

IMPLICATIONS OF THE ICJ’S ADVISORY OPINION ON CLIMATE CHANGE FOR THE IDENTIFICATION OF *ERGA OMNES PARTES* STANDING

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I. INTRODUCTION

In July 2025, the International Court of Justice (“the Court”) issued the Advisory Opinion on Obligations of States in respect of Climate Change (“Climate Change Advisory Opinion” or “the Opinion”). In the Opinion, the Court outlined relevant substantive obligations of States and established that “States’ obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions ... are obligations *erga omnes*” and those which emerge “[i]n the treaty context” are obligations *erga omnes partes*.¹ In the climate change context, the legal consequence is that any State may invoke the responsibility of another State for the breach of its obligations *erga omnes* when such obligations arise under customary international law, and any State party to a

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1. Obligations of States in Respect of Climate Change, Advisory Opinion, ¶ 440 (July 23, 2025) [hereinafter Climate Change Advisory Opinion].

relevant climate change treaty may invoke such responsibility when obligations *erga omnes partes* arise under that treaty.²

Because such responsibility may be invoked by instituting proceedings before the Court,³ the Opinion foreshadows further contentious litigation⁴ related to climate change, where the applicant State can base its standing on *erga omnes* or *erga omnes partes* obligations. Indeed, this liberal framework may not be too far ahead, as the lawyers interviewed by the BBC revealed that “[d]eveloping countries are already exploring bringing new cases,”⁵ which may include cases following this new path.

The Court’s historical jurisprudence shows that it took about five decades to connect obligations *erga omnes* and *erga omnes partes* with the question of standing. The Court first recognized the concept of obligations *erga omnes* in the *Barcelona Traction* case.⁶ According to the *dictum* in that case, obligations *erga omnes* are obligations owed to the international community as a whole, based on the premise that all States have a legal interest in the protection of the rights involved.⁷ In the following four decades, although the Court has referred to

2. *Id.* ¶ 442.

3. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Preliminary Objections, Judgment, 2022 I.C.J. 477, ¶ 108 (July 22) [hereinafter *The Gambia v. Myanmar*] (rejecting Myanmar’s purported distinction between the entitlement to invoke responsibility and the standing to pursue a claim since, *inter alia*, “[r]esponsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court....”); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 117, ¶ 2 (2001) [hereinafter ARSIWA with Commentaries] (noting that for purposes of Chapter I, Part Three of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ARSIWA”), “invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal.”).

4. Federica Paddeu & Miles Jackson, *State Responsibility in the ICJ’s Advisory Opinion on Climate Change*, EJIL:TALK! (July 25, 2025), <https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/> [hereinafter Paddeu & Jackson, *State Responsibility*].

5. Esme Stallard & Georgina Rannard, *Top UN Court Says Countries Can Sue Each Other over Climate Change*, BBC (July 23, 2025), <https://www.bbc.com/news/articles/cc379k4v3pwo>.

6. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5) [hereinafter *Barcelona Traction*].

7. *Id.*

obligations *erga omnes* in some cases, in none of them has the Court linked such obligations to the question of standing, until the *Belgium v. Senegal* judgment in 2012.⁸ In *Belgium v. Senegal*, similar to the characterization of obligations *erga omnes* as those that are owed to the international community as a whole in *Barcelona Traction*, the Court defined obligations *erga omnes partes* as those owed by any State party to all other State parties to a given treaty.⁹ Furthermore, the Court reasoned that the common interest in compliance with obligations *erga omnes partes* entitles each State party to bring a claim against the defaulting State.¹⁰ Since then, *erga omnes partes* standing has also been granted in other cases pertaining to the *Convention against Torture* and the *Genocide Convention*,¹¹ and implicitly under the *International Convention for the Regulation of Whaling*.¹²

Before the Climate Change Advisory Opinion, because the Court had never needed to address the problem of standing regarding the breach of obligations *erga omnes*, the Court had only confirmed *erga omnes partes* standing in response to treaty breaches.¹³ The Opinion

8. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 16 (July 20) (Dissenting Opinion of Judge Xue) [hereinafter *Belgium v. Senegal*]; *The Gambia v. Myanmar*, *supra* note 3, ¶¶ 34–35 (Dissenting Opinion of Judge Xue); Alaa Hachem, Oona A. Hathaway & Justin Cole, *A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing*, 62 COLUM. J. TRANSNAT'L L. 259, 276–77 (2024) [hereinafter Hachem, Hathaway & Cole].

9. *Belgium v. Senegal*, *supra* note 8, ¶ 68; Pok Yin Stephenson Chow, *On Obligations Erga Omnes Partes*, 52 GEO. J. INT'L L. 469, 473 (2021) [hereinafter Chow].

10. *Belgium v. Senegal*, *supra* note 8, ¶¶ 68–69.

11. *The Gambia v. Myanmar*, *supra* note 3, ¶¶ 106–12; Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syria), Provisional Measures, Order, 2023 I.C.J. 587, ¶¶ 50–51 (Nov. 16) [hereinafter *Canada and Netherlands v. Syria*]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, Order, 2024 I.C.J. 3, ¶ 33 (Jan. 26) (finding that the Applicant in those cases has standing based on obligations *erga omnes partes*) [hereinafter *South Africa v. Israel*].

12. Yoshifumi Tanaka, *Reflections on Locus Standi in Response to a Breach of Obligations Erga Omnes Partes: A Comparative Analysis of the Whaling in the Antarctic and South China Sea Cases*, 17 L. & PRAC. INT'L CTS. & TRIBUNALS 527, 537–38 (2018). The implication of this case is that it is up to the respondent State to raise the issue of standing, *see* Giorgio Gaja, *Standing: International Court of Justice (ICJ)*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 29 (June 2018), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3661.013.3661/law-mpeipro-e3661> (noting that since Japan did not object to the standing of Australia in this case, “the court simply ignored the issue.”).

13. Tom Ruys, *Legal Standing and Public Interest Litigation—Are All Erga Omnes Breaches Equal?*, 20 CHINESE J. INT'L L. 457, 463 (2021) [hereinafter Ruys].

expressly confirmed for the first time that States may invoke the responsibility for violating obligations *erga omnes* under customary international law,¹⁴ rather than obligations *erga omnes partes* under a treaty addressing common interest. Given that Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) encompasses both obligations *erga omnes partes* and *erga omnes*¹⁵ as bases for the invocation of responsibility, this “logical next step”¹⁶ aligns with long-standing scholarly arguments.¹⁷ While some commentators did mention that the Court’s broad¹⁸ characterization of “obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm”¹⁹ as obligations *erga omnes* seems sweeping,²⁰ it can also be viewed as an effort to “offer a degree of flexibility for future *in concreto* assessments.”²¹

In short, the concepts of obligations *erga omnes* and *erga omnes partes* are being invoked more frequently in international adjudications, suggesting that the protection of fundamental values of the

14. Climate Change Advisory Opinion, *supra* note 1, ¶ 442.

15. It should be noted that the terms “obligation *erga omnes partes*” and “obligation *erga omnes*” were not used in Article 48 of the ARSIWA. However, the commentary indicates that Article 48 refers to those two types of obligations in essence, *see* ARSIWA with Commentaries, *supra* note 3, at 126–27, ¶¶ 6, 9 (noting that “[s]uch obligations have sometimes been referred to as [‘]obligations *erga omnes partes*[‘]” and that “[w]hile taking up the essence of this statement, the articles avoid use of the term [‘]obligations *erga omnes*[‘].”).

16. Paddeu & Jackson, *State Responsibility*, *supra* note 4.

17. *See, e.g.*, Ruys, *supra* note 13, at 463; Marco Longobardo, *The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond*, 24 INT’L CMTY. L. REV. 476, 499 (2022) (arguing that since obligations *erga omnes partes* and *erga omnes* are similar, the logical conclusion is that *erga omnes* standing would also be upheld).

18. Thomas Burri, *The ICJ’s Opinion on Climate Change: Pushing the Boundaries of International Law*, AM. SOC’Y OF INT’L L. INSIGHTS (Oct. 2, 2025), <https://www.asil.org/insights/volume/29/issue/13>.

19. Climate Change Advisory Opinion, *supra* note 1, ¶ 440.

20. Niklas S. Reetz, *State Responsibility and the ICJ’s Advisory Opinion on Climate Change: One Step at a Time*, CLIMATE L. BLOG (Aug. 7, 2025), <https://blogs.law.columbia.edu/climatechange/2025/08/07/state-responsibility-and-the-icjs-advisory-opinion-on-climate-change-one-step-at-a-time/>.

21. Luciano Pezzano, *Obligations Erga Omnes and Climate Change: Reflections on the ICJ Advisory Opinion*, EJIL:TALK! (Aug. 8, 2025), <https://www.ejiltalk.org/obligations-erga-omnes-and-climate-change-reflections-on-the-icj-advisory-opinion/> [hereinafter Pezzano].

international community may be becoming increasingly important.²² Scholars have commended this trend since it, *inter alia*, constitutes “a momentous confluence of action aimed at the enforcement of community interests in a particularly complex time”²³ and offers the possibility of closing an accountability gap by empowering States to hold defaulting States accountable regardless of who was injured.²⁴

However, the identification of standing based on obligations *erga omnes partes* by the Court lacked clarity and coherence.²⁵ For this reason, it is useful to look to the framework proposed by commentators to assess the relevant identification standards and their implications. As the International Law Commission (“ILC”) observed, in previous cases, the Court has articulated various ways that States may have a common interest in obligations *erga omnes partes*.²⁶ Priya Urs outlined three approaches to the identification of obligations *erga omnes* and obligations *erga omnes partes* seen in the Court’s decisions: “the common interest in compliance with relevant obligations,” “the importance of the rights underlying relevant obligations,” and “the gap in the enforcement by injured States of relevant obligations.”²⁷ Xiao Mao argued that the Court’s sweeping approach of inferring standing from the common interests as a State party to a convention “risks

22. Yoshifumi Tanaka, *The Legal Consequences of Obligations Erga Omnes in International Law*, 68 NETH. INT’L L. REV. 1, 2 (2021) [hereinafter Tanaka, *Legal Consequences*].

23. Eugenio Carli, *Community Interests Above All: The Ongoing Procedural Effects of Erga Omnes Partes Obligations Before the International Court of Justice*, EJIL:TALK! (Dec. 29, 2023), <https://www.ejiltalk.org/community-interests-above-all-the-ongoing-procedural-effects-of-erga-omnes-partes-obligations-before-the-international-court-of-justice/> [hereinafter Carli].

24. Hachem, Hathaway & Cole, *supra* note 8, at 287.

25. See Priya Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes by the International Court of Justice: Coherence or Confusion?*, 74 INT’L & COMP. L.Q. 257, 257–58 (2025) (arguing that the “lack of clarity and consistency permits varied approaches to the articulation of [*erga omnes* and *erga omnes partes*] obligations.”) [hereinafter Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*].

26. International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries, in Report of the International Law Commission on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 67, ¶ 5 (2022) [hereinafter Draft Conclusions on *Jus Cogens*].

27. Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*, *supra* note 25, at 262–77.

subjectivity and over-breadth,” calling for a “more nuanced approach.”²⁸

In the Climate Change Advisory Opinion, the Court characterized certain obligations concerning climate change as obligations *erga omnes* and, in the treaty context, obligations *erga omnes partes*. As Judge Tladi noted, those determinations will “ha[ve] implications for the Court’s jurisprudence beyond these proceedings.”²⁹ Against this background, this commentary focuses on one such implication: the implication for the identification of *erga omnes partes* standing.³⁰ It argues that in the Opinion, the Court reaffirmed common interest and the importance of the rights involved as relevant identification standards, omitted the standards of non-reciprocal performance structure and gap-filling function, and may have suggested an emerging standard of whether the obligation at issue is a “main” obligation under the relevant treaty.

II. THE IDENTIFICATION STANDARDS ENDORSED BY THE COURT

A. *Common Interest*

The Court used the “common interest” standard in the Climate Change Advisory Opinion to identify obligations *erga omnes partes*. This standard has been consistently applied in every case where the Court identified obligations *erga omnes partes*.³¹ In the Opinion, the Court clarified in paragraph 440 that “certain rules of international law relating to global common goods, such as the climate system, may produce *erga omnes* obligations,” and that “all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas.”³²

After this brief observation, the Court then shifted the focus from the *erga omnes* characterization of obligations to the treaty context, identifying obligations *erga omnes partes*. In doing so, the Court relied on

28. Xiao Mao, *Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v. Myanmar Case*, 21 CHINESE J. INT’L L. 589, 589 (2022) [hereinafter Mao].

29. Climate Change Advisory Opinion, *supra* note 1, ¶ 3 (Declaration of Judge Tladi).

30. The scope of this commentary does not cover the identification of obligations *erga omnes*.

31. *Belgium v. Senegal*, *supra* note 8, ¶ 68; *The Gambia v. Myanmar*, *supra* note 3, ¶¶ 107–08; *Canada and Netherlands v. Syria*, *supra* note 11, ¶ 50; *South Africa v. Israel*, *supra* note 11, ¶ 33.

32. Climate Change Advisory Opinion, *supra* note 1, ¶ 440.

the preambular paragraphs in the *United Nations Framework Convention on Climate Change* (“UNFCCC”) and the *Paris Agreement*, acknowledging climate change as “a common concern of humankind” and requiring “a global response.”³³ On that basis, the Court found that both treaties “seek to protect the essential interest of all States in the safeguarding of the climate system, which benefits the international community as a whole,” and thus obligations therein are obligations *erga omnes partes*.³⁴

The implications of this analysis on the common interest standard are twofold. First, consistent with all previous *erga omnes partes* cases, the Court referred to the object and purpose of the treaty to determine the common interest. In *Belgium v. Senegal*, the Court similarly quoted part of the preamble reflecting the object and purpose of the *Convention against Torture*, which is “to make more effective the struggle against torture ... throughout the world.”³⁵ In *The Gambia v. Myanmar*, the Court cited the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,³⁶ which interpreted the object of the *Genocide Convention* to be, *inter alia*, “safeguard[ing] the very existence of certain human groups.”³⁷ That the Court again relies on the object and purpose of the treaties in identifying obligations *erga omnes partes* in the Opinion further affirms that the identification of such obligations would involve a process of treaty interpretation.

Second, the Court appears to deviate from the previous cases by only mentioning the “common interest in compliance with the obligations” to support the finding of *erga omnes partes* standing, but not the *erga omnes partes* character of obligations. In previous cases, “common interest in compliance” is mentioned in determining the *erga omnes partes* character of obligations as well. In *Belgium v. Senegal*, the Court noted that “[t]hese 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.”³⁸ The *Canada and Netherlands v. Syria* decision directly quoted this part and concluded that:

[i]t follows that any State party to the Convention against Torture may invoke the responsibility of another State party

33. *Id.*

34. *Id.*

35. *Belgium v. Senegal*, *supra* note 8, ¶ 68.

36. *The Gambia v. Myanmar*, *supra* note 3, ¶ 106.

37. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

38. *Belgium v. Senegal*, *supra* note 8, ¶ 68.

with a view to having the Court determine whether the State failed to comply with its obligations *erga omnes partes*, and to bring that failure to an end.³⁹

In *The Gambia v. Myanmar* and *South Africa v. Israel*, “common interest in compliance” is mentioned in both the standing and the character of obligations as well:

[s]uch a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are 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 Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*.⁴⁰

However, in the Climate Change Advisory Opinion, the Court concluded that certain obligations are owed *erga omnes partes* based on the “interest of all States in the safeguarding of the climate system, which benefits the international community as a whole.”⁴¹ It was only after affirming the *erga omnes partes* character of obligations that the Court mentioned “the common interest in the protection of these obligations” and the “common interest in compliance with relevant obligations under the treaty” in concluding that all States parties have the standing to bring a claim.⁴²

It is unclear why the Court deviated from the previous cases by not referring to “common interest in compliance” when identifying obligations *erga omnes partes*. This commentary proposes that one possible reading of this deviation is that it may be taken as a clarification of what purposes different kinds of common interest serve. As observed by the ILC, the Court developed various formulations of the common interest of States in obligations *erga omnes* and obligations *erga omnes partes*. Those formulations include: “the legal interest in the [‘]protection[‘] of the rights covered by *erga omnes* obligations,” “the legal interest of all States in the [‘]observance[‘] of

39. *Canada and Netherlands v. Syria*, *supra* note 11, ¶ 50.

40. *The Gambia v. Myanmar*, *supra* note 3, ¶¶ 107–08; *South Africa v. Israel*, *supra* note 11, ¶ 33.

41. Climate Change Advisory Opinion, *supra* note 1, ¶ 440.

42. *Id.* ¶ 442.

the obligation in question,” “the legal interest of States in the prevention of acts covered by *erga omnes* obligations,” and “the []common interest[] in the []accomplishment of those high purposes which are the *raison d’être* of the convention[].”⁴³

After the Climate Change Advisory Opinion, a rough distinction may be drawn between the common interests that support the *erga omnes partes* character of obligations and those that support *erga omnes partes* standing. The common interests required for the *erga omnes partes* character of obligations are those that concern the substantive content of obligations, which would be interpreted by referring to the object and purpose of the convention and be qualified by the importance of the rights involved (as will be argued below). The common interests required for *erga omnes partes* standing are those concerning compliance with the obligations. Although such common interests in compliance follow from the *erga omnes partes* character of the obligation, such interests may not necessarily be required for identifying that character, as evidenced by the Court’s reasoning in the Opinion. Nor can the common interests in compliance alone support the characterization of obligations as *erga omnes partes*, and the Court has not treated them as sufficient by themselves in previous cases.

B. Importance of the Rights Involved

Another standard used implicitly by the Court in the Opinion to identify obligations *erga omnes partes* is “the importance of rights involved.” The reliance on this standard in the Opinion, consistent with all previous *erga omnes partes* cases, affirms that it is a standard qualifying the common interests determining the *erga omnes partes* character of obligations.⁴⁴ This standard was developed in the *Barcelona Traction* case, where the Court reasoned that certain obligations are owed “towards the international community as a whole,” and that they are the concern of all States by their nature.⁴⁵ The Court proceeded to conclude that “[i]n 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*.”⁴⁶ Since then, “the importance of the rights involved” has generally been regarded as one of the two approaches to

43. Draft Conclusions on *Jus Cogens*, *supra* note 26, at 67–68, ¶ 5.

44. Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*, *supra* note 25, at 262.

45. *Barcelona Traction*, *supra* note 6, ¶ 33.

46. *Id.*

identify obligations *erga omnes*, alongside the non-reciprocal nature of the obligation.⁴⁷

Even though the Court did not explicitly mention the language of “importance of the rights involved” in the Opinion, paragraph 440 may be understood as an application of this standard and an illustration of how “the importance of the rights involved” is assessed. This is evidenced by the subsequent paragraph where the Court stated that “obligations *erga omnes* are ‘[b]y their nature...the concern of all States’”,⁴⁸ directly quoting the language from *Barcelona Traction*, and found those in the treaty context to be obligations *erga omnes partes*. This commentary agrees with the view that, according to *Barcelona Traction*, the concepts of “concern of all States” and “importance of the rights involved” are intrinsically connected.⁴⁹ Thus, the Court applied the same standard implicitly in the Opinion.⁵⁰ However, the Court’s reliance on “the importance of the rights involved” in identifying obligations *erga omnes partes* has been criticized for the conflation of obligations *erga omnes* and *erga omnes partes* with *jus cogens*,⁵¹ arguably because this reasoning highlights the function of obligations *erga omnes* and *erga omnes partes* in protecting the fundamental values and common interests of the international community,⁵² a function also associated

47. See, e.g., CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 129 (2009) [hereinafter TAMS]; Tanaka, *Legal Consequences*, *supra* note 22, at 8; Isabel Feichtner, *Community Interest*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. ¶¶ 43–46 (Feb. 2007), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1677> [hereinafter Feichtner].

48. *Id.* ¶ 441.

49. See Tanaka, *Legal Consequences*, *supra* note 22, at 9 (observing that “in accordance with the *dictum* of the *Barcelona Traction* judgment, obligations *erga omnes* are important because these obligations are ‘the concern of all States’ and ‘all States can be held to have a legal interest in their protection.’”); see also Hannah Sweeney, *Gender Equality and State Responsibility: Enforcing CEDAW through the ICJ*, 38 HARV. HUM. RTS. J. 287, 296 (2025) (observing that “[g]iven the ‘importance of the rights involved’ the obligations [*erga omnes*] are [‘]the concern of all States[.]’”) [hereinafter Sweeney].

50. But see Priya Urs, *Open the Floodgates: Standing for the Enforcement of Obligations Erga Omnes in the ICJ’s Advisory Opinion on Climate Change*, NAT’L UNIV. OF SING. CTR. FOR INT’L L. BLOG (Aug. 11, 2025), <https://cil.nus.edu.sg/blogs/open-the-floodgates-standing-for-the-enforcement-of-obligations-erga-omnes-in-the-icjs-advisory-opinion-on-climate-change/> (arguing that the Court did not mention this standard in the Climate Change Advisory Opinion) [hereinafter Urs, *Open the Floodgates*].

51. Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*, *supra* note 25, at 262.

52. Tanaka, *Legal Consequences*, *supra* note 22, at 2.

with *jus cogens*.⁵³ It should therefore be clarified that this standard should not be understood as equating *jus cogens* with obligations *erga omnes* and *erga omnes partes*.⁵⁴

This commentary proposes that one interpretation would be that obligations *erga omnes* and *jus cogens* may serve as indicators of the importance of the rights involved in identifying obligations *erga omnes partes*. Judge *ad hoc* Kress in *The Gambia v. Myanmar* adopted this approach to establish that the *Genocide Convention* “recognizes and protects a fundamentally important common value,” pointing to factors including obligation *erga omnes*, *jus cogens*, and criminal responsibility of the individual under customary international law.⁵⁵ Under this proposed interpretation, the importance of rights involved is established by the Court’s initial conclusion that obligations *erga omnes* exist. This explains why the Court in this case could identify the obligations *erga omnes partes* without explicitly mentioning, or engaging in a lengthy separate analysis of the “importance of the rights involved.”

III. THE IDENTIFICATION STANDARD OMITTED BY THE COURT: NON-RECIPROCAL PERFORMANCE STRUCTURE

In addition to the aforementioned standards endorsed in the Climate Change Advisory Opinion, the Court omitted another standard commonly discussed by commentators: non-reciprocal performance structure. This standard is rooted in *Barcelona Traction*,⁵⁶ where the Court noted in the *dictum* that there is “an essential distinction” between obligations *erga omnes* and obligations in the field of diplomatic protection.⁵⁷ In the latter field, multilateral treaties are “bilateral in application”⁵⁸ since obligations are performed in bilateral

53. Draft Conclusions on *Jus Cogens*, *supra* note 26, at 18, Conclusion 2.

54. *See id.* at 66, ¶ 3 (concluding that although all *jus cogens* give rise to obligations *erga omnes*, not all obligations *erga omnes* arise from *jus cogens*); Tanaka, *Legal Consequences*, *supra* note 22, at 10 (summarizing that “it may be reasonable to consider that *jus cogens* constitutes a subset of obligations *erga omnes*.”).

55. *The Gambia v. Myanmar*, *supra* note 3, ¶ 17 (Declaration of Judge *ad hoc* Kress).

56. TAMS, *supra* note 47, at 129; Tanaka, *Legal Consequences*, *supra* note 22, at 8; Feichtner, *supra* note 47, ¶¶ 43–45.

57. *Barcelona Traction*, *supra* note 6, ¶ 33.

58. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 221, 336 (1994) [hereinafter Simma]; *see also* ARSIWA with Commentaries, *supra* note 3, at 126, ¶ 7 (noting that obligations *erga omnes partes* “must

relations in the sense that “an individual party’s interest will almost exclusively be to the effect that its own diplomatic missions and representatives be treated in accordance with the Convention.”⁵⁹ In other words, a State party is unlikely to have an interest in the infringement of the rights of third States’ diplomatic missions and representatives. In contrast, the non-reciprocal structure means that “an obligation [is owed] towards all the world rather than towards particular parties.”⁶⁰ It reasonably follows that all States have an interest in the observance and may thus seek compliance when such obligations are breached.⁶¹ Despite the recognition of the “non-reciprocal performance structure” standard in scholarly writings,⁶² in all of the cases so far in which the Court identified obligations *erga omnes partes*, the Court has not formally applied this standard.⁶³

Nevertheless, some commentators have linked⁶⁴ this standard to a rationale that the Court offered in identifying obligations *erga omnes partes*, which is understood as the gap-filling function. According to the Court, without the *erga omnes* and *erga omnes partes* standing, where the breach of certain obligations does not injure another State, no State is

be established in some collective interest” in the sense that “in any event the arrangement must transcend the sphere of bilateral relations of the States parties.”).

59. Simma, *supra* note 58, at 336–38.

60. Gerald Fitzmaurice, Law of Treaties, Second Report, Y.B. INT’L L. COMM’N, VOL. II, U.N. Doc. A/CN.4/107, ¶ 126 (1957).

61. TAMS, *supra* note 47, at 129.

62. Tanaka, *Legal Consequences*, *supra* note 22, at 8; Feichtner, *supra* note 47, ¶¶ 43–45. See also MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 218 (2000) (arguing that the concept of obligations *erga omnes* introduced the novelty to international law, “namely the idea that today international law does not only govern the reciprocal relations between States, but also involves considerations going beyond the mere sum of their individual interests.”).

63. Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*, *supra* note 25, at 273.

64. *Id.* at 273–74; Sweeney, *supra* note 49, at 300 (noting that “[i]f a special interest or direct injury were required to bring a claim under Article 29 [of the Convention on the Elimination of All Forms of Discrimination Against Women], no [S]tate would be in a position to make such a claim, given the inherently non-reciprocal nature of the obligations. This is the same logic relied upon by the Court in *The Gambia v. Myanmar*...”). But see Hachem, Hathaway & Cole, *supra* note 8, at 294, 297 (mentioning the gap-filling function as a separate standard); André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT’L L. 769, 777 (2012) (explicitly viewing the *erga omnes* character to be based on “a strategic choice to solve the problem of under-enforcement of norms that protect public interest” rather than “the normative ambition to emphasize the foundations of the international community.”).

entitled to bring a claim based on injury,⁶⁵ and consequently, there is likely to be a gap in the enforcement of such obligations. In light of this, scholars argued that the Court “may consider *erga omnes partes* standing as a way to fill a gap”⁶⁶ of accountability which “limited the international community’s response to devastating violation of international law.”⁶⁷ Hence, to reconcile the disparate approaches that the Court has used in identifying obligations *erga omnes partes*, some scholars linked this “gap-filling” function to the non-reciprocal performance structure, since both concepts are essentially rooted in the structure of performance.⁶⁸

This commentary contends that the Court made no reference to the non-reciprocal structure (including the gap-filling function that was linked to it) in the Climate Change Advisory Opinion. Priya Urs is expressly concerned that the omission of standards such as this one, coupled with the little justification in identifying obligations *erga omnes* and *erga omnes partes*, may open the floodgates for enforcing such obligations.⁶⁹ This commentary concludes that although it would lead to the loosening of the standards and thus a more expansive scope of obligations *erga omnes partes*, the omission of the non-reciprocal structure of performance of the obligations (including the gap-filling function), consistent with the Court’s jurisprudence, does imply that it would not be a part of the standards to identify obligations *erga omnes partes*.

The better way to understand the Court’s approach is that the injured State and non-injured State differ in the availability of remedies, not in the entitlement to bring a claim before the Court. This distinction can be found in Article 48 of the ARSIWA, which the Court

65. See *Belgium v. Senegal*, *supra* note 8, ¶ 69; *The Gambia v. Myanmar*, *supra* note 3, ¶ 108 (finding that “[i]f a special interest were required for [the] purpose [of invoking responsibility], in many cases no State would be in the position to make such a claim.”).

66. Hachem, Hathaway & Cole, *supra* note 8, at 294.

67. *Id.* at 287.

68. For the non-reciprocal structure, see TAMS, *supra* note 47, at 129 (noting that the non-reciprocal approach “addresses the pattern (or structure) along which obligations *erga omnes* have to be performed.”). For the gap-filling function, see Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*, *supra* note 25, at 273–74 (arguing that although there was no “formal endorsement” of the non-reciprocal concept, “the Court has acknowledged more than once that the structure of performance of certain obligations is such that their breach will not necessarily injure another State, precluding, in turn, the enforcement of such obligations by an injured State.”).

69. Urs, *Open the Floodgates*, *supra* note 50.

in the Opinion finally endorsed⁷⁰ for the first time in the context of *erga omnes* and *erga omnes partes* obligations.⁷¹ However, both Article 48 of the ARSIWA and the Court's jurisprudence suggest that the distinction between the injured State and the non-injured State does not affect the entitlement of either to invoke the responsibility for the breach of obligations *erga omnes partes*. In *The Gambia v. Myanmar*, the Court observed that the influx of refugees into Bangladesh from Myanmar⁷² does not impact the entitlement of The Gambia to invoke the responsibility of Myanmar for the alleged breach of its obligations under the Genocide Convention.⁷³ In other words, whether there exists an injured State and whether the injured State decides to bring a claim does not impact the action that the non-injured State can take. While in the situation where there is no injured State, granting *erga omnes partes* standing to the non-injured State serves to fill the accountability gap, it does not mean that *erga omnes partes* standing is confined to such scenarios. Since *erga omnes partes* standing does not depend on the existence of an accountability gap, a non-injured State may have standing even where an injured State exists and chooses not to institute proceedings before the Court. Thus, the gap-filling function represents a possible consequence in practice rather than a standard for identifying obligations *erga omnes partes*. Following this view, the omission of this standard by the Court in the Climate Change Advisory Opinion, consistent with the approach in previous cases, brings some clarity that it is not part of the standards for the identification of obligations *erga omnes partes*.

70. Climate Change Advisory Opinion, *supra* note 1, ¶ 442.

71. See Juliette McIntyre, *Crawford's Multilateralism and the International Court of Justice*, 40 AUSTL. Y.B. INT'L L. ONLINE 271, 282 (2022) (observing that in *Belgium v. Senegal* where the Court granted standing to enforce norms concerning common interests, no reference to Articles 42 or 48 was made); Ruys, *supra* note 13, at 463 (noting that "the ICJ has so far been reluctant to fully endorse the views of the ILC reflected in Article 48 ARSIWA and its Commentary."). Previously, scholars have viewed this attitude of the Court as a commendable departure from the "rigid" and "artificial" distinction by the ILC in the ARSIWA, see Carli, *supra* note 23; Pezzano, *supra* note 21.

72. See *The Gambia v. Myanmar*, *supra* note 3, ¶ 99 (noting that Myanmar argued that Bangladesh is an injured State and the reservation of Bangladesh to Article IX of the Genocide Convention precludes itself and non-injured States from bringing the claim, since the non-injured States "may not override" the right of the injured State). The Court rejected this argument without resolving the issue of whether Bangladesh is an injured State. See *The Gambia v. Myanmar*, *supra* note 3, ¶ 28 (Declaration of Judge *ad hoc* Kress) (observing that the influx of refugees is a questionable basis to qualify Bangladesh as the injured State).

73. *The Gambia v. Myanmar*, *supra* note 3, ¶¶ 113–14.

IV. THE EMERGING IDENTIFICATION STANDARD: MAIN OBLIGATIONS UNDER THE CONVENTION

In addition to the standards discussed, there is one more question regarding the identification of obligations *erga omnes partes* that the Court seems to be silent on: whether upon establishing that there is a common interest underlying a given convention, all of the obligations under the convention acquire the *erga omnes partes* character and may thus be litigated with *erga omnes partes* standing.⁷⁴ In *Belgium v. Senegal* and *The Gambia v. Myanmar*, after examining the common interest underlying the convention, the Court noted that the “common interest in compliance with the relevant obligations” under the convention entails the entitlement of any State party to “invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*.”⁷⁵ The only guidance provided by the Court in this regard is the phrase “relevant obligations.”⁷⁶

Judge *ad hoc* Kress, separately, in *The Gambia v. Myanmar*, offered further analysis on this point, noting that the phrase “relevant obligations” suggests that not all the obligations under a common interest convention would be owed *erga omnes partes*.⁷⁷ Xiao Mao argued, in the context of *Genocide Convention*, that effects of lack of clarity in this respect could be far-reaching, where any State party can sue another State party for the latter’s failure to fulfill the obligation of enacting domestic legislation to criminalize genocide as long as there would be nuance between the definition of genocide in the domestic legislation and that in the convention, even if genocide does not actually take place.⁷⁸

However, the Climate Change Advisory Opinion may be read as noting that the impact of this standard is not as sweeping as commentators have suggested. In paragraph 440, the Court concluded by stating that “*the obligations* of States under these treaties are

74. Miles Jackson & Federica Paddeu, *Erga Omnes and Erga Omnes Partes Obligations in the International Court of Justice’s Climate Change Advisory Opinion*, J. ENV’T L., 3 (forthcoming 2026) [hereinafter Jackson & Paddeu, *Erga Omnes and Erga Omnes Partes Obligations*]; Urs, *The Articulation of Obligations Erga Omnes and Erga Omnes Partes*, *supra* note 25, at 283.

75. *Belgium v. Senegal*, *supra* note 8, ¶ 69; *The Gambia v. Myanmar*, *supra* note 3, ¶ 108.

76. See Hachem, Hathaway & Cole, *supra* note 8, at 297–98 (explaining that while the Court mentioned the requirement of relevance, no criteria to establish it were specified).

77. *The Gambia v. Myanmar*, *supra* note 3, ¶ 16 (Declaration of Judge *ad hoc* Kress).

78. Mao, *supra* note 28, at 593–94.

obligations *erga omnes partes*.⁷⁹ In paragraph 441, the Court noted that obligations *erga omnes partes* exist “with respect to *some* provisions” and that “all States parties have a legal interest in the protection of the *main* mitigation obligations set forth in the climate change treaties.”⁸⁰ Admittedly, there are still some uncertainties around the relationship between the two paragraphs. In particular, it is unclear whether the terms “some” and “main” in paragraph 441 are meant to qualify the statement in paragraph 440 which can be interpreted to mean that all obligations under the treaties are *erga omnes partes* in character.⁸¹ At least, “main” is a term that the Court used for the first time in this context, and it seems that whether the obligation is a “main” one under a common interest treaty may be an emerging new standard in determining the *erga omnes partes* character of obligations.

Nevertheless, the Court did not spell out what the threshold for “main” obligations is. Previously, Judge *ad hoc* Kress, in his declaration in *The Gambia v. Myanmar*, proposed a similar inquiry into whether the obligations are “central” or “markedly peripheral to the fulfillment of the common interest” in assessing what obligations are owed *erga omnes partes*.⁸² Based on the Court’s recourse to the preamble to determine the object and purpose of the treaty in *Belgium v. Senegal*, commentators have largely converged on a test emphasizing the centrality of the obligation to the fulfillment of the object and purpose of the treaty,⁸³ despite employing varying terminology, and explored its application to

79. Climate Change Advisory Opinion, *supra* note 1, ¶ 440 (emphasis added).

80. *Id.* ¶ 441 (emphasis added).

81. See Urs, *Open the Floodgates*, *supra* note 50 (noting that “[t]he Court omitted, as it did in the past, to clarify whether all the obligations contained in a treaty advancing the common interest of states parties are obligations *erga omnes partes*....”); Jackson & Paddeu, *Erga Omnes and Erga Omnes Partes Obligations*, *supra* note 74, at 9 (raising the question that “[i]s paragraph 441 a narrowing of the earlier statement in paragraph 440, or merely an illustration of it? In other words, are all obligations under the Paris Agreement and UNFCCC owed *erga omnes partes*, or only their main mitigation provisions?”).

82. *The Gambia v. Myanmar*, *supra* note 3, ¶ 16 (Declaration of Judge *ad hoc* Kress).

83. See, e.g., Mariko Kawano, *Standing of a State in the Contentious Proceedings of the International Court of Justice*, 55 JAPANESE Y.B. INT’L L. 208, 232 (2012) (noting that discussing the object and purpose of the treaty is not sufficient and that “it is necessary to examine whether the respective rule in question provides rights and obligations of an integral and amalgamate nature”); Chow, *supra* note 9, at 496–97 (proposing to examine “whether the obligation at issue was incorporated to fulfil this purpose” through whether the obligation at issue is subject to reservation, since a reservation incompatible with the object and purpose of the treaty cannot be formulated under Article 19(c) of the Vienna Convention on the Law of Treaties).

establish obligations *erga omnes partes* under different treaties. Examples include the obligation under Article 33 of the *Convention relating to the Status of Refugees*,⁸⁴ Articles 2 and 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women*,⁸⁵ and multiple human rights, counter-terrorism and weapons, and environmental treaties.⁸⁶ This commentary supports such a methodology as the benchmark for the main obligations test.

V. CONCLUSION

The Climate Change Advisory Opinion marks an important development in the Court's jurisprudence on obligations *erga omnes* and *erga omnes partes*. By characterizing certain climate change obligations as obligations of this kind, the Court added to the list of such obligations and clarified the mechanisms through which States may invoke the responsibility of another State for the breach of such obligations. Compared with these significant steps, the Court offered little guidance on identifying obligations *erga omnes* and *erga omnes partes*.⁸⁷

This commentary analyzes the implications of the Opinion for identifying obligations *erga omnes partes* and standing based on such obligations. It shows that the Opinion both clarified and complicated the matter to some extent. While the Court once again relied on the common interest standard and engaged with the interpretation of the object and purpose of the treaty, the Opinion departed from the jurisprudence in that the common interest in compliance with the obligations was not mentioned in characterizing the obligations, but only in relation to standing. The "importance of the rights involved" standard, which may limit the scope of obligations *erga omnes partes*, seemed to only be implicitly mentioned, but may be explained by considering the *erga omnes* obligations as an indicator of the importance. Further, this commentary observes that the omission of the non-reciprocal structure of performance and the gap-filling function suggests that *erga omnes partes* standing is not confined to situations

84. Pavitra Khaitan & Jvalita Krishan, *The Obligation of Non-Refoulement and Its Erga Omnes Partes Character*, HARV. INT'L L.J. (Dec. 24, 2022), <https://journals.law.harvard.edu/ilj/2022/12/the-obligation-of-non-refoulement-and-its-erga-omnes-partes-character/>.

85. Kathryn A. Donoho, *Blazing a Trail for the Enhanced Enforcement of Women's Rights: Erga Omnes Partes Standing*, 110 CORNELL L. REV. 749, 775 (2025).

86. Hachem, Hathaway & Cole, *supra* note 8, at 300–14.

87. Jackson & Paddeu, *Erga Omnes and Erga Omnes Partes Obligations*, *supra* note 74, at 10–11.

where no injured State exists. Meanwhile, the Court's reference to "main" obligations may impose a limit by suggesting that not every obligation under a treaty advancing common interest is owed *erga omnes partes*.

These readings are not the only possible readings, and commentators differ on which standards the Court used.⁸⁸ Nonetheless, the implications of the Opinion for future cases may be anticipated in at least two aspects. First, standing is likely to broaden. With the Court's endorsement of Article 48 of the ARSIWA, confirmation of standing based on obligations *erga omnes* under customary international law, and its omission of the non-reciprocal performance structure and the gap-filling function, a wider range of States may institute proceedings before the Court. Second, this broader standing is accompanied by less clarity on which treaty obligations qualify as obligations *erga omnes partes*. Such uncertainty may crystallize in disputes over whether a given obligation is a "main" one under the relevant treaty. Because the Court did not articulate a threshold for "main" obligations, the respondent State may dispute the *erga omnes partes* character of the obligation invoked by arguing that it is peripheral to the relevant treaty, while the applicant State may argue its centrality to the treaty's object and purpose. Greater clarity and consistency in the Court's approach are therefore needed, since clarity and consistency in the identification standards matter not only for the effective enforcement of such obligations, but also for the choices available to States in deciding whether and how to bring a claim before the Court.

88. See, e.g., Urs, *Open the Floodgates*, *supra* note 50 (noting that the Court did not mention the importance of the rights involved standard and did not address the problem of whether all obligations under a treaty advancing common interests are owed *erga omnes partes*).