riphagen 1983, p. 21.}
\item \textsuperscript{131} \textsuperscript{Tams 2005, p. 28.}
\item \textsuperscript{132} \textsuperscript{Ibid., p. 31.}
\end{itemize}
is about interpretation and dependent on evolution of law. Distinction between mere interests and legal interests is quite straight-forward, since one only needs to show what the applicable legal rules are.

Rules which determine standing are also diversified. Basic rules stem from general international law, which States may derogate from by an agreement. The categories of treaties and general international law are interrelated, since rules of general international law “form a part of the legal context in which treaties – unless they deliberately deviate – have to be interpreted,” and conversely, as stated in the *North Sea Continental Shelf*, rules of treaty law may develop into general international law and provide evidence of its existence. As also pointed out in chapter 3.5.3, for those *erga omnes* obligations which are not *jus cogens*, States may derogate from them by concluding a treaty with a restrictive provision.

As opposed to individual legal interest, general interests may be shared by groups of different sizes. For example, all State parties to a certain treaty may have an interest in seeing the treaty rules complied with. Obligations *erga omnes* then form a category which all States may have interest in seeing complied with.

Therefore, the question is ultimately about determining if the general interest in question is legally protected. In the present study, this happens by identifying the *erga omnes* status of an obligation, and different approaches for doing so are presented in chapter 3.4.

2.3.2 Restrictive Approaches before the Barcelona Traction Dictum

As mentioned in the introduction, it is often conceptualized that before the Barcelona Traction dictum, a restrictive understanding of standing – that only the injured State could respond to breaches – prevailed in international law. However, as will be shown in next chap-

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134 Conversely, not all interests are protected by law, well shown in the Barcelona Traction judgment: the Belgian shareholders and Belgium therefore was individually affected in the case, but the interest was not protected by law.

135 *Tams* 2005, p. 32. Often, however, the rules of standing are not directly addressed, especially if the obligation derives from general international law, see ibid., pp. 37–38.

136 Ibid., p. 36.

137 *North Sea Continental Shelf Case*, ICJ Reports 1969, p. 3, at p. 41, para. 71.

138 One group of such obligations have been called *erga omnes partes*, which will be discussed in chapter 3.3.2. Also, interdependent treaty obligations are also general in character, although they are not absolute like *erga omnes* (general international law) or *erga omnes partes* (treaty law). This structure is explained in the next chapter.

139 *Tams* 2005, p. 41.
ter, there were prominent expansive tendencies in international law already before the Barcelona Traction judgment, although the dictum is certainly a very special turn in international law. However, I will first present two important examples of restrictive approaches to standing in international law.

Perhaps the most well-known example of restrictive approach to standing is the infamous 1966 South West Africa judgment by the ICJ. The case concerned an old League of Nations mandate of South Africa to administrate (not annex) the territory then known as South West Africa, a former German colony, in the treaty of Versailles. The 1920 mandate stipulated obligations for South Africa to, *inter alia*, “promote to the utmost the material and moral well-being and social progress” of the inhabitants of the area, as well as granting rights to nationals of other League members. Unfortunately, in the later years this mandate meant *ipsa facta* increasing extension of apartheid into the region.

In its initial judgment on preliminary objections in 1962, the Court seemed to accept the standing of both Applicants, Ethiopia and Liberia. However, rather shockingly, in the actual judgment in 1966 the Court suddenly decided that the Applicants did not have standing after all. All procedures before that point had implied that both the Respondent and Applicants assumed that the question was no more about the admissibility of the case or the

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140 See articles 2(2) and 5 of the Mandate Agreement, Mandate for German South-West Africa (December 17, 1920), LNOJ Vol. 2, p. 89–90
142 The Court stated, *inter alia*, that “there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory”, see ICJ Reports 1962, p. 328, and that the Applicants as former members of the League of Nations had – based on the meaning of the relevant article in the case – a “legal right of interest in the observance of its obligations”. The formulation in the Article 7 of the Mandate Agreement (“any dispute whatever”) and language altogether was “broad, clear and precise”, which meant that the Parties, as members of the League, had “a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members”, see p. 338 & 343.
143 Concerning the question why this question was assessed in the 1966 judgment instead of the first phase of 1962, the Court held that “there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicants’ standing in the present phase of the proceedings, – not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right or interest regarding the subject-matter of their claim” and “[d]espite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved”, see ICJ Reports 1966, p. 18, paras. 4–5.
existence of a legal dispute between the Parties but the validity of its substance. The question of standing had actually been brought up in dissenting opinions in 1962, and the fact that the Court put the Parties to the dispute through great trouble in collecting and presenting the merits of the case to just “be told that the Court would pay no heed to all their arguments and evidence” was heavily criticized. It is also worth to note that the decision was made with the smallest of margin by vote of 8 to 7, with the deciding casting vote by the President of the Court accordingly with Article 55(2) of the Statute of the Court.

From political perspective, it is often suggested that the Court may have been startled between 1962 and 1966 by the huge political implication of the case. However, the suggestion that the possible criticism acted a major role in the decision to not consider the case seems defective when we consider the outrage caused by the decision to not give a judgment at all. If, however, we assume that the Court indeed avoided a decision on political grounds, a more plausible explanation is that the majority of the judges were concerned about the Court’s prestige, since the losing side of the judgment would have been unlikely to accept the decision. Or perhaps the majority underestimated the outrage that turning down the case on a procedural reason would create, or simply chose what they considered to be the lesser of bad options. Still, it is easy to see why the case is considered a political as well as a judicial failure by many.

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144 Gross 1966, p. 44. For example, the lawyers of South Africa invited the Court for onsite visit to South West Africa to “form a general impression of comparable conditions and standards of the material and moral well-being and social progress of the inhabitants” (see ICJ Pleadings, South West Africa, Vol. VIII, pp. 278–279), thus already trying to establish the invalidity of the merits of the case presented by the Applicant’s lawyers.


146 See e.g. the Dissenting Opinion of judge Jessup, ICJ Report 1966, p. 325, at p. 382, also mentioning the Court “avoiding a decision”, see p. 325.

147 First of all, in the oral proceedings the Court was set to be pushed to concern the question of universal moral values in international law, see e.g. Stefan Possony’s testimony, ICJ Pleadings, South West Africa, vol. XII, p. 55, and Mr. Gross’ comments on the Applicants’ behalf at pp. 373–391. This would have possibly pushed the Court to also consider the age-long legal theory question of natural versus positivist implications, as well as (from political perspective) the alleged character of international law as “Western imperialism” of imposing universal moral rules on other States. Conversely, for some, a favourable decision for Applicants may have implied a decisive move to a “post-colonial” order, recognizing the rights of the ex-colonies in Africa, see Irwin 2010, pp. 37–39. See also Verzijl 1966, e.g. at p. 91, discussing the case and surrounding issues. It should be noted that the discussion on universality of certain moral values is still well and continuing in international law especially in relation to the concept jus cogens.


149 The judgment is sometimes seen as perhaps the most important in the ICJ’s history, and a political failure especially from the post-colonial point of view, as third-world nations had put great hopes in United Nations and the judgment was seen as worsening the fading trust towards the UN by those nations at the time, see Irwin
In any case, the Court chose a restrictive interpretation in its 1966 judgment, although the Court was heavily divided. It is likely that the Court changed its view due to changing composition during the years in between the judgments. It can be argued that the standing of Ethiopia and Liberia in the case could have been verified through expanding interpretation of the Mandate Agreement: after all, Article 7(2) only refers to “another Member of the League of Nations”, which was in 1962 interpreted to refer to all Member States of the League, not simply Parties to the Mandate Agreement. However, in 1966 the Court stated that the “Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims.”

The grounds for the Barcelona Traction dictum establishing the concept of general legal interest are also easy to notice. The decision came ultimately to the question of either textual interpretation of the treaty, or that based on general international law on standing. The exact content of the general rule of procedure – that is, what was the required “capacity to institute proceedings” was not agreed on, and the views differed from the radically restrictive view of judge Winiarski, to progressive approach of judge Jessup, with the majority adopting a restrictive – yet not as categorical as Winiarski’s – view on the issue. Article 7(2) could not, in their view, achieve the threshold of unequivocal terms. The Court thus assessed that there prevailed a restrictive rule of general international law, from which a treaty may derogate from only if the jurisdictional provisions achieve the said threshold.

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2010, p. 6–9. Further, from a legal point of view, the indecision of the Court was seen as confusing and inconsistent, see Weisburd 2015, p. 177. The faith put on the Court in legitimizing universal human rights into international law is comparable to the high hopes often put by the “Cult” (described in chapter 2.2.3) on the Court.

The 1966 decision was made by vote of 8 to 7, with the deciding casting vote by the President of the Court accordingly to Article 55(2) of the Statute of the Court, see ICJ Reports 1966, p. 51, para. 100.

After all, the 1962 decision was also made by slight margin of 8 to 7, see ICJ Report 1962, p. 319, at p. 347.

See footnote 142, the language was “broad, clear and precise”.

According to Tams, it is also sometimes argued that if Ethiopia and Liberia had been Parties to the Mandate Agreement, the decision of the Court would have been different, see Tams 2005, p. 68, footnote 98 on the same page. This seems plausible or even likely, but as pointed out by Tams, the party-status of the Applicants was only one of a number of consideration by the Court, and therefore it is hard to assess the relevance of this argument.

Dissenting Opinion of Judge Winiarski, ICJ Reports 1962, p. 455, requiring individual legal interest to establish standing.

Tams 2005, pp. 66–67. The majority adopted a view that the legal right or interest “need not necessarily relate to anything material or “tangible””, see ICJ Reports 1966, p. 34, para. 44.

Tams 2005, pp. 67–68. It also shows the strength of the restrictive approach applied in the judgment that even as broad jurisdictional clause as the Mandate Agreement Article 7(2) would not overturn it, as the Article
Another example of restrictive tendencies before the Barcelona Traction dictum is the application of the categorization of obligations by Fitzmaurice in the formulation of the Vienna Convention on the Law of Treaties (VCLT). The categorization is also a great tool in analyzing *erga omnes* obligations – as applied in chapter 3.4 – and for this reason alone worth of closer scrutiny.

Fitzmaurice, drawing from the earlier work of Heinrich Triepel and Karl Bergbohm, constructed a structural distinction based on the performance of international obligations, in which reciprocal and other multilateral obligations were distinguished from each other. Multilateral obligations were further categorized to *absolute* obligations and *interdependent* obligations.

Absolute and interdependent obligations “cannot be reduced to reciprocal exchanges between pairs of States”, since all States have the same interest in seeing these obligations observed. This is where the two differ from each other when we consider the question why States have this interest. Interdependent obligations work in an “all-or-nothing” fashion. Performance by a State on its obligations is in effect conditioned upon performance by each other party: for example according to Article 60(2)(c) of the VCLT, a material breach of a multilateral treaty by one of the parties entitles “any other party unilaterally to suspend the performance of the treaty not merely *vis-à-vis* the State in breach but *vis-à-vis* all States”.

The breach threatens the whole treaty structure, and the performance of the treaty is therefore considered interdependent. Disarmament conventions are a good example of containing such interdependent obligations.

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159 See *Tams* 2005, p. 54 on analysis of this influence of Fitzmaurice’s work.
160 For example, diplomatic protection discussed in the Barcelona Traction judgment forms a reciprocal relation.
161 See e.g. Fourth Report of Fitzmaurice, p. 70. Absolute obligations have also been referred to in human rights cases as *objective* obligations, see ECHR case Ireland v. the United Kingdom 1978, para. 239, whereas interdependent obligations have been referred to as *integral* obligations, see e.g. *Crawford* 2002, p. 41.
162 *Tams* 2005, p. 56.
163 *Crawford* 2002, p. 41.
164 Ibid. & Fourth Report of Fitzmaurice, p. 66, para. 82 and p. 70, para. 102.
165 *Dupuy* 2002, p. 1071. Dupuy also mentions e.g. conventions “prohibiting certain weapons or methods of warfare.”
In contrast, absolute obligations require States to adopt uniform conduct within their own jurisdictions. They are not interdependent, which in Crawford’s words is fortunate in case of human rights treaties as “one State cannot disregard its own human rights obligations on account of another State’s breach”. This also applies to environmental treaties: severe disregard of the environment by one State party to a protective treaty does not permit other parties to disregard their own obligations. These treaties do not operate in an all-or-nothing fashion. In contrast, central obligations of States parties to the Outer Space treaty and the Antarctic treaty require complete collective restraint to work.

Therefore, although Fitzmaurice discussed the structural approach in relation to treaty law and not general international law, the approach itself is not necessarily restrictive: what makes it a great example of such approach in international law pre-Barcelona Traction is its application in the formulation of the VCLT. The VCLT adopted a system in which reciprocal or absolute obligations could not be enforced by a non-injured State.

The distinction between multilateral obligations was later used in the formulation of the ARSIWA. For example, Article 60(2)(c) of VCLT, was effectively the model for article 42 ARSIWA (Invocation of responsibility by an injured State), encompassing responsibility

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166 Tams 2005, p. 56.
167 Crawford 2002, p. 41. For this reason, it can be confusing to use the term “integral” to refer to interdependent obligations, as the term has been used in human rights law to refer to non-synallagmatic (non-reciprocal) obligations.
168 The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 UNTS, p. 205.
169 The Antarctic Treaty, 402 UNTS p. 71. Antarctic treaty system is also briefly discussed in chapter 3.2.1 on possible third-party effects of treaties (the traditional meaning of the term erga omnes).
171 In the system of the VCLT, the distinction between different types of multilateral obligations is as follows: Article 60(2)(b) VCLT adopted an approach where the general interest in seeing multilateral obligations of reciprocal nature observed is not sufficient to warrant a right to respond. Further, in case of an injury of non-individual nature, Article 60(2)(c) allows for decentralized responses to breaches of interdependent obligations. On the other hand, general interest in seeing an absolute obligation observed is not sufficient, but their enforcement is left to collective action under Article 60(2)(a). Thus, concerning termination or suspension of treaties, decentralized responses by States are only permitted when there is an exchange of benefits between the States, see Tams 2005, pp. 61–63.
172 Ibid., p. 60.
and standing in relation to an interdependent obligation. In this study, the structural categorization is applied on customary obligations as a deciding distinguisher for certain obligations as having *erga omnes* quality.

All in all, the South West Africa cases and the structural categorization of multilateral obligations are well in line with each other. The obligations of the Mandate Agreement were of absolute character, and as described here in relation to VCLT Article 60(2), international law at that time seemed to pertain to restrictive approach to general standing. But as will be shown next, the state of international law was anything but unambiguous on the matter.

### 2.3.3 Expansive Approaches before the Barcelona Traction Dictum

To reiterate, in the *South West Africa* 1966 judgment the Court held that in its view at the time of the judgment international law did not recognize a possibility for an *actio popularis*. Today we have the subsequent ICJ jurisprudence and State practice, including the Barcelona Traction dictum, confirming the existence of such concept. Yet the dictum was in fact not the “birth” of the concept in the sense that general interest had not been recognized in international law before. Therefore, some examples of expansive tendencies in international law prior to Barcelona Traction are presented here to show that the dictum may have not been as revolutionary as is sometimes suggested, especially since it is clear that even “traditional” international law has been concerned with general observance of rules instead of merely governing reciprocal or “civil” disputes between States.

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174 According to the article a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to “- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”.

175 Chapter 3.4.4.

176 Tams 2005, p. 69.

177 ICJ Reports 1966, p. 47, para. 88.

178 The mere scope of examples is well represented in the separate opinion of 1962 and dissenting opinion of 1966 by judge Jessup in the *South West Africa* cases, stating that “[i]nternational law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other “material”, or, Say, “physical” or “tangible” interests”, i.e. their individual legal right or interest. Jessup also refers to the “historical fact of the wave of idealistic aspiration” after the First World War, also prominent in the Mandates system, see Jessup ICJ Reports 1962, p. 425. See also e.g. Hännikäinen 1988, p. 274 discussing the opinions of Jessup.

179 In the S.S. “I’m Alone” case, the Arbitral Tribunal decided that the US should pay the sum of $25,000 to Canada “as a material amend in respect of the wrong”, see S.S. “I’m Alone” (Canada v. United States of America), 30 June 1933 and 5 January 1935, III RIAA, p. 1609, at p. 1618. This exact payment was not for any material damage or injury, but payed as a “materialization” of the wrong done by the US. See also Jessup ICJ Reports 1962, at p. 425.
First prominent example is *unequivocal clauses in treaties*. As discussed above, the restrictive approach in the *South West Africa* concerned an observed rule of general international law, and as noted above, States may deviate from rules of general international law by an agreement. There are several pre-Barcelona Traction treaty-examples allowing for all States access to judicial proceedings. For example, the Constitution of the International Labour Organization (ILO) Article 26 recognizes the right of Member States to the Constitution to file complaints to the Commission of Inquiry (under the International Labour Office) for conduct of other States in that State’s own territory, in general interest and without the need to show any individual injury. Also, the 1919 Polish Minorities Treaty and many similar Minorities agreements recognized a general right to refer disputes to an international court. Similar general right to court proceedings was included in the Genocide Convention and many other treaties of humanitarian nature. And as shown by the *Memel Statute* case on the 1924 Memel Convention, international courts had little difficulty in applying general standing clause when they are formulated in a clear manner.

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180 However, the question of if a clause is unequivocal is *per se* a result of prior interpretation, see *Tams* 2005, p. 71.
181 See the part linked to footnote 136.
182 Constitution of the International Labour Organisation (ILO), 1 April 1919, 15 UNTS 40. The ILO became a UN specialized agency in 1946.
183 The reports by the Commission may further be advanced to the ICJ under Article 29. First case concerned by the Commission took place in 1961, when complaints by Ghana and Portugal were registered. Judge Jessup stated in his separate opinion to the 1962 South West Africa judgment in relation to this dispute between Ghana and Portugal that “a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests,” ICJ Reports 1962, p. 428.
185 ICJ Reports 1962, p. 426. It was stated by the Court in the Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* that “[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention.” See ICJ Reports 1951, p. 23.
186 *Tams* lists several examples, including e.g. the 1926 Slavery Convention, and as a notable example regionally, the European Convention on Human Rights (ECHR) Article 24, which had been invoked three times before the Barcelona Traction, see *Tams* 2005, p. 72, footnote 110 and p. 75.
187 Convention Between the British Empire, France, Italy, Japan and Lithuania Respecting the Memel Territory and the Statute of the Memel Territory, 8 May 1924, 48 UKTS 1925.
188 *Tams* 2005, p. 75–76 and Jessup in ICJ Reports 1966, pp. 375–377. It was the view of the Applicants that they were not in the PCIJ “to defend their particular interests, nor to maintain any rights of their own which they allege to have been infringed. Their only interest is to see that the Convention to which they are Parties is carried out by Lithuania”, see PCIJ 1932 Ser. C, No. 59, p. 173. The Court agreed, and held that the Applicants could have standing “without any infraction having been noted” (see PCIJ 1932 Ser. A/B, No. 47, p. 248), and their intention “was only to obtain an interpretation of the Statute”, see PCIJ 1932 Ser. A/B, No. 49, p. 337. Thus, although Court proceedings under Article 17(2) of the Memel Agreement were only available to the Principal Allied Powers, the fact that individual injury was not needed for instituting them shows that the case is an important example of expansive approach to standing before the Barcelona Traction.
General interest was also recognized in relation to *equivocal treaty clauses*. Some interpretations of the nature of the Mandate Agreements stated that although the League of Nations had ceased to exist, there existed “a general obligation” owed to States that were Members of the League at the time of the mandate.\(^{189}\) Such acceptance of equivocal treaty clauses was observable in the jurisprudence of international courts, with the obvious example of the 1962 *South West Africa* judgment, which, according to *Tams*, was based on the prior *SS Wimbledon* judgment.\(^{190}\) In the latter judgment the Court held that Article 386 Treaty of Versailles\(^{191}\) referring to “any interested Power” contained not only the UK and France,\(^{192}\) but also Italy and Japan “since they all possess fleets and merchant vessels flying their respective flag.”\(^{193}\) This interpretation was very broad, and the way the PCIJ arrived at this conclusion has been much discussed and also criticized, but still the decision shows that the idea of standing in general interest was not unknown to international law even in case of equivocal treaty clauses.\(^{194}\)

There are also examples of standing in general interest outside of the presented special treaty clauses.\(^{195}\) Controversial *status treaties*\(^{196}\) also seem to include the general enforceability: for example, in the Åland Islands case the Court held that the 1856 Åland Islands Convention was concluded in such way that “there was a general European Interest”,\(^{197}\) and “any State”, including Finland, “in possession of the Islands must conform to the obligations” of the Convention, and similarly “every State interested has the right to insist upon compliance

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\(^{190}\) *Tams* 2005, p. 76–77.


\(^{192}\) Former the State of registry of the SS Wimbledon vessel, latter the State of the chartering company.

\(^{193}\) PCIJ 1923, Ser. A, No. 1, p. 20.

\(^{194}\) *Tams* 2005, p. 78–79.

\(^{195}\) It is timely here to tentatively refute one notion made by Tams: he lists interdependent obligations as another example of “standing in general interest” and refers to them source-neutrally. But as is shown in chapter 3.4.2, interdependent obligations do not emerge from general international law, at least as it is understood in contemporary international law.

\(^{196}\) Status treaties allegedly create objective regimes which have effects (e.g. rights and obligations) extending outside the treaty parties, see chapter 3.2.1.

\(^{197}\) LNOJ, Special Supplement No. 3, October 1920, p. 17.
with them.\textsuperscript{198} Furthermore, the notion that ICJ decisions may be enforceable by any State has received some support.\textsuperscript{199}

Noticeably, humanitarian issues have long been perhaps the most important issue area where States have been concerned with general observance of international law even when they have not been directly injured by an act. For example, long before slavery was confidently deemed illegal under international law, there was a consensus by many powers that it was illegal and reprehensive, and in some cases they intervened.\textsuperscript{200} In more recent examples, Ghana and Malaysia, as well as several European States, resorted to countermeasures pre-Barcelona Traction in cases of severe breaches of fundamental human rights by South Africa and Greece.\textsuperscript{201} Thus, States evidently were open to the idea of taking countermeasures in response to breaches of humanitarian standards.

Finally, before the Barcelona Traction dictum, there had already been a significant body of work by scholars on responsibility towards all States in gravest breaches of international law.\textsuperscript{202} Although not a source of international law \textit{per se}, “juristic writings”, as meant in Article 38(1)(d) serve as a “subsidiary means for the determination of the rules of law”: they shape international law and mirror contemporary developments in it.

\textsuperscript{198} LNOJ, Special Supplement No, 3, October 1920, p. 19. In general, for example conventions regarding the demilitarization of certain regions are considered to be interdependent (see Dupuy 2002, p. 1071) and thus enforceable by any State party to the convention.

\textsuperscript{199} Tams 2005, pp. 87–88.

\textsuperscript{200} For example, some European Powers formed a blockade to prevent export of Slaves from Zanzibar, see Stowell 1921, pp. 195 & 203. Also, Stowell’s book represents in overall a comprehensive look into the issue of the right to intervene in the pre-First World War period. The case of slavery is also an interesting example of the development of international customary law.

\textsuperscript{201} Tams 2005, p. 90–91. In this respect, as noted by Tams, the “humanitarian intervention” form a big part of the issue of intervention in name of human rights. However, the use of force is not in the scope of this study and will be left out. For brief overview, see Ibid., p. 90–93.

\textsuperscript{202} Special Rapporteur Roberto Ago refers in his Second Report on State Responsibility to the work of several Soviet scholars, \textit{inter alia} D. B. Levin and Grigori Tunkin, who had stressed the foundational nature of e.g. genocide, aggression and colonial oppression, as well as aggression and threats to peace as belonging to the most important principles of international law. D. B. Levin had supported the view as early as 1946. However, in this relation it should be noted how rigorous the Soviet Union was on the absolute sovereignty of States; the focus was therefore more on “peaceful coexistence” and inter-state relations than on the community approach, which emphasizes truly common based approach to international law emphasizing cooperation transcending borders and to certain extent sovereignty, see Osakwe 1985, p. 712. Also, the important work of Hersch Lauterpacht, who had supported a similar view, is referred to by Ago, before he relates the presented scholarly work to the Barcelona Traction judgment, which had just been released back then, see Second Report of Ago, p. 184.
This brief overview on the recognition of general interest pre-Barcelona Traction helps to curb the conception which Tams calls the “myth of uniqueness”, a “conviction that the concept [of erga omnes] is revolutionary and unique”, which has led to a lot of unjustified concern and wishful thinking towards the concept by realists and idealists.\textsuperscript{203} Further, based on the fact that general interest has been recognized in international law for such a long time indicates that its recognition in the environmental field is neither as radical as it may seem at first.

\textsuperscript{203} Tams 2005, pp. 306–308.
3 SOURCES OF ERGA OMNES OBLIGATIONS AND THEIR IDENTIFICATION

3.1 Background Information and Outline

This chapter will focus on the general international law origins of obligation *erga omnes* as well as how such obligations can be identified. The findings made in this chapter will then be applied in chapter 4 by analyzing suggested environmental customary obligations and their possible *erga omnes* character.

However, before discussing these essential questions relating to *erga omnes* it is first necessary to outline, based on Tams’ discussion on the topic,\(^{204}\) certain other types of concepts in international law which have been called either “*erga omnes*” or referred to by similar terminology, such as *erga omnes partes*. This is to avoid possible confusion and misconceptions, as the different uses are both common-based in that they are general in nature, yet fundamentally different from each other.\(^{205}\) This brief overview mostly focuses on the use of *erga omnes* terminology by the ICJ, since the term has been used in literature in a variety of ways to denote something that is done or has effects “towards all”, as the rough translation of the term goes.

3.2 Other Uses and Meanings of the Concept of Erga Omnes

3.2.1 Traditional Use of Erga Omnes Terminology

The underlying distinction between Barcelona Traction *erga omnes* and its traditional use\(^{206}\) is that the latter concerns primary rules of international law and try to extend their application outside the State parties, whereas the Barcelona Traction *erga omnes* concerns secondary rules of international law, that is, the rules of standing and enforcement.\(^{207}\) For example, according to the controversial concept of objective regimes, treaties may have general or objective effects, namely obligations which bind third States. *Erga omnes* has been used in

\(^{204}\) Ibid., pp. 103–116.

\(^{205}\) This terminological issue was one of the reasons why Article 48 does not use *erga omnes* in it, see the ILC Commentaries on the Draft ARSIWA, p. 127, para. 9.

\(^{206}\) It is also worth to mention that although these effects are called “traditional”, they are not only a thing of history: they have indeed been applied by the Court also after the Barcelona Traction, see Tams 2005, p. 107–110. In a way, we are now just “paying the price” for the fact that the Court chose the term *erga omnes* to describe the legal effect introduced in the Barcelona Traction; i.e. a term which was already before the dictum used in variety of different contexts, see Ibid., pp. 101–103.

\(^{207}\) See the explanation of primary and secondary obligations in the context of the ARSIWA in chapter 1.5.
this relation to describe the function of the concept as having “objective” or “general” applicability.\textsuperscript{208} The concept of \textit{erga omnes} has also been used to encompass “all legal positions imbued with objective validity or opposability”.\textsuperscript{209}

When the Court in \textit{Namibia} Advisory Opinion stated that certain UN resolutions were “opposable to all States in the sense of barring \textit{erga omnes} the legality of a situation which is maintained in violation of international law”,\textsuperscript{210} one would first assume a relation to Barcelona Traction \textit{erga omnes}, as the Advisory Opinion was given the next year after the dictum, and was in close connection with South West Africa case. However, it seems that the Court only meant that non-members to the UN could not ignore UN resolutions and their effects, thus concerning their third-party applicability.\textsuperscript{211}

In its 1966 \textit{South West African} judgment the Court marked that in certain exceptional cases, a court decision could bring about a “general judicial settlement”, describing this as an “effect \textit{erga omnes}”.\textsuperscript{212} This is in contrast with Article 59 of the ICJ Statute, which states that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”\textsuperscript{213}

Finally, \textit{erga omnes} has also been used in relation to arguments on international legal personality. In the \textit{Reparation} Advisory Opinion, the ICJ stated that States may by treaty “bring

\textsuperscript{208} \textit{For example, McNair} argued in 1957 that “- - we are on a surer ground if we are willing to recognize that the effects of certain kinds of treaties as regards “third parties” is to be attributed to the inherent and distinctive juridical element in those treaties”; calling these effects \textit{erga omnes}, see p. 23. \textit{See also e.g. Simma} 1986 and \textit{Jacobsson} 1998 discussing the Antarctica treaty system and its suggested objective applicability under the title \textit{“erga omnes”}. Although the concept of objective regimes seems to be clearly in contradiction with the \textit{pacta tertii} rule, there seems to be exceptional cases where somewhat objective applicability has been confirmed. These include dispositive and “conveyance-type” treaties such as boundary treaties and treaties of cession. Objective regimes, however, are different from these examples, as the third-party effects of them is mainly incidental, as in the case of objective regimes the third-party effects are intentional, see \textit{Tams} 2005, p. 81.

\textsuperscript{209} \textit{For example, as discussed by Tams and McNair, in relation to treaties transferring territorial titles or other rights in rem, such as international servitudes or rights of passage, see Tams} 2005, p. 104 and \textit{McNair} 1957, pp. 33–35.


\textsuperscript{211} \textit{Tams} 2005, pp. 108–109.

\textsuperscript{212} \textit{ICJ Reports} 1966, p. 41, para. 70.

\textsuperscript{213} \textit{See Tams} 2005, p. 105, also referring to \textit{Rosenne} 1998, p. 519 using \textit{erga omnes} in this context.
into being an entity possessing objective international personality, and not merely personality recognized by them alone.” This encouraged some scholars to refer to the effect (objective legal personality) presented in the Reparation as “erga omnes”.

3.2.2 Erga Omnes Denoting Territorial Limitation of Obligations

Article IX of the Genocide Convention requires that disputes between Contracting Parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the ICJ at the request of any of the parties to the dispute. As Contracting Parties are States, in practice this means that disputes meant in the article are between States and thus considered international disputes. In the 1996 Genocide case, Yugoslavia disputed the claim of Bosnia-Herzegovina on this basis, arguing that the dispute was not international, but a domestic dispute relating to a conflict at a time of civil war, and the disputed acts punishable under the Convention had taken place in an area that was not under the jurisdiction of Yugoslavia. This argument would suggest that obligations of the Convention only applied to Contracting Parties in relation to territories under their jurisdiction.

The Court rejected this argument, stating that the obligation to “prevent and to punish the crime of genocide is not territorially limited by the Convention”. Therefore, “in order to liberate mankind from such an odious scourge”, as the famous phrasing in the Convention’s

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214 ICJ Reports 1949, p. 185.
215 Tams 2005, p. 105, referring to Rosenne 1998, p. 513. See also Mcnair 1957, pp. 30–33 and third report of Waldock, p. 31, para. 14. In relation to the Reparation case, ILC stated in its commentary on Draft Articles on the Responsibility of International Organizations, commenting on draft Article 2, that “- it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles”, see ILC Report 2011 A/66/10, p. 76. This would render the personality of an international organizations opposable to third States, see Crawford 2012, p. 170. Although the Court conditioned its opinion on the quantity and standing of the founding members of the UN (ICJ Reports 1949, p. 185), stating that “the Court’s opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in the conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims”, (italics added), the judgment seems to imply that this proposition can be applied to all international organizations, and according to Crawford, this has indeed happened in practice, see p. 171. Further, in its advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the Court stated that “[t]he Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence”, see ICJ Reports 1996, p. 78, para. 25. In ILC’s opinion, “[w]hile it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law”, see ILC Report 2011 A/66/10, p. 76.
218 Tams 2005, p. 110.
preamble states, “the rights and obligations enshrined by the Convention are rights and obligations erga omnes”, a statement which, according to Tams, was not to denote the same legal effect as erga omnes in the Barcelona Traction dictum.

3.2.3 Descriptive Use of Erga Omnes

Erga omnes has also been used in a descriptive way, although again to address something that is “towards all”. For example, in the Nuclear Tests cases Australia and New Zealand invoked the responsibility of France by referring to the erga omnes of Barcelona Traction. The Court did not use this great opportunity to address the legal implications of the Barcelona Traction in relation to enforcement and partly in environmental context, as in the Court’s opinion the dispute had become moot after France had unilaterally committed to stop the atmospheric tests, which were disputed in the case. But the Court did use the term erga omnes, although in a very different context: it stated that by orally committing to stop the tests, “the French conveyed to the world at large, including the Applicant, its intention to effectively terminate these tests”, since the statement was “made publicly and erga omnes.”

3.3 The Sources and Identification of Erga Omnes Obligations

3.3.1 Barcelona Traction and Erga Omnes

As already mentioned in chapter 2.2.3, the dictum has been seen as the Court redeeming itself after the South West Africa judgment had failed to protect some of the most important values of international community. Indeed, Judge Lachs, who is often considered to be the reason for the inclusion of the dictum, held that including erga omnes “was not necessary

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220 Thus, this seems to be different from the Barcelona Traction erga omnes as well as its traditional use, since standing was not disputed in the case and the Genocide convention was binding on parties to the litigation without objective applicability, see Tams 2005, pp. 111–112. This is not to say that the obligation to “prevent and punish genocide” is not also erga omnes in the Barcelona Traction sense. This case also raises the question if the reference in another case concerning the Genocide Convention also meant this “territorial” erga omnes effect, or erga omnes in the Barcelona Traction sense, or both. See ICJ Reports 2015, p. 47, para. 87.
222 Ibid., p. 269, para. 51 & p. 474, para. 53.
223 Ibid., p. 269, para. 50 & p. 474, para. 52. See Tams pp. 112–115 presenting this use of the term, as well as Nicaragua Provisional Measures (ICJ Reports 1984, p. 169, at p. 416, para. 55) using erga omnes in similarly descriptive way.
224 See Tams 2005, p. 15, footnote 58.
in the judgment, but it was a good opportunity to nail down certain provisions of the law and indicate where states are obliged to act vis-à-vis the international community as a whole.”

However significant the effects of that dictum have been on international law, an important question was left open by the Court: from what sources of international law obligations *erga omnes* may emerge from. It simply stated that “[s]ome of the corresponding rights of protection have entered into the body of general international law - - others are conferred by international instruments of a universal or quasi-universal character.” This quite broad definition seems to suggest source-neutrality, but as will be shown next, *erga omnes* obligations do not emerge from treaty law.

### 3.3.2 Erga Omnes Partes and the Question of Sources

This chapter discusses the suggested treaty counter-part of *erga omnes*. A quite recent case from 2012, the *Questions Relating to the Obligation to Prosecute or Extradite* will be specifically analyzed in this regard. The focus is not on the assessment of standing based on nationality in the case, but on the rather confusing use of *erga omnes* terminology by the Court when applying *erga omnes partes* in the case, and the issue of treaty interpretation. First, however, we need to define what *erga omnes partes* is.

Article 48(1)(a) of ARSIWA concerns obligations which are “owed to a group of states”. In the commentary to the ARSIWA, the ILC stated in relation to Article 48(1)(a) that “States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest.” These obligations, also referred to

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226 In addition to the established position of *erga omnes* in contemporary international law, for example the work of the ILC on State Responsibility took right after the Barcelona Traction an increasing notice of general interest and standing: Ago in his Third Report in 1971 already left open the possibility that a wrongful act may create a legal relationship which could also “extend to other subjects of international law as well” than the State directly injured, see Ago Third Report, p. 211, para. 43.

227 ICJ Reports 1970, p. 32, para. 34.

228 The purpose and scope of the Article is further described: “[o]bligations coming within the scope - - have to be “collective obligations”, i.e. they must apply between a group of States and have been established in some collective interest. They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest. But in any event the arrangement must transcend the
as *erga omnes partes*, have a clear resemblance to *erga omnes*, and not simply because of the similar terminology: at first the only difference seems to be that the former is owed to a group instead of all States. *Erga omnes partes* is usually used to describe treaty-based obligations in whose performance all contracting parties are said to have a legal interest. However, in some instances *erga omnes partes* has been considered to be subject to same legal regime as *erga omnes*. For example, James Crawford, the ILC’s Special Rapporteur on State Responsibility at the time, stated that “human rights obligations are either obligations *erga omnes* or obligations *erga omnes partes*, depending on their universality and significance”.

This statement suggests source-neutrality between the two concepts in the sense that the same analysis on universality and significance of an *erga omnes* obligation would also apply to an *erga omnes partes* obligation.

However, as Tams argues, “[t]he legal regime governing obligations *erga omnes partes* first and foremost depends on the express or implied terms of the treaty of which they form part”. By definition, *erga omnes* obligations are owed to all States, and as will be shown in chapter 3.3.3, they thus naturally emerge from general international law. If, however, *erga omnes* obligations could emerge from treaties (without becoming custom), the rule would violate the *pacta tertiis* rule, since it is usually held that even if a third State accepts provisions of a certain treaty (without becoming a Party), according to the maxim *pacta tertiis nec nocent nec prosunt*, that State does not receive the “benefits” of the treaty, including a right to invoke responsibility. If a treaty would contain these effects, it would be closer to the concept of *objective regime* discussed in chapter 3.2.1 than it would be to *erga omnes*.

Therefore, what is argued for in this chapter is that when an international court uses the term “*erga omnes partes*”, it does not mean that the obligation in question is *erga omnes* in the

*sphere of bilateral relations* of the States parties.” (italics added), see the ILC Commentaries on the Draft ARSIWA, p. 126, para. 7.

229 For example, Dupuy observes – concerning *erga omnes partes* and *erga omnes* – that the two are “restricted and general” kind of breach of absolute obligations, “with the first having their origin in treaties, [and] the latter in customary obligations”, see Dupuy 2002, p. 1072.

230 Third Report of Crawford, p. 31, para 92, footnote 185. See also See also Byers 1997, p. 212, suggesting that obligations *erga omnes* “may be created either through the process of customary international law or by treaty” and the ILC Commentaries on the Draft ARSIWA p. 126, para. 6. It was stated by the ILC that these obligations may derive both from multilateral treaties or customary international law. However, if the ILC meant that there may be e.g. a regional custom *erga omnes partes*, or that a customary obligation may be included in a treaty and applied also only between treaty parties *erga omnes partes*, then there may not be any conceptual conflict.

Barcelona Traction sense, and thus part of general international law. Instead, it states that the provisions of a treaty must be interpreted in an expansive fashion because the object and purpose of the treaty and its protection require it.

In *Prosecute or Extradite* the Court had to assess the standing of Belgium on claims that Hissène Habré should be either prosecuted or extradited by Senegal for acts deemed criminal in Article 4^{232} of the Convention against Torture (CAT).^{233} When justifying why Belgium should have standing as a party to the Convention, the Court stipulated that

“[t]he States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. - - All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case.

The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.”^{234}

On these basis, the Court found that Belgium had standing to invoke the responsibility of Senegal.^{235} This was the first time the Court has concretely confirmed that a non-injured

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^{232} I.e. torture, attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

^{233} UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Vol. 1465, p. 85.

^{234} *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, p. 422, at p. 449–450, paras. 68–69.

^{235} Ibid., p. 450, para. 70.
State has standing based on an obligation *erga omnes partes*, and the latter paragraph suggest that this was based on a structural interpretation.\textsuperscript{236} Yet the case needs to be clearly distinguished from being a concrete application of *erga omnes*. First of all, Belgium did not claim standing based on *erga omnes*: Belgium instead made its claim by being a party to the Convention\textsuperscript{237} and secondarily on the existence of a special interest that would distinguish Belgium from other parties to the Convention and give it a specific entitlement in the case.\textsuperscript{238} The Court did not consider the question of special interest since it found that Belgium had standing solely by being a party to the Convention.\textsuperscript{239} However, it is true that the application of Belgium was not based merely on a dispute on the CAT provisions and their interpretation and application, but also on “customary obligation to punish crimes against humanity”, founded in “customary rules of international law.”\textsuperscript{240} The Court, however, refuted the claim that there existed a dispute on customary obligation,\textsuperscript{241} and the case was based on a dispute on the interpretation and application of Articles 6(2) and 7(1) of the Convention.\textsuperscript{242}

Thus, it seems clear that the case concerned treaty interpretation and not *erga omnes*, since the Court did not even have the opportunity to consider the customary character of the obligation *aut dedere aut judicare*.\textsuperscript{243} *Erga omnes* obligations positively derive from general

\textsuperscript{236} See e.g. Johnstone 2014, p. 220 and Declaration of Judge Donoghue, ICJ Reports 2012, p. 587, para. 11. Since the object of the treaty was to effectively intervene in breaches of the prohibition of torture. If a special interest would be required, this could not be achieved: therefore, the treaty parties must have meant for the obligations to be *erga omnes partes*.

\textsuperscript{237} Belgium argued that the question was not about standing based on nationality (diplomatic protection), thus somewhat linking the case with the Barcelona Traction judgment, see ICJ Reports 2012, p. 448, para. 65.

\textsuperscript{238} Ibid., p. 449, para. 66.

\textsuperscript{239} Ibid., p. 450, para. 70.

\textsuperscript{240} Application Instituting Proceedings, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), filed in the Registry of the Court on 19 February 2009, General List No. 144, p. 11, paras. 7 & 8.

\textsuperscript{241} Ibid., pp. 444–445, paras. 53–55.

\textsuperscript{242} Ibid., p. 445, para. 55.

\textsuperscript{243} Final report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), A/CN.4/L.844, p. 5, para. 14. It should be noted that in his Separate Opinion Judge Abraham, as well as Judge ad hoc Sur in his Dissenting Opinion, were pessimistic that the Court would have found that the obligation *aut dedere aut judicare* has been established as custom (Sur even went to conclude that the “silence” of the Court in the matter served as evidence that the obligation had not become custom), see Separate Opinion of Judge Abraham in ICJ Reports 2012, paras. 21, 24–25, 31–39, and Dissenting Opinion of Judge ad hoc Sur, p. 610, para. 18. However, two other judges pointed out that the Court simply stated that it had no jurisdiction, with no reference to the possible customary character of the obligation, see Separate Opinion of Judge Cançado Trindade, p. 544, para. 143 and Separate Opinion of Judge Sebutinde, p. 604, paras. 41–42. It was further pointed out by the ILC that the customary character of *aut dedere aut judicare* may differ depending on what internationally wrongful acts it is claimed for, see Final report of the Working Group, p. 5, para. 14.
international law, and consequently the Court did not state anything on the suggested *erga omnes* character of *aut dedere aut judicare*.\(^{244}\) Thus for example considerations on the *jus cogens* character of the prohibition of torture\(^{245}\) or if obligation may derive from other obligation if the latter is *jus cogens* (as *aut dedere aut judicare* supposedly is in the realm of CAT\(^{246}\)) were not necessary in this context.

Yet the Court made a reference to the Barcelona Traction dictum when it applied *erga omnes partes*. The confusion created by the reference is well shown by the questions raised by Mexico in the Sixth Committee concerning the work of the ILC on the obligation to extradite or prosecute in the aftermath of the 2012 judgment by the ICJ. Mexico suggested assessing the relation between the said obligation with *erga omnes* obligations and *jus cogens*, with analysis on three questions:

“(a) in respect of whom the obligation exists; (b) who can request extradition; and (c) who has a legal interest in invoking the international responsibility of a State for being in breach of its “obligation to prosecute or extradite”.\(^{247}\)

The request and question clearly show that reference to Barcelona Traction dictum and *erga omnes* raise the questions if the obligation is owed to *all* States, can *all* States request extradition, and can *all* States be held to have a legal interest in protection against breaches of obligations to prosecute or extradite, or are these preserved only to treaty parties of the CAT.

The ILC answered Mexico’s request:

“The statements of the International Court of Justice in this regard in Belgium v. Senegal must be read within the specific context of that particular case. There, the Court interpreted the object and purpose of the Convention against Torture as giving rise to “oblig-

\(^{244}\) Of course, as shown by the Barcelona Traction dictum, nothing would have prevented the Court from making such statement regardless if it is directly claimed for by the applicant or respondent.

\(^{245}\) The *jus cogens* status of the prohibition of torture is usually agreed on, see e.g. *Prosecutor v. Anto Furundžija*, International Criminal Tribunal for the former Yugoslavia (ICTY) 1998, Trial Judgement, IT-95-17/1-T, paras. 153–157, and *Wet* 2004. See also Johnstone rightly pointing out that “[i]t would be a rather stretch” to consider the obligation to extradite or prosecute to be *jus cogens*, in *Johnstone* 2014, p. 220.

\(^{246}\) Galicki proposed in his Fourth Report on draft article 4 that “[t]he obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom”, see p. 24, para. 95, Draft Article 4(3). However, “the draft article was not well received”, see Final report of the Working Group, p. 4, para. 10, and ILC Report A/66/10, pp. 276–277, paras. 320–326.

\(^{247}\) Final report of the Working Group, p. 10, para. 30.
gations *erga omnes partes*, whereby each State Party had a “common interest” in compliance with such obligations and, consequently, each State Party was entitled to make a claim concerning the cessation of an alleged breach by another State Party. The issue of *jus cogens* was not central to this point. In the understanding of the Working Group, the Court was saying that insofar as States were parties to the Convention against Torture, they had a common interest to prevent acts of torture and to ensure that, if they occurred, those responsible did not enjoy impunity.”

This seems to clearly point that the case did not concern *jus cogens or erga omnes*, but clearly distinct *erga omnes partes*. However, the ILC went on to state that “[o]ther treaties, even if they may not involve *jus cogens* norms, may lead to *erga omnes* obligations as well. In other words, all States Parties may have a legal interest in invoking the international responsibility of a State Party for being in breach of its obligation to extradite or prosecute”, thus immediately using the term in a confusing manner suggesting that *erga omnes* obligations may derive from treaties, or that *erga omnes partes* are *erga omnes*. Terminology used by international bodies and scholars should be more consistent than this, and when one discusses *erga omnes partes* without suggesting that it is also *erga omnes*, this should be defined clearly in that context.

### 3.3.3 Erga Omnes Obligations as Rules of Customary International Law

The notion by the Court in the Barcelona Traction dictum that *erga omnes* obligations may derive from “general international law - - [or] international instruments of a universal or quasi-universal character” has understandably led to confusion on the sources of *erga omnes*. However, the fact that the Barcelona Traction decision was not based on any particular treaty but on general rules on the treatment of aliens and their distinction from *erga omnes* rules, as well as ICJ jurisprudence on the matter in overall, show that Court refers to *erga omnes* obligations as customary rules. Customary obligations may of course be, and often are, also recognized in treaty law, which however serves as a further evidence of their acceptance as general international law. General international law, on the other hand, applies in principle to all States. Custom is thus less consensual than treaties, and “cannot therefore be the

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248 Final report of the Working Group, p. 11, para. 31. See Article 31(1) of the VCLT on “object and purpose” interpretation.


subject of any right of unilateral exclusion”, bearing in mind that States may effectively oppose to a certain rule of customary law.

Although erga omnes obligations are usually conceptualized as deriving from custom, if the possibility of jus cogens norms deriving from “general principles recognized as law” is accepted, also these principles have erga omnes effect, since jus cogens are necessarily erga omnes. However, since the theory of general principles is still undeveloped, and the source is rarely applied in international law, this master’s thesis will focus on customary erga omnes. This requires defining what custom is and how it emerges.

Article 38(1)(b) of the ICJ Statute states that the Court shall apply, inter alia, “international custom, as evidence of a general practice accepted as law” when deciding on a dispute submitted to it. It was further recognized by the Court in Continental Shelf Case, that “- - the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States”. Thus, customary international law is understood to be formed by two elements: state practice and opinio juris of States. Making these generalizations should involve evaluation of whether the practice is fit to be accepted and is in truth generally accepted as law.

\begin{footnotes}
\item[252] It is usually accepted in international law that during the formation of the customary rule, State may effectively oppose by persistent objection of being bound by that rule, see Crawford 2012, p. 28. There is also a controversial concept know as subsequent objector, see Ibid., p. 29, but it is not possible for State alone change its mind on custom: a substantial group of States must agree, and a new rule of custom starts to form, from which States may then object from by the concept of persistent objector. It goes without saying that such process is very slow. As can be seen, there is an intrinsic tension in the concept of custom: it is less consensual than treaties in that it can bind without express consent, but consent, or “acquiescence” is required in its formation. As pointed out by Koskenniemi, the differentiation between custom and treaties on their consensual nature seems to leak, as treaties seem to also have at certain situations objective applicability, see Koskenniemi 2006, p. 407. However, e.g. the concept of objective regime (chapter 3.2.1) is controversial, and the general rule is that treaties do not include objective applicability. The issue, however, deserves closer scrutiny, yet cannot be discussed further in this thesis because of length restriction.
\end{footnotes}
The Court has stated further requirements for the establishment of custom: uniformity, consistency and generality. State practice has to reach a certain limit of uniformity, and irrelevant of the period of time that has passed, State practice – including of those States whose interests are specially affected – has to be both extensive and virtually uniform during that time period in the sense of the provisions invoked, and should show a general recognition that a rule of law or legal obligation is involved.\(^{257}\) Complete uniformity is not required, but substantial uniformity is.\(^{258}\) Further, the Court’s case law suggests that perfect consistency is not required: practice does not need to be universal for all States to be bound by it; “general” practice suffices.\(^{259}\) This means that a State is bound by international rule even if it has not itself actively participated in the practice in question or deliberately acquiesced in it: there is no need to prove the individual consent of a State to it.\(^{260}\)

State practice may consist of any action by a State or someone part of its apparatus, for example military action, official proclamations, spoken declaration by a State head or diplomatic protests, if the action is public.\(^{261}\) However, some suggest that it may be necessary to restrict such a broad definition, for example to behaviours respecting a particular issue that amounts to direct action by – or has a direct effect on – the State whose behaviour is in question, which would leave out certain actions by State officials which do not create direct commitments to the State.\(^{262}\)

Settled state practice must also show opinio juris, referred to as the subjective element or sometimes the “psychological element”.\(^{263}\) *Opinio juris* is the belief of a State of what it

\(^{257}\) ICJ Reports 1969 p.3, at p. 43, also recognized by *International Law Association* (ILA) 2000, p. 8, working definition n. i.

\(^{258}\) *Crawford* 2012, p. 24. The Court applied this when it refused to accept the existence of a 10-mile rule for the closing line of bays on the grounds that the practice was not substantial enough, see *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, ICJ Reports 1951, p. 116, at p. 131.

\(^{259}\) *ILA* 2000, p. 24 & 8, working definition n. ii.

\(^{260}\) Ibid., working definition n. iii. The ILA also noted that “[t]his is also generally the position taken by States, and there have been no substantial challenges to this proposition”, see p. 24.

\(^{261}\) *Mendelson* 1999, p. 204 & *ILA* 2000, p. 15. However, these examples do not form the complete list of accepted actions.

\(^{262}\) *Weisburd* 2014, p. 303. Weisburd gives as an example in relation to border disputes “state representative’s vote in favor of a non-binding resolution in some international body taking a position on a border dispute to which the voting state was not a party would have no effect on that state, and would therefore not count under this definition.” The debate usually relates to UN General Assembly resolutions, as they are legally non-binding for States, and States often do not vote with a view to create law, see *Schwebel* 1979, p. 302. However, at the same time, General Assembly resolutions are hard to ignore, at least to the extent that it may show a majority opinion in issue areas of grave importance, especially if there is a clear consistency over time.

considers to be legally mandated by international law, instead of simply by a moral obligation. The role of the opinio juris seems to be that of a “sliding scale”; “[a]s the frequency and consistency of the practice decline in any series of cases, a stronger showing of an opinio juris is required.” Conversely, “a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.” Thus, it seems, the duration of the practice does not have to be long, and for example in rules relating to airspace and continental shelf custom has emerged quite quickly. In fact, there has been academic endeavours towards a concept of instant custom for example in relation to space law or times of fundamental change in the international plane.

All this may seem like forming a clear concept: all that needs to be done is showing State practice and opinio juris to determine a rule of customary international law. However, actually doing this would be a “herculean task”, and it can be contested if a Court ever really goes through all relevant State practice to determine the existence of custom. This is especially clear in those cases where the Court has emerged a rule as custom with what seems non-existent justifications. Even more complicated is determining the existence of opinio juris. Some writers have even suggested that the psychological element of opinio juris is not required. This is partly because of the conceptual circularity of the definition of custom:

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264 It was stated in North Sea Continental Shelf that settled State practice “must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation”, ICJ Reports 1969, p. 44, para. 77. A similar notion, without a reference as opinio juris (sive necessitatis) can be found in the classic PCIJ Lotus judgment, see S.S. Lotus (France v. Turkey), PCIJ Series A, No. 10, September 7th, 1927, p. 28.


267 See e.g. Cheng 1998. Also, as worded by Cassese, “[t]hus, for instance the norm concerning the free use of outer space took shape as soon as the first spacecraft was launched”, in Cassese 1999, p. 796.

268 See e.g. Scharf 2014. However, instant does not usually mean literally instant, but “very quick” suffices, which on international plane – on which custom has traditionally taken decades if not centuries to develop – seems like an instant. The concept of instant custom, however, is somewhat controversial.

269 Bodansky 2010, p. 198.

270 For example, in Corfu Channel, the Court simply stated that “[i]t is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent”, without presenting any evidence on State practice or opinio juris, see ICJ Reports 1949, p. 28.

271 Crawford 2012, p. 25, footnote 29, referring to works of Paul Guggenheim and Hans Kelsen. See also Mendelson 1999, p. 292.
after all, States often act according to what they consider to be the law, thus showing *opinio juris*: yet the acts are therefore subsequent to existence of *opinio juris*, but the only way to determine the existence of *opinio juris* is through examination of actual State practice.

To answer this, arguments based on different stages in the development of customary rules have been laid out. As mentioned above, it may be argued that in times of fundamental change a rule of customary rule may be formalized in an “instant”, at least when combined with the reaction of other States to that event. When such thing cannot be said to have happened, but States still consider it to be economically, politically and morally needed to act, even in contrary to international law, one may talk about *opinio necessitatis*, where *opinio juris* has only partially formed, and complete *opinio juris* is not required at the outset. The ILA seemed to accept this line of thought when it suggested that *opinio juris* should be removed from the absolute criteria of formation of custom; the role of *opinio juris* is simply to point what practice should count towards the formation of custom, and is only sometimes required.

It further stated that “[p]art of the confusion may be caused by a failure to distinguish between different stages in the life of a customary rule. Once a customary rule has become established, States will naturally have a belief in its existence: but this does not necessarily prove that the subjective element needs to be present during the formation of the rule.”

But what is the significance of these conceptual issues in a study on environmental *erga omnes*? First, as we next turn focus on the identification of *erga omnes* obligations, the identification of customary rules has great significance in that relation: obligations which follow the material approach (chapter 3.4.3) need to be distinguished from “ordinary” customary

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272 Cassese 1999, p. 796. In the environmental field, there is the theoretical possibility that some environmental problem evolves into a global disaster, and in that case, it can be argued that the requirement of State practice becomes completely obsolete: *opinio juris* emerges instant custom. This issue relates also to the topic of environmental *jus cogens*, which will be discussed in chapter 4.2, although this kind of speculations are not given considerable attention in this thesis.

273 Ibid., pp. 797–799.

274 ILA 2000, p. 34–35. Similar view is backed by PCIJ *Lotus* judgment and ICJ *Nicaragua* judgment, see PCIJ Ser. A, No. 10, p. 28 and ICJ Reports 1986, pp. 97–110, paras. 183–209. However, one needs to be vary when assessing the possible significance of *opinio necessitates*. As noted by Mendelson, “*opinio necessitates* - - can play a part in the law-creating process, even though extra-legal necessity and reasonableness are not themselves sufficient to make law”, Mendelson 1999, p. 271.

275 ILA 2000, pp. 7 & 9–10. The argument of the ILA is that when the ICJ has referred to *opinio juris* as a necessary element of custom, the Court has done so in *special situations*, where the conduct is too ambiguous to constitute a precedent capable of contributing to the formation of a customary rule, or where it is necessary to distinguish practice which does not contribute, see Ibid., p. 33–35.

276 Ibid., p. 7.
rules, and if the identification of custom itself is a challenge, it must have consequences on the identification of *erga omnes* obligations; it thus may not be a surprise that the material approach to *erga omnes* is usually associated with well-known *jus cogens* norms. Secondly, for those obligations which are purely non-bilateralizable, deduction deems it *de rigeur* that the binding customary character of such obligation also means that it must be enforceable *erga omnes*. Thus, identification of custom is crucial. This topic is discussed in chapter 3.4.4 and extensively applied in relation to environmental *erga omnes* in chapter 4.3.

Thirdly, despite extensive theoretical debates, it is still the “two-element” approach of State practice and *opinio juris* which enjoys the recognition of States and international judicial bodies.\(^{277}\) However, it has been suggested in the ILC’s ongoing work on identification of customary international law that the weight of each element depends on the field of international law, or the type of the rule.\(^{278}\) Thus it seems, based on the above discussion, that it is somewhat justified to conclude that in the formation of pronouncedly important customary rules, such as *erga omnes*, the weight of *opinio juris* increases, and less evidence from State practice is required. However, it is still important to remember that ultimately the existence of *opinio juris* is also determined through practical evidence.\(^{279}\) The problem discussed above that it is hard, if not impossible, to orchestrate a thorough examination of State practice to determine the existence of an customary rule, was recognized by the ILC, and Special Rapporteur Wood discussed possibilities for making the information more readily available.\(^{280}\) Since for the purposes of the present thesis a complete review of all existing State practice would be an absurd task, chapter 4.3 will mostly focus on existing case law.

### 3.4 Identifying Obligations *Erga Omnes*

#### 3.4.1 General Remarks and Outline

Now that it has been established that obligations *erga omnes* emerge from general international law, we need to observe how *erga omnes* obligations may be identified. The ICJ has

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\(^{277}\) See e.g. Third Report of Wood, p. 7.

\(^{278}\) This was accepted by the ILC discussing the fourth report of Wood, see ILC report A/71/10, Conclusion 3, p. 76. Further, what is also important to notice is that the practice of international organizations may also serve as evidence, see Conclusion 4(2).

\(^{279}\) E.g. draft conclusion 10(2) by the ILC states, that “[f]orms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.” Failure to react over time may also serve as evidence (conclusion 10(3)), see ILC report A/71/10, p. 77.

\(^{280}\) See Fourth report of Wood, Chapter IV, pp. 13–19.
been quite cautious in its remarks on obligations *erga omnes*. Also, State practice is even more indefinable on how obligations actually enter the category of *erga omnes*.

This ambiguity has resulted in academic division, as will be seen below in this chapter. However, some criteria can be drawn from the ICJ jurisprudence, and others can be deduced from existing knowledge on international law and the nature of *erga omnes*.

This chapter presents the main theories conceptualized in attempt to identify obligations *erga omnes*. These theories are roughly divided into two categories, the structural approach and material approach. Furthering from these theories, this study will also present how purely non-bilateralizable customary rules may become *erga omnes*.

### 3.4.2 Structural Approach

In the Barcelona Traction dictum, the Court drew a distinction between obligations which are owed to the international community as a whole, and obligations which are owed reciprocally to another State.

For the latter, there has to be a material or tangible injury or obligation broken towards the State which wishes to invoke the responsibility of the wrong-doing State.

The proponents of the structural approach draw their deduction from this distinction made by the Court. Since there is “an essential distinction” between said obligations, and diplomatic protection was referred to in the case by its reciprocal nature, obligations *erga omnes* must be non-reciprocal or non-bilateralizable. As pointed out by Tams, this is certainly true if it is the consequences of the breach that are concerned, since all States have legal interest in the protection of obligations *erga omnes*. However, the proponents of structural approach are not concerned with the consequences when they consider to whom the obligation is owed, but its *performance*. In this approach (in its strictest form), the fact that any State may invoke the responsibility of another State breaching an *erga omnes* obligation derives because the obligation has to be performed towards all States, without need to consider the importance of the obligation.

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281 Tams 2005, pp. 117–118.
283 Ibid., para. 35.
284 Tams 2005, p. 129.
The approach is closely connected to the structural analysis of multilateral obligations by Fitzmaurice discussed in chapter 2.3.2. To reiterate, the whole analysis is based on the distinction between reciprocal and multilateral (interdependent and absolute) obligations. Human rights and environmental obligations are usually absolute in character, as the duty of their performance in one State is not dependent on the performance of other States, and those endorsing structural approach often stress that by applying this approach, these obligations would qualify as *erga omnes*. However, Tams argues that the structural account is inadequate for identifying *erga omnes* obligations. First, in its most rigid form it ignores the reference to the importance of the obligation by the Court when it has discussed *erga omnes*.²⁸⁵ In its moderate version the approach seems to simply import the main problem of the material account, i.e., how important the obligation in question has to be.²⁸⁶ Secondly, Tams argues, similarly to *de Hoogh*, that when the structuralists argue that the mere requirement for an obligation to be *erga omnes* is its non-bilateralizable nature (i.e. it is non-reciprocal), they ignore the fact that e.g. the prohibition of aggression (expressly referred to by the Court in the Barcelona Traction dictum) is perfectly bilateralizable.²⁸⁷ And it is true that the prohibition of aggression is different from the other obligations given as examples in the dictum or the Court’s later jurisprudence: however, this is only because it is considered *jus cogens*, and structure has nothing do with what obligations may be regarded as peremptory; the only requirement is its acceptance and recognition as *jus cogens* by States.²⁸⁸ Therefore, *jus cogens* norms (which all of the *erga omnes* obligations referred to by the Court are or at least are usually considered as such) follow perfectly the material approach by emphasizing the importance of the obligation. Also, the argument that the other obligations in the dictum “can at least give rise to (bilateral) responsibility between pairs of States”²²⁸⁹ seems justified: as illustrated by Tams,

“if State A “engages in genocidal conduct *vis-á-vis* the population of State B, responsibility – irrespective of any general legal interest of other States, or of the rights of the individual victims of the act – arises primarily between the perpetrator (A) and the State of nationality of the victims (B). If the perpetrator State (A) is also responsible towards

²⁸⁵ Ibid., p. 131. See also *de Hoogh* 1996, p. 54.
²⁸⁶ Tams 2005, p. 133. Material account is discussed in the next chapter.
²⁸⁸ See chapter 3.5.1 on *jus cogens* and its identification. However, as will be shown in chapter 3.4.4, this problem can be transcended in case of certain obligations of customary international law.
other States (C-Z), this cannot be explained as a consequence of an alleged non-reciprocal structure, but must be based on other arguments.”

Finally, Tams argues that if the mere non-bilateralizable character of the obligation was the requirement for an obligation to be *erga omnes*, it would make all “absolute and interdependent obligations - - valid *erga omnes*.” However, Tams uses obligations emerging from *treaty law* to argue against a concept which applies to obligations of *general international law*, and thus fails to confidently exhaust the applicability of the structural approach. Firstly, he points out that giving interdependent obligations “*erga omnes* status would be quite unnecessary” as they are “subject to a special legal regime”, since all States bound by the interdependent obligations may invoke the responsibility of the wrongdoer State. Tams admits that this is not a problem if *erga omnes* is only applied to absolute obligations and interdependent are regarded as a separate category. Yet the argument on “interdependent *erga omnes*” seems invalid in itself, at least in the contemporary understanding of international customary law. Custom is thought to be universally binding or binding on “parties” in case of regional or bilateral custom. Custom is binding on States which have not effectively objected to the rule when it emerged: thus, consent is given through acquiescence, and retrospective objection is not allowed. If we would accept interdependent customary rules, then the above would not apply. States could effectively object to the rule by simply infringing it. Such arrangement would not be custom, but a tacit agreement, since it is an accepted nature of custom that a breach by a State does not mean that the custom ceases to exist: it remains as an obligation for other States to abide by the rule regardless of a breach by another State: thus, the obligation is not dependent on the performance by other States. Consequently, interdependent obligations do not just “usually arise under treaties”; they do not arise from general international law at all.

290 Ibid., p. 135.
291 Ibid., p. 132, footnote 71.
292 For example, let’s consider a case where Island X has been neutralized by State A and State B, both States committing not to make claims on the area. State B becomes dissatisfied with arrangement and wants to challenge the rule. If the custom was “interdependent”, State B merely has to take its military to the island X and breach the rule. This would, of course, breach the rule, but as the definition goes e.g. in the ARSIWA Article 42(b)(ii), this would “radically - - change the position” of State A, “with respect to the further performance of the obligation”, and consequently the obligation would cease to exist anymore.
293 As pointed out in chapter 3.3.3, State practice does not need to be perfectly consistent.
Tams also argues that structural approach would also make all absolute obligations *erga omnes*, but concedes that it can be argued that absolute obligations are mostly contained in treaties (which cannot be considered to be *erga omnes*), yet points out that Fitzmaurice’s structural distinction of obligations does not depend on the obligation’s formal source.\(^{295}\) However, nothing is forcing one to apply the approach in such a rigid way, and it would be unnecessary, since *erga omnes* obligations do not emerge from treaties. Applying the structural approach to customary rules makes a remarkable difference, as will be shown below in chapter 3.4.4

### 3.4.3 Material Approach

In the Barcelona Traction dictum, the Court also stipulated that all States can be held to have a legal interest in the protection of obligations *erga omnes* “[i]n view of the importance of the rights involved”.\(^{296}\) The material approach focuses on this element of the dictum and to achieve some concreteness to this flexible and ambiguous criterion, there must be a threshold of how important a obligation must be to be considered *erga omnes*. The Court’s jurisprudence offers no definitive answers for this.\(^{297}\) As already listed in the introduction, the Court referred to certain *basic* human rights,\(^{298}\) which seems to point at a restrictive understanding, especially as the Court has been unwilling to admit *erga omnes* status to all human rights.\(^{299}\) Therefore, as a starting point, *erga omnes* is usually linked to *jus cogens* (peremptory norms of international law) to approach the requirement of material importance. This topic is discussed in chapter 3.5.

As noted by Tams, there is also the question of “which aspects of the legal relations arising from obligations *erga omnes* need to be important”, which he calls “the point of reference”.\(^{300}\) First point is that the Court simply refers to the importance of the right involved,

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295 Tams 2005, p. 133.
297 In addition to wordings similar to the Barcelona Traction dictum, the Court has, for example, referred to the right to self-determination “one of the essential principles of contemporary international law”, see ICJ Reports 1995, p. 102, para. 29. Further, Judge Schwebel has referred to “basic tenets” of international law to describe the required importance, see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, ICJ Reports 1984, p. 169, at p. 198.
298 See paragraph in relation to footnote 20 of this thesis.
300 Ibid., p. 136.
not the intensity in which it is infringed, which means that in a given case the consequences of the infringement do not have to be serious, i.e. it is the right which decides and not the effects of the infringement. Second point is that erga omnes is not functionally conditioned: the erga omnes status of a right is not dependent on other rights of protection, effectively meaning that if a right is also protected by treaty law, that does not make the right’s erga omnes status disappear.

The material approach seems to be fit as an identifier of erga omnes character of certain obligations. For example, if a rule becomes jus cogens, it becomes also necessarily erga omnes. Any obligation may become erga omnes if it is accepted and recognized as jus cogens. Yet this thesis does not exclude the possibility of obligation which are important enough to be erga omnes without being jus cogens. However, as will be shown next, the material approach is not necessarily the only way an obligation may emerge as erga omnes.

3.4.4 Hybrid Approach

It seems to be a misconception to assume that it is only and strictly either the importance or non-bilateralizable nature of an obligation which determines its erga omnes character. There is a special case for the non-bilateralizable nature of an obligation and its source. The issue is briefly referred by Tams when he states that “[o]ne might object that absolute obligations are usually contained in treaties, and thus would not qualify as obligations erga omnes. But this is not necessarily the case, as the structural criterion upon which the distinction is based does not depend on an obligation’s formal source.”

There seems to be no reason for the assumption that the treaty law basis of the structural criterion by Fitzmaurice excludes its possible strict application to customary rules, since even if their source differs, the performance of the obligations follows similar patterns. Therefore, let’s assume a purely non-bilateralizable obligation of customary law. Such rule would be the assumed obligation to not harm areas beyond national jurisdiction. I argue that

301 As Tams notes, the Court made a similar observation in East Timor (Portugal v. Australia), ICJ Reports 1995, p. 90, at p. 102, para. 29.
302 Tams 2005, p. 137.
303 See chapter 3.5.2.
304 See chapter 3.5.3.
305 The hybrid approach gets its name for the fact that it does not exclude the material approach or the “jus cogens path” to erga omnes status for obligations, and also because the subjective valuation (importance) acts as a necessary element in this approach too, as will be shown below.
306 Tams 2005, p. 133.
said obligation would acquire *erga omnes* character when it becomes part of customary international law. This is determined by a simple deduction based on necessity: as responsibility is the necessary corollary of an obligation, they cannot exist a *legal* obligation with *legal* responsibility if the responsibility cannot be invoked by anyone. Thus, if a purely non-bilateralizable obligation becomes a rule of customary international law, that notion has to contain the built-in assumption that any States can invoke the responsibility of the wrong-doing State, assuming that the litigant State is bound by the rule. If an obligation does not contain a responsibility when breached, it is not law at all: “no responsibility, no law” and unless it has this status, it is “entirely hollow” and thus not an obligation at all.

*Erga omnes* is exactly linked to the secondary rules of international law, that is, the consequences of a breach: it has the implicit notion of creating a certain consequence or responsibility. Sure, there are numerous rules in international law which may not be enforced *de facto* effectively – and yet international law is still called “law” – but if the rule cannot be enforced *de jure*, then the rule or system would certainly not be law. Non-bilateralizable obligations are thus identified as *erga omnes* by their binding customary character. Of course, a State may be specially affected by, for example, the maritime pollution taking mostly place in the high seas, but that effect does not belong under the main obligation of “not harming the high seas”: the specially affected State would invoke the responsibility of the wrongdoing State as *directly injured State*, not because the high seas was polluted. Other States would remain their right to invoke the responsibility of the wrongdoing State *erga*

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307 This is ascertained in the ARSIWA (considered as a reliable codification of general international law on State Responsibility, at least at that point of time) Article 1 (and in the Articles in overall), and it has been confirmed in the jurisprudence of international courts, e.g. quite recently by the ITLOS in Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, at p. 44, para. 144.

308 I.e. it has not successfully objected to the customary rule when it emerged.

309 *Pellet* 2010, p. 4.

310 See Judge Donoghue using this deduction in relation to *erga omnes partes* in ICJ Reports 2012, p. 587, para. 11, although in that exact case there would exist an obligation, but it would be *de facto* hollow. See also *Wolfrum* 2011, p. 1143, stating that without an adequate international body or general standing, community interests are “nothing but empty shells.”

311 It needs to be underlined that what is done in this study is not to try to deduct the existence of any customary obligations from its *de facto* or *de jure* need of protection, since that is not how customary rules emerge. Further, it is another topic if the international law should provide effective *de facto* protection for certain obligations to avoid “self-contradiction” with the suggested importance given to the obligations, see e.g. Separate Opinion of Judge Petrén, p. 303 in ICJ Reports 1974, discussing the self-contradiction between lack of jurisdiction of human rights protection. These questions of jurisdiction and admissibility are not discussed here, as the question is about *de jure* need of effective enforcement for the obligation to be law.
omnes, if the obligation is recognized as having such status. Further, there is always the possibility of pollution strictly taking place in areas outside national jurisdiction.

Tams also points out that “there is little evidence that existing absolute [non-bilateralizable] obligations of general international law outside the human rights or environmental field are considered to be valid erga omnes.” This may be true, but if said absolute obligations were of purely non-bilateralizable character and they are not erga omnes, then they are neither binding custom, but rather courtesy that cannot be enforced.

The notion is somewhat supported by the statement by then-Special Rapporteur Crawford in his Third Report on State Responsibility. There he stated on the topic “Victimless” breaches of community obligations, that

“[i]f there are no specific, identifiable victims (as may be the case with certain obligations erga omnes in the environmental field, e.g. those involving injury to the “global commons”), and if restitution is materially impossible, then other States may be limited to seeking cessation, satisfaction and assurances against repetition. Again, however, these are significant in themselves, and any State party to the relevant collective obligation should be entitled to invoke responsibility in these respects.”

Of course, Crawford does not state that States “necessarily” have standing in relation to victimless breaches, although they “should”. Moreover, and again rather confusingly, erga omnes is first discussed, but then “any State party” seems to refer to erga omnes partes. However, this may be best read as comprising both erga omnes and erga omnes partes obligations.

Article 48(1)(b) seems to contain a structural understanding of erga omnes, since “the obligation breached is owed to the international community as a whole”, without reference to

312 Tams 2005, p. 133.
314 Another explanation may be that the passage refers to the fact that even customary erga omnes obligations may not concern all States, since States can effectively object to being bound by one if the norm is not jus cogens.
importance requirement. However, the commentaries to the ARSIWA recognizes the problem that some *erga omnes* obligations are bilateralizable.\textsuperscript{315} The hybrid approach also responds to this slight inconsistency by presenting a valid explanation for how non-bilateralizable obligations may emerge as *erga omnes*.

Somewhat similar logical deduction was used by the ICJ in the *Prosecute or Extradite* judgment, although in that case the deduction related to treaty interpretation and the object and purpose of the treaty,\textsuperscript{316} and not as such if the provisions of the treaty were binding on treaty parties or not. In that case, the Court therefore deducted that the treaty parties must have intended for the treaty to be enforced effectively: without *erga omnes partes*, “in many cases no State would be in the position to make such a claim”, and as a consequence, the relevant obligations must have been meant to be *erga omnes partes*.\textsuperscript{317} Applied to customary law, the same can be formalized as follows: if States consider being bound by an obligation they must have meant for it to be also effectively enforceable. Also, a somewhat similar “necessity” argumentation was discussed by the Court in the *South West Africa*, although it was dismissed in the 1966 judgment by the majority, representing strictly restrictive approach to standing.\textsuperscript{318}

\textit{Giorgio Gaja} stated in relation to environmental *erga omnes* that

“[o]n the logical plane, in the absence of such provision, the responsible State could avoid fulfilling any obligation of reparation when there is no injured State. No State would in fact be able to invoke the responsibility of the wrongdoing State. In the case of heavy pollution of the high seas or unlawful harm to the ozone layer, the responsible State would have an obligation of reparation that would not be owed to any other State and would therefore remain theoretical. This would also imply that the obligation not to pollute the high seas and not to cause harm to the ozone layer would also be theoretical, for they could easily be breached without consequences.”\textsuperscript{319}

\textsuperscript{315} ILC Commentaries on the Draft ARSIWA, p. 127, para. 10. See also Johnstone 2014, p. 219.

\textsuperscript{316} See ICJ Reports 2012, pp. 449–450, paras. 68–69.

\textsuperscript{317} Ibid, para. 69.

\textsuperscript{318} ICJ Reports 1966, p. 45–47, paras. 85–87.

\textsuperscript{319} Gaja 2010, p. 961.
As noted by Johnstone, Gaja clearly applies structural approach here.\footnote{Johnstone 2014, p. 223. She also points out that Gaja participated as a judge in the Questions Relation to the Obligation to Prosecute or Extradite, which also applied structural approach (to a treaty), as discussed above.} However, the above quote only presents the problem, but does not consider the link between the non-bilateralizable and customary characters of obligations.

What weakens the concept of hybrid approach is indeed its theoretical nature: at present, support for it in the Court’s jurisprudence is lacking. However, I assume that this is because the Court has preserved its \textit{erga omnes} recognition to obligations which are also \textit{jus cogens}, since as pointed out above, for them the \textit{erga omnes} character is clear.\footnote{See chapter 3.5.2. As for the argument presented in chapter 2.2.3, that the Court needs opportunities (cases) to pronounce on legal questions, the Court has certainly had opportunities to pronounce on this topic, yet it has not done so, probably because the customary character of certain environmental non-bilateralizable obligations remains unestablished. See especially chapter 4.3.2 on this.} What strengthens this theory is the fact that in the end, it is still ultimately, at least in principle, the importance of the obligation which determines its \textit{erga omnes} character: not all suggested non-bilateralizable “obligations” are \textit{erga omnes} since not all of them are rules of binding customary international law. If they develop to have that status, it develops because States consider the non-bilateralizable obligation to be important enough to gain their interest and be the object of their actions or conscious omission of action. Thus, it is close to what Johnstone discusses on structural and material approaches in relation to maritime law:

“If a structural account is accepted, then there is no reason to treat such abuses of a State’s own maritime zones differently to abuses beyond national jurisdiction (there is no “specially affected” State); if instead a material account is preferred, then the question remains as to whether contemporary international law would hold the obligations of States to protect their own maritime zones and prevent pollution to be of equal gravity to equivalent obligations in areas beyond national jurisdiction.”\footnote{Johnstone 2014, p. 224.}

However, it takes the line of thought further by making a hybrid of the structural and material approaches. Thus, it also answers the defining question stated by Tams that the moderate version of structural approach simply “imports the main difficulty of material approach” in that it still needs to answer \textit{how} important an obligation has to be to become \textit{erga omnes}.\footnote{Tams 2005, p. 133.} Since non-bilateralizable obligations’ \textit{erga omnes} character is determined by their customary
nature, the importance test is determined in the formation of the customary rule: the customary rule emerges through State practice and *opinio juris* related to the value in question, and thus becomes a primary rule of international law which merits an adequate consequence (secondary rule) if breached. Since non-bilateralizable obligation is not owed to any single State, the only stake that States have in this regard is their valuation of the entity in question, for example the climate or the high seas, for it to be owed to the international community as a whole. “Law must be respected *per se*, in itself, not only because of a violation has caused an injury to another State”.

The deduction made here is briefly touched upon by Linderfalk as a necessary implication of the structural approach in his 2011 article on the possible hierarchical superiority of *erga omnes* obligations among non-peremptory law, where he rightly points out that the structural approach does not explain why an obligation *erga omnes* should be necessarily normatively higher in hierarchy than other obligations. However, Linderfalk only repeats the faults of classical structural approach by applying it to all obligations although *erga omnes* obligations only emerge from general international law. As discussed by Linderfalk, *erga omnes* are seen as separate from interdependent obligations and *erga omnes partes*; yet as shown above in this chapter, this fact is explained by the customary character of *erga omnes*, which makes their applicability general (among all States), as opposed to interdependent and *erga omnes partes* treaty obligations, which only apply among parties to the treaty. This only underlines the importance that should be given to categorically distinguishing *erga omnes* from *erga omnes partes* in legal discourse.

Therefore, to reiterate, the importance creating the binding customary character of a non-bilateralizable obligation does not make the obligation normatively greater or of higher hierarchy than other customary obligations. Therefore, in this relation, there is no necessary connection with the structure of the obligation and its normative hierarchy. It is simply different in that States are willing to be bound by the non-bilateralizable obligation as opposed to other non-binding rules of non-bilateralizable character.

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324 See Pellet 2017, p. 233.
325 Linderfalk 2011, pp. 11–12.
326 Ibid., p. 12.
327 See chapters 3.3.2 and 3.4.2.
328 Therefore, the problem of hierarchy only concerns *erga omnes* obligations which are determined through material approach.
Of course, the deduction may be countered by the fact that court proceedings and countermeasures are not the only enforcement mechanisms under international law, and that it may be enforced by international organizations instead of individual States. However, the understanding of customary international law is that it applies generally to all States and exists even if the international organizations ceased to exist: for example, when the League of Nations collapsed, law (especially general) did not disappear. At least in theory, general international law is by definition existing between States irrespective of the prevailing power structure, and therefore for a rule to be part of binding custom, it needs to be enforceable by individual States. Further, such institutional or treaty enforcement mechanisms do not necessarily exclude enforcement through *erga omnes*.\(^{329}\)

3.4.5 Interim Conclusions: Two Patterns of Erga Omnes Identification

As a conclusion, there are two ways in which obligations may become *erga omnes*. First of all, obligation becomes *erga omnes* if it is accepted and recognized as important enough, by, for example, becoming *jus cogens*. The obligations referenced by the Court in the Barcelona Traction fall perfectly in this category. This “*jus cogens* path” applies to both bilateralizable and non-bilateralizable obligations. However, it is not excluded here that an bilateralizable obligation may become *erga omnes* through the material approach even if it is not accepted and recognized as *jus cogens*.\(^{330}\)

Secondly, purely non-bilateralizable obligation becomes *erga omnes* if it forms into a binding rule of customary international law: if it is not *erga omnes*, the responsibility of the State infringing the obligation cannot be invoked by anyone, and the obligation is thus not binding at all. Yet the notion of necessary *erga omnes* character of non-bilateralizable customary obligations must be approached with caution, since the approach has not been explicitly recognized by the ICJ. Secondly, if, for example, a protective obligation towards areas outside national jurisdiction was recognized as customary, there is always the possibility and burden of international law that States may not enforce it *de facto*; yet it is a necessity that there is *de jure* availability of enforcement if the rule is to be recognized as truly binding law.

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\(^{329}\) Tams 2005, p. 304–305.

\(^{330}\) This is discussed in chapter 3.5.3.
3.5 Peremptory Norms (Jus Cogens)

3.5.1 The Legal Basis of Jus Cogens and the Ontological Questions Surrounding it

Jus cogens is an accepted part of international law, as shown by effectively unqualified State recognition and case law of sufficient magnitude.\(^{331}\) Many leave the question there, regardless if they are proponents of natural law or positivist theories: a committed natural law scholar is happy that the States have come to their senses and accepted morality as part of international law, and a positivist is happy since there exists no problem in relation to State consent. However, for the present purposes a brief overview of the underlying philosophy is necessary to understand the outlooks for possible environmental Jus cogens in chapter 4.2, and the “Jus cogens path” for obligations to erga omnes status, as discussed above. The important link between Jus cogens and State responsibility is also illustrated by the inclusion of State responsibility and erga omnes in the work of the ILC on Jus cogens.\(^{332}\)

Article 53 of the VCLT stipulates that

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

Further, Article 64 states that

“[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

Jus cogens norms form one of the most discussed topics in international law.\(^{333}\) At the time of its codification, these norms garnered a lot of attention, and high hopes were put into them

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\(^{331}\) See for example First report of Tladi, pp. 28–30, paras. 48–49, discussing State practice and opinions, and pp. 25–28, paras. 46–47 for case law and individual opinions of judges of the Court.

\(^{332}\) ILC report A/71/10, p. 300 & pp. 303–304.

\(^{333}\) As noted by Daniel Costelloe, it would be an underestimate to call the writings on Jus cogens merely “important body of scholarly work”. The field is so full of varying contributions that it would be impossible to give a comprehensive overview of it here. However, as Costelloe notes, this does not mean that further study is neither important nor justified, see Costelloe 2017, p. xv (preface).
to provide effective protection for what are considered to be the most fundamental values – or perhaps more adequately “fundamental principles”\textsuperscript{334} – of the international community.\textsuperscript{335}

\textit{Jus cogens} may be seen as the international application of an element that is identifiable in many national legal systems in the distinction made in contractual law between \textit{jus dispositivum} and \textit{jus strictum}, concepts which are based on Roman law: the former may be derogated from by individuals in their contractual relations, but derogation from the latter is void to the extent of the purported derogation.\textsuperscript{336} Similar conclusion was achieved in international law through a more complex route, as it was originally conceived by early Spanish legal theorists that the whole authority of international law derived from immutable natural law, namely from god, with inevitable identification of non-derogable (or peremptory) norms, which consequently led to \textit{Hugo Grotius} to even state that there existed Law of Nature that even god himself could not change: evil is always evil and two times two is four.\textsuperscript{337}

However, through the codification movement in the late eighteenth and early nineteenth century Europe,\textsuperscript{338} international law began to be conceived in strictly positivist terms as deriving from the consent of States, which seemed to make the existence of peremptory norms impossible. This positivist requirement was overcome – at least formally – when peremptory norms were recognized in the VCLT, connected to overall development towards common value base after the World War II. The formulation in Article 53, however, was accused of being too vague, and thus liable to lead to substantial differences of opinion along political, social and economic lines.\textsuperscript{339} The concept and its codification in the VCLT also lack clear criteria of identification, which has contributed to the practical shortcomings of the concept

\textsuperscript{334} Since the existence of \textit{jus cogens} is arguably not dependent “on a subjective assessment of values”, see ILC report A/71/10, p. 303, para. 126.


\textsuperscript{336} Crawford 2013, p. 378–379. See also Dissenting Opinion of Judge Tanaka, ICJ Reports 1966, p. 298.

\textsuperscript{337} \textit{Grotius} 1625, Book I, Chapter I(X)(5) (p. 155 in Tuck 2005) and Crawford 2013, p. 379

\textsuperscript{338} For a summary of this development in Europe see e.g. Wencelas J. Wagner, 1953, p. 340–345.

\textsuperscript{339} Crawford 2013, p. 379.
with still mostly theoretical potential. This has led to many attempts at establishing such criteria or framework who may determine how *jus cogens* emerge.\(^{340}\)

The concept clearly has its historical roots in natural law and using natural law as the theoretical basis of *jus cogens* would seem logical since the concept clearly has a connection to values and morality. Therefore, it comes as no surprise that the concept has emerged overly positive wishful thinking especially among some human rights lawyers of bringing morals to international law.\(^{341}\) Some natural law theorists argue that the whole point of *jus cogens* is to answer to the threat of *relativism* and *consensualism*.\(^{342}\) Yet, as stipulated in Article 53, *jus cogens* is a norm *accepted and recognized* by the international community of States as a whole, which seems to indicate a consensual character of the norm. Consequently, the fact that for example human rights and environmental protection can be seen – at least to some extent – as fundamentally moral conceptions have created an ontological problem of choosing between positivist and natural law approach to *jus cogens* and international law in overall.\(^{343}\) Even the ICJ and its judges, as well as other international courts, have been heavily divided on the issue, basing the concept both on natural and positive law depending on the case.\(^{344}\) Therefore, although it may be argued that natural and positive law need each other to make their arguments on law valid,\(^{345}\) it is *jus cogens* around which the tension between the two manifests perhaps in its strongest in international law.

The legal basis of *jus cogens* is often considered to be in customary international law. But this cannot be the whole truth, since customary law is ultimately consensual with concepts such as persistent objector,\(^{346}\) which would seem to make *jus cogens* some kind of “super-custom” as it is universally applicable.\(^{347}\) Consequently, there have been attempts at basing

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\(^{341}\) This is not to say that human rights do not deserve protection and promotion.

\(^{342}\) See e.g. *Dörr – Schmalenbach* 2011. The topic of *universalism* and *relativism* of values deserves its own study of more philosophical orientation and will not be discussed in more detail in this study.

\(^{343}\) *Rubin* 2001, p. 265 *et seq*.

\(^{344}\) For a summary on relevant case law and opinions, see First Report of *Tladi*, pp. 33–34, paras. 54–55.

\(^{345}\) *Koskenniemi* 2006, pp. 308 and 323, as referred to by First Report of *Tladi*, p. 37, para. 59.

\(^{346}\) E.g. France, in relation to the current work of the ILC on the topic, referred to its persistent objection to the concept, see the French statement *GA Sixth Committee A/C.6/71/SR.20*, p. 16, para. 78.

\(^{347}\) First Report of *Tladi*, pp. 41–42. However, Tladi notes that what is said in his first report may change in future reports after “more detailed study” and “is therefore provisional.” This universal application would also seem to make regional or *jus cogens inter partes* (whom at least theoretical possibility is argued for by e.g. *Byers* 1997, p. 234–236) impossible. However, some members of the ILC stated that the possibility of regional *jus cogens* should not be excluded *a priori*, referencing same “Inter-American Commission on Human Rights”
the concept on the third source of international law, the general principles recognized by civilized nations.\textsuperscript{348} In domestic systems (both common and civil), principles serve as “filling the gaps” of consensual legislation and judges are usually granted the power to apply these principles. The idea behind the concept in international law according to one theory is that when a certain principle is recognized by “civilized nations” (which as a term is way outdated), the ICJ may apply it as a source of international law. \textit{Jus cogens}, then, as consisting of general principles, is based on this underlying “consciousness” of the international community, derived from national laws.\textsuperscript{349} Obviously in this sense its effect would be anything but merely “filling the gaps”, and international courts have applied them as an autonomous source of international law.\textsuperscript{350}

And basing peremptory norms on general principles seems logical, since \textit{jus cogens} seems to require some independence from State consent, and therefore cannot be purely positivist. Further, this approach would overcome the problem of natural law as “immutable”, something divine or otherwise unchangeable and ever-existing. After all, VCLT Article 64 clearly indicates that new \textit{jus cogens} rules may emerge. By basing the concept on national consciousness, the principles would be relatively independent from State consent since these domestic principles are not fully consensual legislation, but could emerge and change over time.\textsuperscript{351} Yet, the concept of general principles has rarely been applied, and many things surrounding their nature remains unclear: for example, in \textit{East Timor}, the ICJ referred to self-

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\textsuperscript{348} See e.g. Report of \textit{Lauterpacht} p. 155, para. 4, referring \textit{inter alia} to Separate opinion of Judge Schücking in the \textit{Oscar Chinn} case (Britain v. Belgium, 1934, PCIJ, Ser. A/B, No. 63, p. 150), that “[t]he Court would never - - apply a convention the terms of which were contrary to public morality.” (Schücking’s separate opinion also serves as an example of early discussion on peremptory norms, see especially p. 148). See also \textit{Janis} 1988. See also ICJ Reports 1951, p. 23.

\textsuperscript{349} For example, the Rome Statute of the International Criminal Court (UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90) Article 21(1)(c) refers to, as applicable law, “general principles of law derived by the Court from national laws of legal systems of the world”, which, according to \textit{Alain Pellet}, corresponds to general principles of law recognized by civilized nations meant in Article 38(1)(c) of the ICJ Statute, see \textit{Pellet} 2002, p. 1076 and \textit{Vázquez-Bermúdez} 2017, p. 227, para. 9.

\textsuperscript{350} \textit{Vázquez-Bermúdez} 2017, p. 228, para. 12.

\textsuperscript{351} This line of thought is thus close to the fiduciary theory forwarded by \textit{Criddle and Fox-Decent}, who argue that State is dependent on its people, and under the “fiduciary obligation to respect the agency and dignity of the people subject to state power” and consequently “compliance with \textit{jus cogens}”, see \textit{Criddle – Fox-Decent} 2009, p. 347. However, as noted by \textit{Tladi}, this theory does not explain unambiguously e.g. the \textit{jus cogens} rule against genocide, which does not flow from States’ fiduciary obligation towards its own nationals, as the obligation is owed to any human being regardless of State borders, even though \textit{Criddle} and \textit{Fox-Decent} argue that States have this fiduciary obligation to any individual subject to (any) state power, see First report of \textit{Tladi}, p. 37 and \textit{Criddle – Fox-Decent} 2009, p. 359. This discussion rings a bell, as it is close to the structural discussion
determination of peoples as “one of the essential principles of contemporary international law”, and consequently also *erga omnes*.\footnote{ICJ Reports 1995, p. 102, para. 29.} but it is unclear if the Court meant general principles in Article 38(1)(c) of the ICJ Statute when it made this reference.\footnote{Vázquez-Bermúdez 2017, p. 229, para. 14. Because of these uncertainties, the ILC is planning on including general principles to its working programme similarly to other sources, i.e. treaties and customary international law, see ILC Secretariat A/CN.4/679/Add.1.}

The unclear status and substance of *jus cogens* brought about in August 2014 the ILC to first add the topic of peremptory norms to its long-term programme of work.\footnote{ILC report A/69/10, p. 265.} The ILC noted that “[n]otwithstanding its inclusion in the Vienna Convention, the contours and legal effects of *jus cogens* remain ill-defined and contentious.”\footnote{Ibid., Annex to the Report, Syllabus by Tladi, *Jus Cogens*, para. 3. These uncertainties have emerged arguments that the VCLT Articles on *jus cogens* are effectively empty, or inclusion of any rule deemed important by the author under its umbrella, see Rubin 2001, p. 272.} The result of the work, however far in the future, will hopefully shed some illuminating light on the issue,\footnote{Similarly noted by Finland, representing the Nordic countries, in commenting the inclusion of *jus cogens* in the work of the ILC, see GA Sixth Committee, A/C.6/69/SR.19, pp. 11–12, paras. 85–87.} and as a consequence most probably on *erga omnes* too, since *jus cogens* norms are necessarily *erga omnes*, as demonstrated in the next chapter.

However, as noted by Special Rapporteur Tladi, “it is probably not possible to resolve [the debate between natural and positive law], nor is it necessary”\footnote{First Report of Tladi, p. 30.} and “[w]hat is important for the purposes of the Commission’s work is whether *jus cogens* finds support in the practice of States and jurisprudence of international and national courts.”\footnote{Ibid., p. 25.} The result of the work, however far in the future, will hopefully shed some illuminating light on the issue,\footnote{Ibid., p. 6.} and as a consequence most probably on *erga omnes* too, since *jus cogens* norms are necessarily *erga omnes*, as demonstrated in the next chapter.

With all the surrounding uncertainties, this master’s thesis takes the approach that was suggested by Special Rapporteur Tladi, that to qualify as *jus cogens*, the rule must be a norm of

\begin{itemize}
\item on obligations in this master’s thesis, i.e. to whom obligations are performed, and problems that the structure presents in conceptualizing them.
\item ICJ Reports 1995, p. 102, para. 29.
\item Vázquez-Bermúdez 2017, p. 229, para. 14. Because of these uncertainties, the ILC is planning on including general principles to its working programme similarly to other sources, i.e. treaties and customary international law, see ILC Secretariat A/CN.4/679/Add.1.
\item ILC report A/69/10, p. 265.
\item Ibid., Annex to the Report, Syllabus by Tladi, *Jus Cogens*, para. 3. These uncertainties have emerged arguments that the VCLT Articles on *jus cogens* are effectively empty, or inclusion of any rule deemed important by the author under its umbrella, see Rubin 2001, p. 272.
\item Similarly noted by Finland, representing the Nordic countries, in commenting the inclusion of *jus cogens* in the work of the ILC, see GA Sixth Committee, A/C.6/69/SR.19, pp. 11–12, paras. 85–87.
\item First Report of Tladi, p. 30.
\item Ibid., p. 25.
\item Ibid., p. 6.
\item Second report of Tladi, p. 47, para. 94.
\end{itemize}
general international law, and can emerge from either customary law or be a general principle of law.\textsuperscript{361} This leaves many questions open, especially in relation to general principles and their nature,\textsuperscript{362} but for the time being, suffices for the purposes here.

Further, the double-consent criteria, established by Hännikäinen based on Article 53 of the VCLT, will be applied similarly to the ILC. The approach establishes that a norm is identified as \textit{jus cogens} when it is a) accepted as a rule of general international law, and b) recognized as \textit{jus cogens} by the international community of States as a whole.\textsuperscript{363} The “acceptance and recognition” requirement makes the identification of \textit{jus cogens} unique from for example ordinary customary rules in that \textit{jus cogens} has to be accepted as a rule which cannot be derogated from.\textsuperscript{364}

3.5.2 Are \textit{Jus Cogens} Necessarily \textit{Erga Omnes}?

\textit{Jus cogens} – although also having its own mysteries as described in the previous chapter – has been often used as a measure to narrow down the contents and scope of \textit{erga omnes}. As was written above in relation to \textit{jus cogens}, they mostly protect important values of international community, and thus the somewhat substantive overlap with \textit{erga omnes} is apparent.

It is usually concluded that \textit{jus cogens} rules are necessarily \textit{erga omnes}.\textsuperscript{365} Firstly, there are numerous circumstantial evidence, such as Judge Ammoun’s separate opinion to the Barcelona Traction judgment where he explicitly referred to \textit{jus cogens} in elaborating on community interests\textsuperscript{366} and similarity to the description of the concepts as well as the fact that the four examples of \textit{erga omnes} obligations in the dictum had been used as examples of \textit{jus cogens} norms in the Vienna Conference.\textsuperscript{367} Perhaps the strongest argument is, however, in relation to the VCLT that the concept of \textit{jus cogens} itself includes a general interest: if only

\textsuperscript{361} Second report of \textit{Tladi}, pp. 45 & 46, draft conclusions 4(a) and 5(2) & (3).
\textsuperscript{362} \textit{Tladi} even noted after comments by the ILC that it is “possibility that general principles could form the basis of norms of jus cogens, and that it would not be appropriate to exclude that possibility.” He also concluded that “proposed draft conclusion 5 was sufficiently soft, so as to connote that this was only a possibility and that the practice in that regard was minimal”, see ILC report A/72/10, p. 202, para. 204.
\textsuperscript{363} Hännikäinen 1988, p. 12, and ILC Report A/72/10, pp. 192–193, draft conclusions 6(1) and (2). Further, the ILC suggested, that “[a]cceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of jus cogens. Acceptance and recognition by all States is not required”, see p. 193, draft conclusion 7(3).
\textsuperscript{364} ILC Report A/72/10, p. 193, Draft conclusion 8(2).
\textsuperscript{365} See e.g. Byers 1997, p. 236, \textit{Tams} 2005, pp. 139–140.
\textsuperscript{366} See e.g. ICJ Reports 1970, p. 325, para. 34.
\textsuperscript{367} \textit{Tams} 2005, p. 140.
the treaty parties have interest, why should there be *jus cogens* preventing them from concluding a treaty at all? Finally, a strong body of State practice and *opinio juris* seem to support the idea that *jus cogens* are necessarily *erga omnes*.

Interestingly however, the VCLT itself does not include a general standing for all States although it is the most important codified source of *jus cogens*, even if many States pushed for including such provision in the treaty. Yet it seems that the drafters of the convention viewed that the fact that *jus cogens* deemed treaties void was strong enough in the formation of treaties, which the VCLT concerns, as concluding of a contrary treaty would not in itself comprise a breach of an obligation *erga omnes*.

Therefore, since any rule “accepted and recognized” as such can be *jus cogens*, this is a quite straight-forward way of identifying *erga omnes* obligations. However, there is still at least theoretical possibility that an obligation can be considered *important enough* to have *erga omnes* status without being *jus cogens*, which I will briefly discuss next.

### 3.5.3 Dispositive Erga Omnes

Finally, it needs to be answered if *erga omnes* obligations consist only of *jus cogens* rules. This seems to not be the case: for example, during the drafting of ARSIWA, some members of the ILC stated that “although all *jus cogens* norms were by definition *erga omnes*, not all *erga omnes* norms were necessarily imperative or of fundamental importance to the international community.” Further, *jus cogens* and *erga omnes* concern different things: the former is preventive in nature, precluding conclusion of treaties which are in conflict with *jus cogens*, whereas the latter concerns responding to a treaty without necessarily affecting the validity of an obligation. Thus, at least in theory, it cannot be concluded that preventive

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368 Ibid., p. 148–149.
369 A comprehensive look at examples can be found in Tams 2005, p. 149–151.
370 Ibid., p. 146–147.
371 Ibid., p. 148.
372 ILC report A/53/10, p. 69, para. 279. Many contemporary statements by State also confirm this understanding of the two concepts as separate, see e.g. Poland stating that “[a]ll norms of *jus cogens* were *erga omnes* obligations, but the converse was not true. *Erga omnes* norms clearly entailed important obligations, but that did not mean that they also had *jus cogens* status”, in GA Sixth Committee A/C.6/71/SR.26, p. 8, para. 57. See also France in GA Sixth Committee A/C.6/71/SR.20, p. 16, para. 77. This is one of the reasons why the ILC’s work on *jus cogens* will examine the relation between the two in the future, see ILC report A/71/10, p. 303, para. 129 & p. 304, para. 135.
373 Tams 2005, p. 152.
non-derogability is the necessary condition of *erga omnes*, and this applies to both bilateralizable as well as non-bilateralizable obligations.

If an obligation is *erga omnes* without being a norm *jus cogens*, three things has to be taken into consideration. First, the persistent objector concept of customary international law applies. States thus have an effective way of not becoming bound by an emerging *erga omnes* obligation. Secondly, States may derogate from it by, for example, concluding a treaty. States will then of course be still bound by the customary *erga omnes* obligation towards those States which are not party to the derogating treaty. Thirdly, when there is a violation of an *erga omnes* obligation consisting in the implementation of a treaty, said treaty could remain intact.\(^\text{374}\)

\(^{374}\) *Tams* 2005, p. 152.
4 ENVIRONMENTAL ERGA OMNES

4.1 Preliminary Notions and the No-Harm Rule

The assessment on environmental *erga omnes* here will focus mostly on the no-harm rule, as it is one of the oldest and most established rules of international environmental law relating to transboundary and global environmental issues, the sphere where environmental *erga omnes* is most likely to emerge.\(^{375}\) This is also to limit the discussion to a reasonable length. Other environmental rules and principles introduced in the jurisprudence of international courts are also discussed in relation to their suggested customary character. However, the no-harm rule should be seen as an “umbrella concept” of due diligence in this relation, in which case the various obligations discussed here relate to the preventive duties that States (may) have towards the environment, in and outside their national jurisdiction. For example, a State may breach the no-harm rule if it does not conduct Environmental Impact Assessment (EIA) if it anticipates there to be likely and significant transboundary damage.\(^{376}\) In the context of *erga omnes*, the focus will be particularly on areas outside national jurisdiction (chapter 4.3.2) although the possible *erga omnes* status of transboundary no-harm rule and environmental harm taking place in a State’s own territory are also discussed (chapter 4.3.3).

The required threshold of due diligence in each individual case may depend on the individual environmental obligation. However, this complex question relates to the primary rules of international environmental law, and for the present purposes it is enough to make the preliminary assumption that the required level can be confidently established for each environmental obligation.\(^{377}\) Similarly, the materialization of the required threshold of “potential harm” is assumed here, although the contemporary threshold seems to be that of “significant harm”.\(^{378}\)

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\(^{375}\) No-harm rule is used instead of the perhaps more established principle to avoid confusion with the general principles of international law.

\(^{376}\) Johnstone 2014, p. 175.

\(^{377}\) It would also probably take a thesis of its own to establish the thresholds for each obligation. However, see Johnstone 2014, pp. 205–207 for a brief overview of the topic.

\(^{378}\) See ibid., pp. 207–209 for discussion on how the threshold may be ambiguous and possibly vary between different obligations (for example the no-harm rule and EIA), as well as how acts of private operators may be causally attributed to a State.
Thus, the line of thought in these chapters follows the discussion done almost *ad nauseum* in international environmental law on the existence of customary rules, by discussing relevant case law of international courts and tribunals. However, this is because of necessity: firstly, as shown in chapters above, the existence of *erga omnes* obligations is intertwined with the customary character of the obligation either by necessity or by the character acting as possible evidence of the importance given to the obligation. Secondly, it is impossible to do a thorough examination of State practice in this master’s thesis, or even by a lawyer at all, as suggested by Bodansky; this is even if, as pointed out by the ILC and ICJ, State practice is the only source from which a reliable account on the existence of custom can be confidently drawn from. However, as noted by Viñuales, judicial practice plays an eminent role in the recognition of international law, and can be relied on in relevant studies. Thirdly, the interesting question of general principles as the adequate source for environmental principles is also too much for master’s thesis with addition to the discussion that has been already done in this study: in this study, general principles are mainly applied as a possible source for *jus cogens* norms.

As stipulated in the *Trail Smelter Arbitration*, the no-harm rule imposes that no State has the right to use or permit the use of its territory in such a manner that causes harm in the territory of another State. The rule was also referred to in the *Lac Lanoux*, although in a quite

379 A rather critical view on how international environmental lawyers base their arguments on this discussion starting from *Trail Smelter* to Stockholm and Rio Declarations and finally *Use or Threat of Nuclear Weapons* Advisory Opinion as well as statements and documents by authoritative international bodies, is given by Bodansky 2010, p. 200.

380 Ibid., p. 198.


382 Viñuales 2017, p. 72. See also Koskenniemi 2006, p. 397.

383 General principles as a possible source of *jus cogens* was discussed in chapter 3.5.1. Environmental *jus cogens* is discussed in chapter 4.2.

384 *Trail Smelter Arbitration (United States v. Canada)*, 3 RIAA, p. 1905, at p. 1965. In this famous dispute, sulphur dioxide fumes produced by the zinc and lead smelter owned by the Consolidated Mining and Smelting Company of Canada (Cominco) operating in British Colombia of Canada caused damage to forests and crops in surrounding areas, including across the border in the Washington state of the United States. The dispute was submitted to an arbitration tribunal, which gave its decision in 1941, stipulating, *inter alia*, that “under the principles of international law - - no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.” This statement has been considered to represent one of the first and most important evidence of the establishment of the no-harm rule or *sic utere tuo* standard in international environmental law, forbidding a state from using its territory in a why which causes damage in another state’s territory, see e.g. Michelson 1994, p. 221. *Sic utere tuo* comes
restrictive manner. In *Corfu Channel*, the Court confirmed the rule as belonging to general international law and thus its applicability as decisive law, although this was not pronounced in environmental context. This early case law shows the restrictive understanding on the value of the environment at the time of the decision, mainly linked to individual rights of States. This rather reciprocal nature of early environmental law is also well shown by the 1978 ILC work on International Liability, which took transboundary approach to environmental harm.

In the modern applications of the no-harm rule, namely the *Stockholm Declaration* Article 21 and the Article 2 of the *Rio Declaration*, the principle has been given a more expansive substance. Article 21 stipulates:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (italics added.)

Here the focus is not anymore only on State territories and rights, but also on areas outside their jurisdiction. A formulation as this clearly implies a heightened value of the environment to the international community and responsibility owed to all, since no State is harmed by

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385 The Arbitrator held *inter alia*, that “assuming there is a principle prohibiting the upstream State from altering the waters of a river in such a way as to seriously harm the downstream State, in any event such principle would not apply in the present case, to the extent that it has been admitted by the Tribunal - - that the French project does not alter the waters of the river Carol.” (as Translated by Viñuales 2008, pp. 236–237.) The case seemed to take waters mainly as a resource to be exploited by States, see Viñuales 2008, p. 237, and for the case itself (in French) *Affaire du Lac Lanoux (Spain v. France)*, 12 RIAA, p. 281, at p. 308.

386 The case concerned a minefield in Albanian territorial waters, from which some British warships suffered damage when they were passing through the Corfu Channel. The Court listed among "general and well-recognized principles - - every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” See ICJ Reports 1949, p. 4, at p. 22.


390 Rio Declaration Article 2 is effectively the same but adds “developmental policies” together with the environmental policies mentioned in Stockholm Declaration Article 21. Article 3 of the Convention on Biological Diversity (1760 UNTS 79; 31 ILM 818 (1992)) and in the 8th recital of the UNFCCC preamble (771 UNTS 107; 31 ILM 849 (1992)) also include the same language with Article 2 of the Rio Declaration.
an action that is directed to, for example, the high seas.\textsuperscript{391} As pointed out by Viñuales, it is difficult to infer the formulation in the declarations from previous case law.\textsuperscript{392} The Nuclear Tests cases could have provided an excellent opportunity for the Court to give authoritative statement on the more expansive no-harm rule: the Stockholm declaration Article 21 was, after all, expressly referred to by the Australian Solicitor-General R.J. Ellicott.\textsuperscript{393} However, as noted above, the Court decided that the dispute had become moot when France had announced its plan on ending the Nuclear Tests after the 1974.\textsuperscript{394}

In any case, some writers discussing environmental applicability of \textit{erga omnes} have thus taken these declarations as suggesting a structural move from reciprocal responsibility to \textit{erga omnes}.\textsuperscript{395} And the declarations indeed form evidence of a trend moving from reciprocal to common interest approach not only in international environmental law, but in law of State responsibility in overall. However, as was discussed above in chapter 3.4.2, strict structural approach to \textit{erga omnes} is inadequate since it is applied source neutrally, and as thus includes obligations which are definitely not \textit{erga omnes}. It is \textit{de rigueur} to have a certain threshold of importance before an obligation reaches the status of \textit{erga omnes}. For bilateralizable obligations this happens through their importance as compared to other customary obligations. For non-bilateralizable customary obligations, the importance is the requirement for its development into binding custom: if States value, for example, the common areas enough, practice and \textit{opinio juris} will develop which will necessarily result in the obligations having an \textit{erga omnes} character. Therefore, if there is a customary rule towards the protection of global commons, it should be seen as a consequence of the fact that we have come to value the environment and consider it to be important enough to be protected beyond national jurisdiction and without direct harm to States: the fact that common areas cannot protect themselves should not be seen as evidence of \textit{erga omnes per se}. Thus, statements in support of environmental \textit{erga omnes} based on the structure of the obligation and “the need of protection” are merely statements of individual valuation or evidence suggesting importance of

\textsuperscript{391} However, the Stockholm and Rio are only \textit{declarations}, which aim to guide States.

\textsuperscript{392} Viñuales 2008, p. 240.


\textsuperscript{394} See chapter 3.2.3.

\textsuperscript{395} See e.g. Shigeta 2012, p. 177.
the obligation to States: there cannot be an approach to *erga omnes* “without value judgment”, of at least implicit kind.\(^{396}\) Therefore, to underline and reiterate, this study does not state that since prohibition to pollute areas outside national jurisdiction is structurally non-bilateralizable, it *is* consequently *erga omnes*; rather, I state that there is no such obligation if it is not *erga omnes*.

Therefore, if the broader understanding of the no-harm principle was to be recognized by the Court in a concrete case, it would mean that the obligation then *needs* *erga omnes* character to be protected effectively. The following discussion should be seen in this light. However, before turning to environmental *erga omnes* itself, we have to establish what the no-harm rule in fact requires for States to do.

Preventive obligations such as the no-harm rule may be related either to *result* or *conduct* of the act in question. For example, if the result was the determining factor for the obligation, the only requirement for the responsibility to emerge would be the realization of the result, for example harm to the environment. On the other hand, obligations of conduct are of *due diligence* nature. They do not require absolutely for the harm to be prevented: States are merely responsible to take all possible measures to prevent the result. Responsibility only emerges if a State does not take these measures. The prevention of harm discussed in this chapter is an obligation of “due diligence to take preventive measures, not to prevent any significant transboundary harm at all.”\(^{397}\) This is supported by the fact that the ILC Articles on State Responsibility do not include the notion of “damage” as a requirement for the responsibility to emerge: the act merely needs to be wrongful under international law.\(^{398}\)

The due diligence nature of the no-harm rule determines for which kind of conduct a State may be responsible for. States and private operators under its jurisdiction pollute all the time and cause transboundary harm. Yet States do not become *responsible* for such “daily” acts: pollution is lawful under international law to a certain extent. Acts, where required threshold

\(^{396}\) Cf. ibid., pp. 180–181.

\(^{397}\) *Johnstone* 2014, p. 201. Of course, individual “sub-duties” of States when they are fulfilling the obligation of prevention may be obligations of result. For example, if a State does not establish the required monitoring apparatus to ensure that it acts in due diligence, said obligation is of result: there either is or is not such apparatus, see Ibid., p. 202. This does not change the “obligation of conduct”

\(^{398}\) However, as pointed out in the ILC Commentaries on the Draft ARSIWA, it is the primary rule which determines in each case if there is a need for tangible damage; see footnote 35 in chapter 1.5.
of damage materializes, but which are still lawful fall under the heading of liability or “responsibility for risk”, as codified in the ILC Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities. However, the “day-to-day” pollution does not fall under the heading of either responsibility or liability: sustainable development as a cornerstone of modern environmental law allows for such pollution in order to balance developmental goals with those of environmental origin. The issue what kind of pollution can be seen as “day-to-day” has to be assessed case-by-case, as it relates to the nature of the activities and pollution in question: this is expressly notified in the Draft Articles on Liability, as they apply to “hazardous activities” which involve a risk of causing significant harm (Article 1).

Thus, the fact that the obligation of prevention is an obligation of conduct and not of result means two things. First, if a State does not act in due diligence, and damage is prevented only by mere luck or change, a State may become responsible since it has not fulfilled its obligation. Secondly, even if damage takes place, a State may not become responsible if it has done everything in its power to prevent the result, since in that case the State has done nothing unlawful. However, a State may still become liable for the result: it has done everything in its power, and the result happened because of a lawful act.

However, as stated in Article 1 of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, the Articles “apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.” This means that under contemporary international law, at least as codified in the Draft Articles, States may not become liable for harm that is caused to areas outside national jurisdictions. Thus, in relation to these areas, the only concept that applies is State responsibility for internationally wrongful acts.

399 As appearing in ILC report A/56/10.
400 This was confirmed, for example, by ITLOS in the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area Advisory Opinion, ITLOS 2011, at p. 58, para. 178.
401 This may be because at the time, after the Nuclear Tests became a “frustrated case” i.e. the Court did not give decision on the main question, the existing case law only concerned transboundary pollution, see Viñuales 2008, pp. 241–242. However, it may be telling that this stand point was not changed after the environmental development of the 1990’s –as described briefly in chapter 4.3.1 – when the Articles were drafted in the 2000’s.
Before turning to discuss the existence of dispositive environmental \textit{erga omnes}, the possibility of environmental \textit{jus cogens} must be dealt with. That is because if an environmental rule was to achieve such status, it would be also necessarily \textit{erga omnes}, as shown above.

\textbf{4.2 Environmental \textit{Jus Cogens}}

This study has embarked on the theoretical discussion on \textit{jus cogens} earlier, and although there are uncertainties surrounding the concept, the current stand in international law appears to be that there are two requirements for a rule to be \textit{jus cogens}: a) the norm has to be accepted as general international law, and b) be recognized as \textit{jus cogens}. Further, it should be kept in mind that \textit{jus cogens} is meant as an exception and to be applied only in rare instances.

There is no strong support in State practice or judicial practice for such thing as environmental \textit{jus cogens}.\textsuperscript{402} The closest we have perhaps come to recognizing environmental \textit{jus cogens} was in the ILC draft on State Responsibility in Article 19(3), which included the notion of “international crime”, with the following wording:

Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, \textit{inter alia}, from: - -

\begin{itemize}
\item d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.\textsuperscript{403}
\end{itemize}

Such “serious breach” concerned, according to paragraph 2, “an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international

\textsuperscript{402} This may be because the rules in the field are still in their infancy, see Pellet 2017, p. 234. The recognition of customary environmental law is itself quite recent, as demonstrated here in chapter 4. And as stated above, \textit{jus cogens} is meant to be applied only in exceptional cases, which means that the requirements of valuation and universality are very high.

\textsuperscript{403} ILC Report A/51/10, p. 60. Other crimes listed were a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression, b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination and c) serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.
crime.” According to paragraph 4, those prohibited acts which were not crimes were international delicts. This division to crimes and delicts was based on the extensive work of earlier Special Rapporteur Roberto Ago.404

Although the article referred above is from a ILC Report from 1996, it had been included in the draft work in the exact same wording already in 1976.405 Ultimately the notion of international crimes of States, including the Article 19(3)(d), was not included in the final draft ARSIWA. As noted in the introduction, the final ARSIWA thus talks simply about “internationally wrongful acts”, and the environment is not expressly mentioned anymore.

But why was Article 19(3) dropped? First reason is the terminology of “crimes”. Many States had reservations on this issue.406 They argued, inter alia, that there was no support for “criminalizing public international law”.407 Further, criminal law, as based on domestic systems, usually requires clear and precise language, with such requirements as nulla poena sine lege, and a list of obligations which starts with “an international crime may result, inter alia, from” clearly is anything but precise. Secondly, the Article included peculiar notion of “serious breach”, although most of the individual acts concerned jus cogens norms. Breach of a jus cogens norm seems to be serious in its own right, and it remained unclear what constituted a serious breach of a prohibition which already concerned such fundamental issues.408 Thirdly, the inclusion of exact acts as “crimes” was contrary to the overall philosophy of the ARSIWA, that is, describing the secondary rules of State responsibility leaving for primary sources to establish what is considered to be prohibited under international law.409

Prohibitions of massive pollution of the atmosphere or of the seas were listed in Article 19(3)(d) as “international obligation[s] of essential importance”, among such obligations as prohibition of aggression, right of self-determination, genocide, slavery and apartheid. Many

404 For extensive discussion by Ago on international crimes, see Fifth Report of Ago, pp. 24–54, paras. 72–153.
405 See ILC Report A/31/10, p. 75.
406 Crawford 1999, p. 442, listing examples in footnote 26; at least Austria, France, Ireland, Switzerland, United Kingdom, United States, Germany and Japan had reservations. On the other hand, as pointed out by Crawford on the same page and in footnote 27, Denmark (as representing the Nordic Countries), Mongolia, Italy and Greece were strongly supporting the idea.
407 First report of Crawford, pp. 11–14, containing comments by States on the issue.
408 Gaeta 2010, pp. 423–425. This problem applies equally to the current ARSIWA Articles 40 and 41, applying to serious breaches of jus cogens norms, defining such acts as “gross and systematic”, see Article 40.
of the latter were also listed in the Barcelona Traction dictum. Self-determination was rec-
ognized as *erga omnes* by the ICJ, for example, in the *East Timor*. Apartheid is also linked
to Barcelona Traction through *South West Africa*, as discussed above in chapter 2.3.2. But
what may be more important is that all listed acts, apart from the environmental ones, are
often given as examples of *jus cogens* norms. However, although the ILC discussed interna-
tional crimes in rather close connection to *jus cogens*, it did not absolutely equal the two
with each other.

In overall, it ultimately remained undecided what exactly was the nature of international
Crimes, and their relation to *jus cogens* and *erga omnes*. For example, Special Rapporteur
*Riphagen*, who followed after Ago, took the position that international crimes were the only
internationally wrongful acts that had *erga omnes* quality, whereas Article 19 seemed to
suggest that international crimes were merely a sub-category of *erga omnes* obligations.

However, the fact that the Article was dropped, and that no reference to environment or
massive pollution is made in the commentary on Article 40 in the final 2001 draft ARSIWA
— where it suggests as peremptory norms all the other obligations listed in the original Article
19(3) — is quite telling. Therefore, not too far-reaching conclusions should be made on the
contemporary existence of environmental *jus cogens* norms based on the history of Article
19(3)(d).

Environmental *jus cogens* emerges as an idea in international law from time to time. This
issue was brought up in *Gabčíkovo-Nagymaros Project*, although nothing was ultimately
pronounced by the Court on the existence of such norms. In *Pulp Mills*, Judge Cançado
*Trindade* expressed in his Separate Opinion support for *jus necessarium*, a rather close con-
cept to *jus cogens* related to necessity based on human survival. The issue that States either
allow environmental degradation to a certain extent — even significant — or are sometimes

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410 ICJ Reports 1995, p. 102, para. 29.
411 Yearbook of the International Law Commission, 1976, vol. II, Part Two, p. 120, para. 62. However, it seems
to be clear now that the two were closely connected: when Article 19 was dropped, it was compensated with
"additional consequences" for serious breaches of *jus cogens* norms in Articles 40 and 41.
412 See Fourth Report of *Riphagen* 1983, p. 13, para. 73, stating that “it would seem that, beyond the case of
international crimes, there are no internationally wrongful acts having an erga omnes character.”
414 *Beyerin – Marauhn* 2011, p. 287.
415 See the case discussed in chapter 4.3.3 below.
unwilling to be bound by international environmental law was also notified by the ILC in its discussions on the law of the atmosphere, concerning what it means that *jus cogens* reflects and protects fundamental values of the international community. The ILC considered that “[c]lean air - - was a fundamental value in the environmental domain, yet some States had taken a controversial stance on the Paris Agreement.”\textsuperscript{418} With no further elaboration on the point, the passage – given after noting that State and judicial practice usually invoked *jus cogens* in relation to human rights, the prohibition of the threat or use of force or State immunity – seems to suggest that the protection of clean air does not fulfil the requirement of being “universally accepted and recognized” by States.\textsuperscript{419} Of course, it also seems to indicate that climate protection values, such as clean air, has some potential of being *jus cogens*.

In this relation a statement by France in its statement concerning the work of the ILC on *jus cogens* is also to the purpose:

> “The concept of *jus cogens* must not be conflated with that of fundamental norms; norms could be considered to reflect fundamental values, of a particular region, for example, or possess an *erga omnes* character without being *jus cogens* norms. Including issues of State responsibility in the Commission’s work on *jus cogens* could undermine the balance of the articles on the responsibility of States for internationally wrongful acts.”\textsuperscript{420}

The notion that *jus cogens* should not “be conflated with that of fundamental norms” may polarize people, but the latter notion relating to *erga omnes* and State responsibility may have truth to it. *Jus cogens* may not even be the best way of managing global environmental problems.\textsuperscript{421} However, the valuation of the environment seems to be constantly rising, and


\textsuperscript{419} See also discussion on the failed 2011 request for an advisory opinion by Palau on the no-harm rule and climate change below in footnote 428, evidencing the different opinions by States.

\textsuperscript{420} GA Sixth Committee A/C.6/71/SR.20, p. 16, para. 77. It should be noted that France is perhaps the most outspoken opponent of *jus cogens* in the history of the concept, see e.g. Shelton 2006, pp. 300–302 and First Report of Tladi, A/CN.4/693, pp. 20–21.

\textsuperscript{421} It needs to be reiterated here that the lack of support for environmental *jus cogens* does not mean that environmental obligations are not considered to be important *per se* by the international community. However, things may even be better this way for environmental obligations: as shown above, the concept of *jus cogens* is bedevilled with contradictions related to consent and universality. If *erga omnes* obligations, including environmental obligations, would strictly consist of *jus cogens* norms, they would simply inherit the same conceptual problems.
nothing is preventing the possibility that an environmental prohibition is accepted and recognized in the future as *jus cogens*. 422

4.3 Dispositive Environmental *Erga Omnes* In International Practice

4.3.1 Preliminary Notions on the lack of Practice on Environmental *Erga Omnes*

There has not been an express recognition of environmental *erga omnes* by an international court. In fact, since jurisprudence on *erga omnes* itself is quite scarce – as in the ICJ jurisprudence the status appears to be reserved for exceptionally important values (*jus cogens*) – there has not been recognition of dispositive *erga omnes* in the first place.

*Erga omnes*, although not yet established, has garnered support from authoritative institutions, together with some scholarly examples already presented in chapter 3.4.4. Firstly, the ILC has referred to environmental pollution as an example of possible collective interest protected by *erga omnes* status. 423 Also *Institut de Droit International* considered that “a wide consensus exists to the effect that... obligations relating to the environment of common spaces” was an obligation “reflecting fundamental values” among those which have already been recognized as *erga omnes* by the ICJ. 424

What the international community appears to agree on, at least to some extent, is that for example the atmosphere, high seas and the area, ozone layer and their protection are common concerns, common heritage or pressing concern of humankind. 425 Without entering the discussion on the dimensions of these concepts, 426 what is not agreed on is the connection between common concerns and *erga omnes*, and the customary character of the former, at least

422 This possibility was recognized by Bernd H. Niehaus of the ILC, which “warranted further, detailed study” on the topic of *jus cogens*, see ILC Provisional summary record of the 3323rd meeting, A/CN.4/SR.3323, p. 4.

423 See e.g. ILC Report A/56/10, p. 127, para. 10.

424 Institut De Droit International, Krakow Session 2005, Fifth Commission, Resolution on Obligations and Rights *erga omnes* in International Law, Rapporteur: M. Giorgio Gaja, p. 1. Confusingly, Article 1 considers under the title “*erga omnes*” also what is effectively *erga omnes partes*.

425 E.g. the preambles of the Convention on Biological Diversity (1992) and the United Nations Framework Convention on Climate Change (1992) refer to biological diversity and the climate as common concerns of humankind, and also similarly the Paris agreement (2015) in its preamble acknowledges climate change as a common concern of humankind. See preamble of the UNCLOS recognizing “the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole irrespective of the geographical location of States.” See on the use of the terminology “pressing concern” in relation to the atmosphere; Third report of Murase, p. 2, para. 3 and p. 3. para. 5.

426 See Soltau 2016, pp. 205–206, for a discussion on this.
to its extent in relation to State jurisdiction.\textsuperscript{427} Further, the extent of how, for example, the no-harm rule affects climate change action and greenhouse gas emissions is not agreed on, as shown by the failed advisory opinion request by Palau in 2011.\textsuperscript{428}

Consequently, following chapters will focus on the contemporary understanding on environmental customary obligations. In chapters 4.3.2 and 4.3.3 global environmental questions are divided by their position in relation to State jurisdiction: in chapter 4.3.2 the focus is on entities and areas outside national jurisdiction, whereas chapter 4.3.3 focuses on environmental entities which are under national jurisdiction. Although the distinction between bilateralizable and non-bilateralizable obligations does not follow this division based on jurisdiction, it helps in outlining them, since it is assumed here that environment under national jurisdiction is less likely to achieve \textit{erga omnes} status due to sovereignty issues. This also applies to transboundary pollution, which is a bilateralizable obligation recognized as custom, as will be shown below.

\textbf{4.3.2 Areas and Entities Outside National Jurisdiction}

The middle of the 1990’s was a time of optimism for international environmental law and environmental protection in overall. Rio Declarations had contributed to great development in environmental law, and by including the addition of “areas beyond national control” to the no-harm principle similarly to the Stockholm declaration, its suggested customary character seemed to gain stronger support.\textsuperscript{429} Yet what was still missing in the early 1990’s,

\textsuperscript{427} See e.g. Bodansky – Brunnée – Rajamani 2017, pp. 51–52 discussing the status of common concerns and their relation to \textit{erga omnes}.

\textsuperscript{428} See the Statement by the Honorable Johnson Toribiong, President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly. 30 States supported the request, but it was diplomatically not enough for the GA to forward the request to the ICJ. See e.g. Beck – Burleson 2014 discussing the request. See also Sands 2017 – who at the time of the request of Palau opposed it – explaining why his stance on the matter has changed since.

\textsuperscript{429} The middle of the 1990’s was also significant for international environmental law as it marked the formation of the Environmental Chamber of the ICJ. There was clear optimism with the positive results in the protection of the Ozone Layer, and the somewhat “common good” feeling created in Rio at the UNCED (United Nations Conference on Environment and Development) in 1992 (including great progress in the fields of biodiversity and combating climate change and desertification). However, the Environmental Chambers was never requested to consider a single case, and the ICJ consequently ceased to hold elections for the chambers, effectively ending its work in 2006, see ICJ Website Chambers and Committees. Further, the Rio Summit brought about the creation of the CSD (Commission on Sustainable Development), which has since overlapped with the UNEP (United Nations Environmental Programme), undermining, to some extent, effective and centralized environmental governance at the UN level. However, the situation has gotten better, although there is still considerable overlap still today. See Chambers 2008, pp. 24–43 on institutional cooperation problems between the UNEP and CSD. Thus, the optimism seems to have been slightly exaggerated, although not unjustified, as the focus has anything but shifted away from environmental issues in international relations. As Sands points out, the Court can be proud of its modern environmental jurisprudence, see Sands 2017, p. 131.
rather surprisingly, was the recognition of the no-harm principle *per se* by the ICJ in relation to environmental protection; after all, the *Trail Smelter* and *Lac Lanoux* decisions were given by arbitration tribunals, and *Corfu Channel* did not concern environmental protection or transboundary environmental harm.\(^{430}\)

With the positive developments in the field of environmental protection, the Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons*, requested by the General Assembly in 1994,\(^{431}\) understandably garnered a lot of attention by environmental lawyers. In this Advisory Opinion the Court, in order to answer the question “is the threat or use of nuclear weapons in any circumstance permitted under international law?”,\(^{432}\) aspired to decide “what might be the relevant applicable law” under international law.\(^{433}\) In order to answer if international environmental agreements may serve as prohibiting the use of nuclear weapons, many States had made the reference to the Stockholm Declaration Principles and Rio Declaration Principles and the environment in overall.\(^{434}\) When considering these principles as well as other environmental agreements, the Court made the following statement:

“The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. *The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national*

\(^{430}\) On this point, see Viñuales 2008, p. 243.

\(^{431}\) World Health Organization (WHO) had also requested quite similar Advisory Opinion from the Court a year earlier. However, the Court decided that WHO lacked competence, i.e. the question did not fall under the scope of issues empowered to WHO under its mandate, see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, p. 84, paras. 31–32. See request made to the GA: *Request for Advisory Opinion transmitted to the Court under the United Nations General Assembly resolution 49/75 K of 15 December 1994, Legality of the Threat or Use of Nuclear Weapons, 1994 General List No. 95.*

\(^{432}\) The question by the GA was criticized by some States who claimed that it was against the Lotus principle, in which the question is not if something is permitted under international law, but if it is explicitly *prohibited* by it, thus resting on the principles of consent and sovereignty, see ICJ Reports 1996, p. 238, para. 21.

\(^{433}\) ICJ Reports 1996, p. 239, para. 23.

\(^{434}\) See *Written Proceedings, Comments, Letters and Note Verbales by States*, e.g. Egypt, pp. 29–30, paras. 69–70, Nauru, e.g. at p. 11, Ireland p. 1, paras. 2–3, Solomon Islands, p. 9, para. 30 and Submission 35(C), Sweden, p. 5 and New Zealand, e.g. p. 4, para. 17 and p. 24, para. 101. The UK was quite negative on the customary character of e.g. certain Stockholm Principles, see p. 71, para. 3.115 in Letter by the United Kingdom of Great Britain and Northern Ireland. France objected to the Declarations as applicable legal basis, see the French letter pp. 38–39. See similarly the USA in its letter, pp. 38–40.
control is now part of the corpus of international law relating to the environment.\footnote{435 ICJ Reports 1996, pp. 241–242, para. 29.}

(italics added).

This was a strong statement by the Court in support of the global environment, but most importantly it seemed to recognize as a “general obligation” what is effectively the no-harm principles broadened as stated in Principles 21 and 2. However, the Court then considered that the issue was not if the treaties relating to the protection of the environment were applicable during an armed conflict but if obligations stemming from them were intended to be “total restraint during military conflict.”\footnote{436 ICJ Reports 1996, p. 242, para. 30.} In this respect the Court stated that it did

“not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”\footnote{437 Ibid. As one of its conclusions – and as a disappointment to many – the Court found that “in view of the current state of international law - - the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”, see ICJ Reports 1996, p. 266, para. 105(2)(E). However, the Court also found, \textit{inter alia}, that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”, see para. 105(2)(F).}

As can be seen, the reasoning of the Court is heavily based on treaty law. This did not go unnoticed to judge Weeramantry in his Dissenting Opinion, when he stated that

“[e]nvironmental law incorporates a number of principles which are violated by nuclear weapons. - - These principles of environmental law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the \textit{sine qua non} for human survival.”\footnote{438 ICJ Reports 1996, pp. 502–504. Principles referenced by Weeramantry included “the principle of intergenerational equity and the common heritage principle have already been discussed. Other principles of environmental law, which this request enables the Court to recognize and use in reaching its conclusions, are the precautionary principle, the principle of trusteeship of earth resources, the principle that the burden of proving safety lies upon the author of the act complained of, and the "polluter pays principle", placing on the author of environmental damage the burden of making adequate reparation to those affected. There have been juristic efforts in recent times to formulate what have been described as "principles of ecological security" - a process...}
Thus, as noted by Viñuales, the Courts’ reasoning was rather ambiguous: ICJ simply stated, after all, that the principle was now part of the “corpus of international law relating to the environment”, not general international law, and as a consequence cannot be used as a definitive evidence of recognizing the broadened no-harm rule as binding custom although the Court did refer to it as a “general obligation”.

An earlier case, the 1995 Nuclear Tests II, had a rather ambiguous reference to the customary character of environmental obligations. The case related to the 1974 Nuclear Tests cases, where the Court had found that the dispute had become moot when France unilaterally committed to stop the atmospheric tests which were disputed in the case. However, in this relation the Court in the 1974 judgment seemed to suggest that the case could be re-examined in certain circumstances. New Zealand took the Court’s statement as giving it the right to have the case re-examined if France did not comply with its obligation. When France planned on conducting underground Nuclear Tests in the South Pacific starting in September 1995 as “final series” of nuclear tests, New Zealand filed an application in the ICJ to re-examine the dispute. However, firstly, the Court found that New Zealand was not given a right outside the special procedure stipulated in the Statute of the ICJ for re-examination. Secondly, the Court stated that the 1974 dispute concerned atmospheric tests, whereas the tests planned by France to be conducted in 1995 were underground tests, and the case was thus dismissed.

Yet in that relation the Court also stated that the “[o]rder is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New

\footnotesize{of norm creation and codification of environmental law which has developed under the stress of the need to protect human civilization from the threat of self-destruction.”

\footnote{Viñuales 2008, p. 246.}

\footnote{As pointed out in chapter 3.2.3, the term \textit{erga omnes} was used in that case to refer to the way France committed to this obligation towards the international community, as according to the Court, this was “made publicly and \textit{erga omnes}”.}

\footnote{The Court stated that “[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute”; see ICJ Reports 1974, p. 457, at p. 477, para. 63.}


\footnote{ICJ Reports 1995, p. 306, para. 63 and p. 307, para. 68.}
Zealand and France have in the present instance reaffirmed their commitment.” 444 According to Viñuales, “the general character of the phrase [obligations of States to respect and protect the natural environment] suggests that these obligations, which are not specified, belong to each and every state, irrespective of their having signed a particular treaty.” 445 Although it is true that New Zealand did refer in its application to environmental impact assessment and precautionary principle as having a customary character “derived from widespread international practice”, 446 reading this much into the statement seems like a reach, although it certainly is not excluded that the Court may have also considered customary obligations in that relation. 447 It seems to be a trend in international law that “precautionary approach”, among other due diligence requirements, is making its way into being part of customary law, as noted by ITLOS. 448 However, it is another thing in which sphere these principles work: in transboundary dimension, in State’s own area or also towards areas and entities outside national jurisdiction.

In the original Nuclear Tests case – although the Court did not pronounce on the issue in its majority judgment – two interesting opinions were expressed in relation to erga omnes. To reiterate, the judgment was given in 1974, shortly after the Barcelona Traction and when it was still unclear to what extent the dictum of Barcelona Traction should be seen as a move from restrictive to expansive approach in relation to standing. In his separate opinion, Judge Gros for instance was rather negative on the notion of erga omnes itself, as he saw it concerning political action “disguised” as a legal one. 449 Quite similarly, in his Dissenting Opinion Judge de Castro stated that the Barcelona Traction dictum should be taken “cum grano salis” and was still of the opinion that since the Applicant did “not have its own material legal interest”, the claim that the Court should declare that atmospheric nuclear tests are unlawful by virtue of a general rule of international law was to be dismissed. 450 Even if the

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444 ICJ Reports 1995, p. 306, para. 64.
447 Judge Weeramantry, as usual, was very favourable for the notion of customary obligation towards the protection of the maritime environment even outside national jurisdictions, see Dissenting Opinion of Judge Weeramantry, ICJ Reports 1995, p. 317, at p. 345 onwards. Judge ad hoc Palmer was also favourable for the idea that the principles in the Stockholm Declaration in overall have reached the status of customary international law, see e.g. p. 406, para. 75 of the Dissenting Opinion of Judge ad hoc Palmer, ICJ Reports 1995, p. 381.
448 ITLOS Reports 2011, p. 10, at p. 47, para. 135.
erga omnes character of atmospheric nuclear tests may be still disputed, in contemporary law statements opposing erga omnes per se should be taken themselves (to borrow the great expression) “cum grano salis” even if there are also rather recent restrictive statements towards the concept, such as Judge Oda’s statement that individual States could not invoke the responsibility of another State in relation to the Genocide Convention, since “it is essentially directed not to the rights and obligations of States but to the protection of rights of individuals and groups of persons which have become recognized as universal.”

Another case on nuclear weapons deserves a brief consideration here, as it concerned an obligation which has both transboundary and non-bilateralizable implications. In the recent Nuclear Arms Race the Marshall Islands submitted cases against India, Pakistan and the United Kingdom, accusing them of not fulfilling the obligation relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, as laid down in Article VI of the Treaty on Non-Proliferation of Nuclear Weapons (NPT). As the United Kingdom was the only respondent party to said treaty, the Marshall Island also based its case against all three on the supposed customary character of the obligation. Although by slightly different voting numbers in each case, the majority dismissed the case in the UK litigation by slightest of margins with vote of 8-8 decided by the president of the Court. Noticeably, the majority rather awkwardly departed from previous PCIJ and ICJ case law by resorting to overly formalistic definition on the existence of an “dispute” between the parties, which was heavily criticized in dissenting opinions by several judges, although President Abraham challenged these views in his Declaration.

451 ICJ Reports 1996, p. 595, at p. 626, para. 4. Judge Oda seems to support the school of thought where human rights are somehow separate from other public international law which is still rather State-centred. Therefore, he opposes erga omnes, since genocide, as meant in the Convention, is to be enforced by other measures than vis-à-vis another State.


453 Formalistic in the sense that in considered the existence in relation to the time of the filing of the case, not considering the time after that even if dispute may have definitely raised afterwards, see e.g. Dissenting Opinion of Judge Bennouna (ICJ Reports 2016, pp. 900–906) and Separate Opinions of Judge Tomka (ICJ Reports 2016, pp. 885–899) and Judge Xue (pp. 1029–1033) on the issue. However, many stated in their opinion that the Marshall Islands still had the option of filing a new application if and because there was now clear dispute between the States, see e.g. Separate Opinion of Judge Gaja, p. 1038.

454 See the Dissenting Opinions of Vice-President Yusuf (ICJ Reports 2016, pp. 861–876), Judge Bennouna (pp. 900–906), Judge Cançado Trindade (especially the part starting at p. 917), Judge Robinson (pp. 1063–1092), Judge Crawford (pp. 1093–1107) and Judge ad hoc Bedjaoui (pp. 1108–1133).

455 Declaration of President Abraham, ICJ Reports 2016, pp. 858–860.
Dismission of the case is an important moment in the ICJ jurisprudence for several reasons. First, as stated by Judge Robinson, considering the “existential threat to mankind posed by nuclear weapons”, there may not be “as critically important [treaty] for the work of the Court and the interests of the international community” as the NPT is.⁴⁵⁶ And as discussed already above, nuclear weapons also necessarily pose a threat also to the global environment. Second, it may be another example in the suggested “avoidance of decision” by the ICJ in cases of high political implications, a topic discussed in chapter 2.2.3. In this relation, it is unfortunate news for the recognition of the customary character of non-bilateralizable obligations as they include – almost out of necessity – political questions of heightened importance.

Obligations of disarmament in treaties are interdependent in character, meaning that a breach by one party may radically change the position of another parties in performance of the obligation for their part.⁴⁵⁷ However, as discussed above in chapter 3.4.2, customary obligations may not interdependent: thus, if an obligation in disarmament treaty would achieve customary status, it certainly would not be reciprocal in nature, but absolute, owed to all States equally. Consequently, any State would have the shared legal interest in seeing such obligation observed, which is what the Marshall Islands tried to do in this case.⁴⁵⁸ Since the Court did not consider the substance of the case, it unfortunately did not pronounce anything on the potential customary as well as erga omnes character of the obligation. When we take the potential legal implications discussed here into consideration, it may not be surprising that the ICJ chose not to do so.

Together with nuclear issues, another potential field for environmental erga omnes is the international maritime law. In this relation, an interesting declaration was made by the ITLOS in MOX Plant provisional measures order,⁴⁵⁹ where it stated that the “duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under

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⁴⁵⁷ See e.g. Sicilianos 2002, p. 1135.
⁴⁵⁸ At least for the part of India and Pakistan, whom are not party to NPT. Although Marshall Islands has been certainly specifically affected by nuclear weapons (see e.g. Application Instituting Proceedings by Marshall Islands, 24 April 2014 General List No. 160, p. 10), it was not directly damaged in this case, and therefore the claims against India and Pakistan would have had to be based on erga omnes character of the suggested customary obligation.
Part XII of the Convention and general international law - “,\textsuperscript{460} a statement which was also later referred to in the \textit{South China Sea Arbitration} between Philippines and China.\textsuperscript{461} \textit{Viñuales} discusses these decisions in a way which seems to suggest that the protection of the environment is \textit{per se} an obligation applicable to all. It is right to observe that binding obligations do apply to States also in disputed areas,\textsuperscript{462} since technically that area may belong to \textit{some} State, and thus is, again technically, under national jurisdiction.\textsuperscript{463} In any case, based on the two decisions, it cannot be confidently concluded that the duty to cooperate as part of prevention of pollution of the marine environment, as meant by the ITLOS, is a customary obligation also applying to high seas. Such conclusion would mean that the obligation would have to be also enforceable \textit{erga omnes}.

In another important instance the ITLOS went as far as stating in its 2011 Advisory Opinion that “[e]ach State Party may also be entitled to claim compensation in light of the \textit{erga omnes} character of the obligations relating to preservation of the environment of the high seas and in the Area”, and followed by making a reference to Article 48 ARSIWA (with reference to both paragraphs a) and b), effectively containing \textit{erga omnes partes} and \textit{erga omnes}).\textsuperscript{464} One firstly notices the suggestive and rather weak phrasing of “may - - be entitled”, meaning that the Tribunal did not necessarily state that the obligation in question (compensation for damage) was \textit{erga omnes}. Further, even if the Tribunal also referred to Article 48(b) (\textit{erga omnes}), the phrasing “[e]ach State Party” and the context, that is, the interpretation of Article 139(2) of UNCLOS, show that the Tribunal in fact had in mind \textit{erga omnes partes}, not \textit{erga omnes}. This is further shown by the fact that Article 139(2) constitutes, as pointed out by the

\textsuperscript{460} ITLOS Reports 2001, p. 110, para. 82. This was also referenced in \textit{Straits of Johor, ITLOS Reports} 2003, p. 10, at p. 25, para. 92

\textsuperscript{461} \textit{South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea} (Republic of the Philippines v. People's Republic of China), PCA Case No. 2013-19, Award of 12 July 2016, at p. 376, para. 946. Although MOX Plant concerned transboundary dispute, and South China Sea a dispute on the interpretation and application of the UNCLOS, as provided in its PART XV, and an area technically under the jurisdiction of \textit{some} State, the cases are discussed here instead of the next chapter because of their possible implications on areas outside national jurisdiction.

\textsuperscript{462} See \textit{Viñuales} 2017, p. 74, stating that “[c]abe resaltar que en el caso Filipinas c. China, así como en una ordenanza sobre medidas cautelares y en una opinión consultiva adoptadas por el TIDM la aplicación de las normas consuetudinarias de protección ambiental fue afirmada a pesar de que el título y los derechos soberanos sobre ciertos espacios marítimos fuesen litigiosos. La protección del medio ambiente es un deber objetivo que incumbe a todos los Estados.”

\textsuperscript{463} However, it should be noted that some of the disputed areas belong to the high seas.

\textsuperscript{464} Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at. 59, para. 180.
Tribunal, an exception to general international law. The Advisory Opinion thus again shows the importance of clearly distinguishing between erga omnes and erga omnes partes.

In that same Advisory Opinion the Tribunal however also stated, by referencing Pulp Mills judgment of the ICJ (which had concerned a transboundary dispute) discussed in more detail below in chapter 4.3.3, that “[i]t should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”, and then went on to state that

“[a]lthough aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court’s references to “shared resources” may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to “resource deposits in the Area which lie across limits of national jurisdiction”.”

The language used by the Tribunal is again quite ambiguous, with “may” used several times. This might be because the Tribunal was aware of the implied legal implications of declaring a non-bilateralizable obligation towards areas outside national jurisdiction as customary. If there in fact exists such binding customary obligation in cases of, for example, pollution purely directed to the Area, that obligation would necessarily be erga omnes. However, it seems that nothing can be confidently drawn from the above implication by the Tribunal. Further, none of the varying considerations by the Tribunal on the potential customary character of certain environmental principles suggest that they have erga omnes status.

Protection of living resources in areas outside national jurisdiction also deserve brief consideration, since as stated by the ITLOS in Southern Bluefin Tune Cases “the conservation of the living resources of the sea is an element in the protection and preservation of the

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465 ITLOS Reports 2011, p. 58, para. 178.
466 Ibid., p. 50, para. 145.
467 Ibid., p. 51, para. 148.
468 For example, customary status of the precautionary principle was merely a “trend”, see p. 47, para. 135.
marine environment”. For example, one of the earliest international environmental disputes, the Bering Sea Fur Seals, concerned the US seizing British and British Colombian vessels in the Bering Sea in order to conserve the seals living in the area, which was located in the High Seas. In the similar vein in “Russian Fur Seals” controversy Russia had issued a decree prohibiting the hunting of seals in the high seas contiguous to its territorial seas. In the arbitration one of the arguments made by the US was that it had the right of property or protection based “upon the established principles of common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interest of mankind.” Since the US arguably alone had the power of preserving the seals, they were the “trustee thereof for the benefit of mankind - -“.

Although the Arbitration Tribunal ultimately found that the US did not have this right – as the right was limited only to those areas under national jurisdiction (at the time the three-mile limit) – it is interesting that already over hundred years ago States were ready to argue for conservational necessity outside national jurisdiction on common interest basis.

4.3.3 Environment Under National Jurisdiction
Yet what about environmental obligations which concern environmental entities not outside but under national jurisdiction? Principally States as sovereigns have the right to exploit natural resources under their jurisdiction as they like, if said right has not been limited by

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470 See e.g. the ILC Commentaries on the Draft ARSIWA, p. 81, para. 6 and Malgosia Fitzmaurice 2010, p. 164. In a letter to the British ambassador the Foreign minister of Russia had explained that the decree had been issued because of the “absolute necessity of immediate provisional measures” in view of the imminent hunting season; these measures were of “essentially precautionary temporary character”, “taken under the pressure of exceptional circumstances”, see the letter in British & Foreign State Papers, 1893–1894, Vol. 86, pp. 217–221 (the letter is in French, the translation is from The ILC Commentaries on the Draft ARSIWA referenced here).
471 Fur Seals Arbitration, The Case of the United States before the Tribunal of Arbitration to convene at Paris under the provisions of the treaty between the United States of America and Great Britain, concluded February 29, 1892, p. 85.
472 Ibid., pp. 300–301.
474 See Article 25 ARSIWA on necessity, and the ILC Commentaries on the Draft ARSIWA, pp. 80–84, paras. 1–21. This also an important distinction to countermeasures: necessity is not dependent on the prior unlawful act of another State to act as justifying the otherwise unlawful act of the State which invokes the necessity.
475 In addition to the no-harm rule, the Stockholm Declaration Article 21 and Rio Declaration Article 2 also stipulate that States “have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental [and developmental] policies”.

an agreement or a rule of general international law: for example, the no-harm principle obviously limits how a State may, for example, exploit water resources in its own territory, as shown by case law discussed below. But if there is not any limiting treaty law or transboundary effects to another State, can it be held that for example the obligation to protect the biodiversity inside State’s own territory has reached customary character and consequently the status of *erga omnes*? Or may transboundary harm be conceptualized as *erga omnes*?

In a single case it can be hard to determine if, for example, the protection of the biodiversity is a bilateralizable or non-bilateralizable obligation, as damage under State’s own jurisdiction may also cause impacts in other States, partly because ecosystems do not often follow State borders. Even then this chapter focuses on two theoretical possibilities where this issue can be delimited conclusively: first, harm to environment in States own territory, in which case the obligation is purely non-bilateralizable and its *erga omnes* evolution follows from its development into binding custom. Secondly, the possibility that harm to other State’s environment may – in addition to reciprocal responsibility – also raise responsibility *erga omnes*, in which case the obligation would be bilateralizable, and the *erga omnes* character of the obligation would follow from its importance. To reiterate, transboundary no-harm rule is a recognized rule of customary international law, but it is another thing to say that it is important enough to emerge the legal interest of all States.\footnote{476}{This would possibly require for the rule to evolve into *jus cogens*, as the issue touches so significantly State sovereignty; the valuation of the environment would be indeed intrinsic in that case.}

*Gabčíkovo-Nagymaros Project* case concerned a dispute between Hungary and Slovakia regarding the implementation and the termination by Hungary of the Budapest Treaty of 16 September 1977 on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System and on the construction and operation of the “provisional solution” or “Variant C” by Slovakia, i.e. the damming up of the Danube on Czechoslovak (now Slovak) territory and the resulting consequences for the water and navigation course, regardless of resistance by Hungary.\footnote{477}{ICJ Website Overview of the Case (Gabčíkovo-Nagymaros Project) and ICJ Reports 1997, pp. 17–28, paras. 15–26.} Hungary had suspended and abandoned, after attempted negotiations,\footnote{478}{See Hungary’s take on the preceding developments and negotiations at pp. 49–79 in Memorial of the Republic of Hungary, Vol. 1. See also Chapter 5 for Hungary’s assessment for possible risks and damage of the project. For Slovakia’s view, see its Memorial Vol. 1, pp. 103–186, and the following Chapter V on the Variant C.} its work on the project after concerns were raised about its environmental as well as economic
impacts. The fact that (Czecho)Slovakia continued with its Variant C also contributed, according to Hungary, to the termination.\textsuperscript{479} In the end, the Court decided that Hungary had violated the treaty and had the obligation to continue its part of the project, as the treaty was still in force. However, at the same time, Slovakia should not have put into operation the Variant C during the Court proceedings, although it was entitled to proceed with it.\textsuperscript{480}

For the purposes of the present study, one argument made by Hungary to justify why it had suspended its work and terminated the treaty in 1992 was especially interesting: according to the Court, Hungary had argued that

“subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an \textit{erga omnes} obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C.\textsuperscript{481}"

Slovakia in its reply had argued that

“none of the intervening developments in environmental law gave rise to norms of \textit{jus cogens} that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather “to the language of self-help or reprisals”.\textsuperscript{482}"

This dialogue is particularly interesting in the context of this study. Firstly, Hungary based its argument on \textit{erga omnes} although it clearly had \textit{jus cogens} in mind, as can be also traced from Slovakia’s reply. However, Slovakia on the other hand missed the \textit{de rigueur erga}

\textsuperscript{479} On reasons for termination, see Memorial of the Republic of Hungary, 2 May 1994, Vol. 1, pp. 79–95.

\textsuperscript{480} IJC Reports 1997, p. 82, para. 155. From environmental perspective, the case is also interesting in that it was the first time the Court visited the site of the dispute. This underlines the importance of factual consideration in environmental cases, something the Court, or the whole modern judicial system, is sometimes accused of being weak at, see e.g. Brett 1972, p. 191 on judicial system in overall, and Bettauer 2011, p. 63, being rather critical on the IJC’s role in international environmental law in overall and in relation to complex facts.

\textsuperscript{481} IJC Reports 1997, p. 62, para. 97. In its Memorial Hungary stated, \textit{inter alia}, that “[t]he main principle of international environmental law is that environmental degradation must be prevented. The principle of prevention, which forms the basis of all environmental law, must be considered an \textit{erga omnes} obligation”, see pp. 200–201, para. 6.63 of the Hungary’s Memorial, Vol. 1.

\textsuperscript{482} IJC Reports 1997, p. 62, para. 97.
ommnes character of jus cogens obligations. However, there was no reason to refer to erga omnes, since both countries as parties to the agreement had clear standing or role as litigants in the case.

Consequently, the Court decided that since neither State had “contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty”, the Court did not examine the question if there had emerged an environmental jus cogens norm as meant in Article 64 of the VCLT. One cannot help but to wonder what the Court would have done if Hungary had explicitly contented that there existed environmental jus cogens. However, the Court continued, stating that “newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty” since these provisions were “evolving” by their nature and open to adapt to new international law.483 The Court referred to the Legality of the Threat or Use of Nuclear Weapons paragraph 29 and the “much stronger - - awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis - - since the Treaty's conclusion” to highlight the importance of environmental protection in relation to such treaties.484

The fact that the Court went to discuss jus cogens after Hungary referred to erga omnes tells two things: The legal question was about the termination of the treaty, and thus naturally linked to the question if there existed any jus cogens norms which would render the treaty void, and consequently Hungary’s actions justified. Secondly, although implicit, it may suggest (again) that when the Court has considered erga omnes, it has linked the concept to jus cogens: this would fit well with the argument in this paper that in case of a bilateralizable (or just bilateral) obligation, its “evolving” into having an erga omnes status is through its importance, which possibly requires for it to achieve jus cogens status.

Nevertheless, the case was more about interpretation of the 1977 treaty, with questions how general international law may have affected the interpretation and application of the treaty. The dispute was thus not about concrete impact on the environment and proceedings based

483 Ibid., pp. 67–68, para. 112.
484 Ibid., p. 68, para. 112.
on customary international law on such environmental harm, but on treaty interpretation and if the precautionary principle established the requirement not to continue with the treaty.

Judge Weeramantry was more progressive – again – than the majority of the Court in his separate opinion. Although voting in favour of the majority's judgment, his reasoning was different. He stated, *inter alia*, that sustainable development was not “a mere concept” as referred to by the majority of the Court, but a “principle with normative value crucial to the - - case.”\(^{486}\) He further went on to consider the legal implication of *inter partes* cases involving *erga omnes* obligations by stating, *inter alia*, that

> “[t]he Court, in the discharge of its traditional duty of deciding between the parties, makes the decision which is in accordance with justice and fairness between the parties. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character - least of all in cases involving environmental damage of a far-reaching and irreversible nature. - - There has been conduct on the part of Hungary which, in ordinary *inter partes* litigation, would prevent it from taking up wholly contradictory positions. But can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not. - - We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation. When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.”\(^{487}\)

\(^{485}\) Ibid., p. 78, para. 140.

\(^{486}\) Ibid., p. 88.

Weeramantry clearly links *erga omnes* to importance in these paragraphs. It is here timely to reiterate that the present study does not take stance against *erga omnes* based on its importance which is dispositive and thus not *jus cogens*: it is possible yet unclear when a bilateralizable obligation becomes “important enough” to the international community to be *erga omnes* without being *jus cogens*. As pointed out by Tams, it also seems that Weeramantry was primarily concerned with the question of estoppel, which was left open by the majority of the Court. Under normal circumstances, it would seem that Hungary could have not terminated the treaty on the basis of estoppel. But in Weeramantry’s opinion, *erga omnes* modified in the rules of estoppel and termination, in that the legal interest of other States on the subject matter prevented estoppel from being applied to Hungary. This seems to be in line with assumed weight or importance of the obligation in question applied by Weeramantry.

*Pulp Mills* judgment concerned a dispute between Argentine and Uruguay on the Statute of the River Uruguay, a treaty signed by the two States on 26 February 1975. Argentina alleged Uruguay of breaching the treaty, which had as its purpose establishing “the joint machinery necessary for the optimum and rational utilization” of that part of the river which constitutes their joint boundary. Uruguay had unilaterally authorized the construction of two pulp mills on the River, which, according to Argentina, violated the provisions in the treaty of prior notification and consultation procedures, as the project threatened the river and its environment – and consequently its water quality – as well as causing significant transboundary damage to Argentina.

The Court decided in 2010, that Uruguay had violated its procedural obligation of prior notification. However, on the substantive obligations of the treaty, the Court stated that there was

“No conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia)

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489 See Ibid., p. 191 on this question.
492 ICJ Reports 2010, p. 60, para. 122.
mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007.

Regardless of the conclusion of the judgment, it includes important issues and statements for the present study. However, as seems to be the narrative for environmental disputes in the ICJ, the case concerned a treaty dispute and interpretation. The Court concluded that Articles 1 and 41 of the 1975 Statute did not provide that other multilateral agreements should be incorporated in the treaty, and consequently the Court could not decide if Uruguay had complied with its obligations under them. However, the parties agreed that general international law was to be taken into account in the interpretation, as stipulated by the Article 31 of the VCLT.

In this relation the statement by the Court in paragraph 204 is of utmost importance:

“In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.” (italics added)

At first it seems that the Court was not entirely confident on the customary status of the EIA, as it used the language “may now be considered”. Consideration on EIA were included in

493 ICJ Reports 2010, p. 101, para. 265. See also paras. 250, 254, 257, 259, 262 and 264 for conclusion on insufficient evidence on different kind of substance pollutions and environmental effects. Another interesting question in the case was Argentina’s argument that the precautionary approach would shift the burden of proof to Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment, see p. 70, para. 160. However, the Court found that “while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties”, see p. 71, para. 164.

494 Ibid., pp. 44–46, paras. 60–63.

495 See Ibid., paras. 55, 57 and 64, as well as paras. 65–66.

496 Ibid., p. 83, para. 204.
the case because the parties agreed that it was needed, not because it was required by general international law. But the phrasing seems to be strong enough that it is often concluded to the mean that EIA is a binding customary rule in transboundary context. However, as noted by the Court, general international law does not determine the exact scope and content of the EIA; it was to be determined by non-binding standards and domestic legislation as determined by special circumstances surrounding each instance.

Further, the Court reaffirmed the customary character of the transboundary no-harm rule. In this relation the Court stated that “[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”, and then pointed to the statement in the Legality of the Use or Threat Advisory Opinion that the obligation “is now part of the corpus of international law relating to the environment”, confirming that the Court indeed meant – regardless of the rather peculiar phrasing – that the principle has become a rule of customary law, however, conspicuously only in the transboundary context.

In the Pulp Mills context, the EIA is a bilateralizable obligation linked to the due diligence preventive obligation of transboundary no-harm principle. Thus, it is unnecessary to consider EIA’s individual erga omnes character: it will follow the overall development of the transboundary no-harm rule. However, as it is, there is nothing in Pulp Mills judgment pointing that the obligation is erga omnes. It would be another thing if EIA also in State’s own territory or in acts concerning areas outside national jurisdiction were considered to be binding customary obligations.

In Costa Rica v. Nicaragua the Court reconfirmed the findings of the Pulp Mills judgment on the customary EIA and principle of prevention in transboundary situations. Both parties also agreed “broadly” on the existence of the general international law character of the

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497 Ibid., p. 82, para. 203.
498 The “may now” in the given context seems to point at that growing acceptance made it now possible to consider the EIA as customary obligation. For example Johnstone 2014, p. 40 sees this now as unambiguous, and further points out that reference to practice and acceptance also points customary law and the requirements of State practice and opinio juris.
500 Ibid.
Thus, their status in contemporary international law as binding obligations seems well established.

4.3.4 Some Concluding Remarks

Based on this brief analysis of the relevant case law, evolution of international environmental law where harm to environment under national jurisdiction would be recognized as *erga omnes* seems far-fetched at the current stage. The same then applies to *erga omnes* character of the transboundary no-harm principle. Of course, if this development was to take place, there would certainly be a threshold of severity for the pollution: as the system stands, lawful conduct is concerned under the heading of “liability” or “responsibility for risk”, whereas unlawful acts are under “responsibility”. This means that not any kind of pollution is considered to be unlawful. Thus the argument by Slovakia in *Gabčíkovo-Nagymaros Project*, when it stated that “if the principle of prevention were in fact an *erga omnes* obligation, moderate transfrontier air pollution moving from State A to State B could theoretically be challenged by State C, even if State C were totally unaffected and located in another hemisphere - a patently absurd consequence”\(^{504}\) is rather unjustified, as the responsibility issue would certainly not emerge for simply “moderate” pollution.

There is neither enough evidence that it could be confidently stated that there exists a customary obligation to not cause harm to areas outside national jurisdiction. Consequently, this also means that nothing definite can be said on their *erga omnes* character since the two are interlinked. Therefore, the conclusion in this thesis is glaringly different to, for example, that of Bodansky, Brunnée and Rajamani, whom have stated in relation to same case law discussed here that “the Court has confirmed repeatedly that the no-harm rule and related procedural rules apply to adverse environmental impacts in areas beyond national control and to the global commons.”\(^{505}\)

It can be assumed that in cases where a State damages, for example, biodiversity in its own territory, is unlikely to achieve *erga omnes* status, at least in the near future. Such approach

\(^{503}\) Ibid., p. 705, para. 101.

\(^{504}\) Counter-memorial by the Slovak Republic, Vol. 1, p. 265, para. 9.67.

would affect the very heart of State sovereignty, and the contemporary international system may not be yet ready for such development.

It may be argued that truly massive pollution affecting several States could also be _erga omnes_ even if the injured States clearly have standing to respond to the breach. However, I see this discussion to concern more environmental _jus cogens_ than _erga omnes per se_. As was concluded in chapter 4.2, it cannot be confidently declared with current evidence if there exists environmental _jus cogens_.

However, we should remember that it was a long way for international environmental law to reach the point where the ICJ has expressly recognized the customary status of protective obligations in transboundary context. Therefore, it may only be a matter of time when an environmental obligation is recognized as _erga omnes_. The Court has certainly had opportunities to do so already, as seen from the case law above.\(^{506}\)

In this relation, a brief return to the drafting of the dropped Article 19 ARSIWA is in order here to show its relevance to _erga omnes_. The ILC stated that

> “[m]ore recently, the requirements of economic and social development on all sides and the marvellous achievements, but also the terrible dangers, of scientific and technological progress have led States to realize the imperative need to protect the most essential common property of mankind and, in particular, to safeguard and preserve the human environment for the benefit of present and future generations. New rules of international law have thus appeared, others in course of emergence have become firmly established and yet others, already existing, have acquired new vigour and more marked significance; these rules impose upon States obligations which are to be respected because of an increased collective interest on the part of the entire international community.”\(^{507}\)

Further, there had gradually arisen “the conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach "like any other" but that it necessarily represents an internationally wrongful act which is far more serious, a wrong which must be differently characterized and therefore be subject to a different regime of responsibility.”\(^{508}\) Although not conclusively proving the emergence of environmental

\(^{506}\) See chapter 2.2.3 on importance of opportunity.


\(^{508}\) Ibid., p. 102, para. 15.
erga omnes, this passage presents the view of the ILC on State practice. And this was already in 1976.

Today the concept of erga omnes is brought up quite often by States for example in the work of the UN Sixth Committee. Especially in recent times the topic has come forth in relation to the topic “protection of the atmosphere”.509

This thesis has therefore taken a rather pessimistic view on the existence of certain environmental customary obligations, at least when compared to writings of many contemporary environmental lawyers. Therefore, the famous description by Robert Jennings, the former president of the ICJ, may stand true: “most of what we perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble a customary law.”510 Yet this is not to say that it is the same thing with custom which is not always enforced de facto and State practice may not be uniform, and with custom which cannot be enforced de jure: the former is called custom although it raises theoretical questions about the validity of how we understand custom at the moment,511 but the latter is certainly not custom. If we want to be intellectually honest without surrendering to wishful thinking, we have to accept that concepts which are not legally binding should not be called custom, at least in the way the concept is understood in contemporary international law.

Of course, this is not to say that the concepts do not deserve binding nature or environmental protection should not be promoted. Yet, to borrow an idea from Alain Pellet, one should be wary of what is the role of lawyers, and what should be left for activists.512 In the worst-case

509 See e.g. statement of Iran, referring to the obligations in the Nuclear Arms Race as erga omnes which concerned “the protection of the environment, and that the Marshall Islands was therefore in some sense representing the international community as a whole”, see GA Sixth Committee A/C.6/71/SR.25, p. 6, para. 21. In that same meeting Portugal stated that “while the atmosphere was certainly a natural resource, and must be treated as such” it was doubtful if “it could be given the same legal treatment as, for example, transboundary aquifers or watercourses. The Commission should therefore reflect more deeply on that issue and further develop its work on the consequences of recognizing the obligations related to the protection of the atmosphere as obligations erga omnes.”, see p. 18, para. 94. Similarly Mexico “stressed that ensuring such protection was an erga omnes obligation of great importance for the international community and required international cooperation, the legal scope of which should be clearly established”, see GA Sixth Committee A/C.6/71/SR.26, p. 4, para. 20. Sri Lanka noted the “divergent views on its nature, in particular on whether it should be considered to be an obligation erga omnes”, see GA Sixth Committee A/C.6/71/SR.27, p. 2, para. 5, whereas in the same meeting Micronesia stated that it was Micronesia’s view “that the obligation to protect the atmosphere was an obligation erga omnes”, see p. 4, para. 25, see also Micronesia in GA Sixth Committee A/C.6/70/SR.18, p. 4, para. 15.

510 Jennings 1982, p. 5. See also Bodansky 2010, p. 199 et seq.

511 See on this topic e.g. Bodansky 2010, p. 197 et seq. on the existence of environmental custom.

512 Pellet 2000, pp. 5 & 8.
scenario, not doing so and surrendering to overly wishful thinking may lead to undermining the credibility of the whole field of international environmental law. Yet we should not fall into gloom either: even if international environmental law is not yet where we would like it to be, it does not mean that lawyers should not work on developing the relevant rules of responsibility for future use.
5 CONCLUSIONS

Chapter 2.2.3 showed that the International Court of Justice has an important role in the development of international environmental law, and as demonstrated in chapter 4.3, it has certainly done so, although, as a long-lived gatekeeper of international law, it has also been cautious in its pronouncements. Further, as demonstrated in chapter 2.3.3, international law has known and applied expansive approaches to standing long before the Barcelona Traction dictum, and *erga omnes* should not be seen as such a revolutionary concept as it is often thought to be. Consequently, the possible existence and rise of environmental *erga omnes* obligations is not as radical as it may seem at first.

As discussed in Chapter 3.2, the term *erga omnes* has been used for variety of different legal effects different from the meaning in the Barcelona Traction dictum. Further, as shown in chapter 3.3.2 and throughout this study, *erga omnes* is often used confusingly to also refer to *erga omnes partes*, although the concepts are fundamentally different: *erga omnes* obligations emerge from general international law whereas *erga omnes partes* seems to be a concept of expansive treaty interpretation. Therefore, what seems to be needed is more unified use of terminology by lawyers to avoid further confusion in discussion and development of the concepts.

In chapter 3.4 it was demonstrated that *erga omnes* obligations may be identified in two ways, partly depending on the structure of the obligation. Bilateralizable obligations become *erga omnes* when they are considered important enough, as expressed by the material approach. Non-bilateralizable obligations become *erga omnes* when they become binding customary rules of international law, and importance has also its role in this process too, since the required threshold of becoming binding custom is clearly high for such obligations. Finally, any obligation becomes *erga omnes* if it is accepted and recognized as *jus cogens*, since *jus cogens* norms are necessarily also *erga omnes*, as shown in chapter 3.5.2.

Chapter 4, discussing the main question of this thesis, that is, the existence of environmental *erga omnes*, first pointed out in chapter 4.2 that there are not any agreed environmental *jus cogens* norms or even particularly strong support for such concept. Consequently, no environmental obligation is *erga omnes* through this “*jus cogens* path”. As demonstrated by the analysis of relevant case law in chapter 4.3, there is not any confident recognition of dispositive environmental *erga omnes* obligation either. This includes both bilateralizable and non-
bilateralizable obligations, both under and outside national jurisdiction. However, international law, including the ICJ jurisprudence, has taken environmental entities and values increasingly into account when adjudicating cases having environmental effects or implications. There is also an observable international trend in recognition of the environment today by the public. Therefore, it may only be a matter of time before the first environmental *erga omnes* obligation is recognized due to its increasing importance. In this relation, and finally, the existence of an *erga omnes* obligation must be distinguished from its recognition: there may very well already be environmental obligations with *erga omnes* character. However, since there is no confident recognition, the question “are there any existing environmental *erga omnes* obligations” has to be answered that we do not know for certain.