

## STANDING BEFORE THE ICJ: ARE THE FLOODGATES OPEN FOR ERGA OMNES PARTES CLAIMS?

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**Annotation:** this article is aimed to answer to question whether the International Court of Justice (ICJ) has opened floodgates for addressing community interest based claims: *erga omnes partes* standing. The analysis to answer to this question has done through the Court's case law and scholars' opinion on this matter. There are several contradictions on the issue of *erga omnes partes* standing and the related category *actio popularis*, however, the room for recognizing this type of standing is largely opened.

**Key words:** *erga omnes, erga omnes partes, actio popularis, locus standi.*

From the recent ICJ's case law, it is known that each State party to a human rights treaty has standing for protection of *erga omnes partes* obligations, i.e. collective obligations.<sup>1</sup>

One of the latest Court's decision can confirm this conclusion. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* the ICJ has addressed the issue of *erga omnes partes* standing. In accordance with this case, South Africa had standing before the Court as a State party to the Genocide Convention and thus, has a legal interest in compliance with *erga omnes partes* obligations.<sup>2</sup> During the oral proceedings, Israel did not challenge South Africa's standing to bring a claim. Moreover, South Africa itself referred to *erga omnes partes* standing only in one paragraph,<sup>3</sup> not discussing it own standing broadly. We believe, it is because now, *erga omnes partes* standing before the Court is accepted category.<sup>4</sup> All what

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<sup>1</sup>*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012) ICJ Rep 422, [68]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Preliminary Objections* (2022) ICJ Rep 477, [107]; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic) Provisional Measures* (2023), [55]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) Provisional Measures* (2024), [33].

<sup>2</sup>*Ibid.*

<sup>3</sup>*Application instituting proceedings and request for the indication of provisional measures (South Africa v. Israel)* (2023) ICJ, [5].

<sup>4</sup>FaridAhmadov, (ed. Malgosia Fitzmaurice & Sarah Singer) *The Right of ActioPopularis before the International Courts and Tribunals* (Brill Nijhoff, 2018), 22.

is required is to be a State party to the convention in question.<sup>5</sup> However, the procedure was not always as simple as it stands in present. Application of *erga omnes partes* standing has a long and controversial history.<sup>6</sup> There are still contradictions, which were not addressed by the Court in terms of *erga omnes partes* standing.

For instance, all human rights treaties are designed to protect a common interest.<sup>7</sup> If this description is correct, then it appears that all obligations related to human rights treaties are *erga omnes partes*.<sup>8</sup> Does it mean that all State parties to particular human rights treaty, regardless of the significance of the rights involved, have *prima facie* standing before the Court?<sup>9</sup> Have the Court's latest decisions opened the floodgates for instituting proceedings for alleged violations of *erga omnes partes* norms? This article is aimed to answer to this question.

The Court, when it dealt with the claims of protection of a collective/common/general interest, applied the rules of standing very carefully. For example, Judge Oda, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* case,<sup>10</sup> suggested approach in accordance with, parties can have standing before the Court only for protection of their direct legal interest, i.e. being an injured State.<sup>11</sup> He justified such approach under police issues, reflected in the caution that the Court may run the risk of opening the floodgate for numerous cases of a

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<sup>5</sup>*Belgium v Senegal*, [68].

<sup>6</sup>KébaMbaye, "L'intérêt pour agir devant la Cour internationale de Justice" [Standing before the International Court of Justice] (1988) 209 *Collected Courses of the Hague Academy of International Law* 227, 299.

<sup>7</sup> ILC, Special Rapporteur James Crawford, *Third Report on State Responsibility* (2000) A/CN.4/507, [92].

<sup>8</sup> Human Rights Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc ICCPR/C/21/Rev.1/Add.13 (2004), [2]; Erika De Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. (2006), 55.

<sup>9</sup>*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Second Phase* (1970) ICJ Rep 6, [91]: "the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe." In other words, the corresponding duty to protect the right to access to justice does not qualify as an obligation *erga omnes*; Manfred Lachs, *The Development and General Trends of International Law in Our Time*, 169 *Recueil des Cours* 9 (1980).

<sup>10</sup>*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 1996*, ICJ Rep 7.

<sup>11</sup>Oda's Declaration, *Genocide Convention case (Bosnia and Herzegovina v Yugoslavia) Preliminary Objections* (1996), [10].

similar character.<sup>12</sup> Furthermore, this view was also supported by the ICJ's expert Shabtai Rosenne, who was convinced that only injured States can bring a claim for a violation of Genocide Convention under Article IX.<sup>13</sup>

Such view is in contradiction with the Court's decisions, namely *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* and *South Africa v. Israel* cases, where the Convention in question was Genocide case. Moreover, the notion that only injured States can bring a claim for protection of their legal interest would preclude *actio popularis*.<sup>14</sup>

Thus, *erga omnes partes* standing before the Court did not always had a singular approach and developed over time. We shall start our analysis by referring to the *South West Africa Cases (Ethiopia and Liberia v. South Africa)* of 1966,<sup>15</sup> where the controversial begins.

In the *South West Africa* case the Court found that the Applicants (Ethiopia and Liberia) did not have a standing to bring a claim for protection of a common interest.<sup>16</sup> The reasoning of the Court's finding was simply lying on the fact that Applicants lacked a legal interest. Jurisdictional clause under Article 7(2) of the Mandate Agreement was not sufficient to enforce a collective interest under Article 22 of the Covenant of the League of Nations.<sup>17</sup> However, the reason is much deeper than just a lack a legal interest. The core of the issue is the existence of **legal dispute** between the parties.

Judge Morelli in his dissenting opinion pointed out a lack of a legal dispute, and, thus, Ethiopia and Liberia were not entitled to bring a claim. A mere fact that Applicants were State parties to the Covenant was not sufficient itself to bring a claim. As a result, the Court proclaimed that Ethiopia and Liberia did not have a legal interest to address the issue.<sup>18</sup>

An issue of the existence of the dispute between the parties was decided by interpretation of the jurisdictional clause of the Mandate agreement (Article 7(2)). In accordance with this provision,

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<sup>12</sup>*Ibid.*

<sup>13</sup>ShabtaiRosenne, "War Crimes and State Responsibility" in Y. Dinstein, M. Tabory (eds.), War Crimes in International Law, (The Hague, 1996), p. 81.

<sup>14</sup>FaridAhmadov, (ed. Malgosia Fitzmaurice & Sarah Singer) "The Right of ActioPopularis before the International Courts and Tribunals"(Brill Nijhoff, 2018), 321.

<sup>15</sup>*South West Africa Cases (Ethiopia and Liberia v. South Africa)* Second Phase (1966) ICJ Rep 6.

<sup>16</sup>*Ibid.*, [88].

<sup>17</sup>*Ibid.*, [20].

<sup>18</sup> Dissenting Opinion of judge Morelli, *South West Africa Cases (Ethiopia and Liberia v. South Africa)* Preliminary Objections (1962) ICJ Rep 6, 571.

“... if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.”<sup>19</sup>

Moreover, the reference is made to the *Mavrommatis Palestine Concessions* case<sup>20</sup> in accordance with *dispute isa disagreement between two persons on point of law or fact*.<sup>21</sup>

Indeed, there was a contradiction of opinions between the parties on application and interpretation of the Mandate Agreement. However, the Court decided to interpret the definition of the dispute very narrowly, limiting it only to contradiction which may arise with tangible interests.<sup>22</sup> Thus, such limitation of the term of dispute lead to the conclusion that jurisdictional clause under Article 7(2) was not intended to cover disputes for protection of a general interest.<sup>23</sup> The Court did not find evidence that the drafters intended to construe the jurisdictional clause in the way to enforce a collective interest.<sup>24</sup> Generally speaking, Article 7(2) of the Mandate Agreement was limited only to tangible legal interest, in order for a general interest exist it must be clearly stipulated in the treaty itself:

“The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law”.<sup>25</sup>

We must give a specific attention to the fact that the substantial provisions of the Mandate Agreement were not taken into account while making such conclusion. The Court, in its now famous *obiter dictum*, stated that there is a certain category of obligations to which the international community as whole has a legal interest in their protection; they are obligations *erga omnes*.<sup>26</sup> The Court mentioned examples of *erga omnes* obligations, which are the prohibition of an act of aggression, genocide, protection from slavery and racial discrimination. Other obligations of *erga omnes* nature can derive from the international instruments

<sup>19</sup>*South West Africa*, [60].

<sup>20</sup>*South West Africa Cases* (Ethiopia and Liberia v. South Africa) Preliminary Objections (1962) ICJ Rep 319.

<sup>21</sup>*Mavrommatis Palestine Concessions*(Greece v. Britain) (1924) PCIJ No.3.

<sup>22</sup>*South West Africa*, [44].

<sup>23</sup> Joint Dissenting Opinion of judges Spender and Fitzmaurice, ICJ Reports, 1962, 548.

<sup>24</sup> Dissenting Opinion of judge Winiarski, ICJ Reports, 1962, 452.

<sup>25</sup>*South West Africa*, [44].

<sup>26</sup>*Barcelona Traction*, [33].

of universal and quasi-universal character.<sup>27</sup> There are certain debates between scholars whether *Barcelona Traction* case overruled *South West Africa* decision.<sup>28</sup> Indeed, *Barcelona Traction* was a departure from *South West Africa* case and overruled it.<sup>29</sup> Specifically, the Court's approach has changed with regards to the definition of dispute. Barcelona's pronouncement on *erga omnes* obligations has broadened the scope of dispute by including a general interest into a legal interest. This broad approach on acceptance that certain obligations are concern of the international community as a whole was admitting of *actio popularis*, i.e. claims on enforcement of a collective interest.

Therefore, in *Barcelona Traction* case, the Court's interpretation of jurisdictional clause was broadened to include a general interest. Thus, granting standing on *erga omnes partes* basis highly referred to the character of the treaty in questions, which is designed to protect a common interest and a liberal interpretation of the jurisdictional clause.

It is worth to mention that there are also cases when *actio popularis* does not always depend on interpretative functions of the Court.<sup>30</sup> States can include the right to protect a collective interest in a treaty itself by express provisions. All what left is to apply such express treaty stipulation to bring a claim.<sup>31</sup> Examples include Article 33 of the European Convention on Human Rights:

"Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party".<sup>32</sup>

This provision is a clear example of *actio popularis*, the right of any State party to bring a claim for protection of a common interest under a treaty. In practice of the International Court of Justice there was not such a case, where a treaty stipulation was specifically provided. Nevertheless, the predecessor of the Court has referred in *S.S. Wimbledon* decided by the PCIJ.<sup>33</sup> All State parties to the

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<sup>27</sup>*Ibid.*, [34].

<sup>28</sup> Manfred Lachs, "The development and general trends of international law in our time", 169 RdC (1980), 341, suggesting that there is a long way between Barcelona and *actio popularis*; Ch. Chinkin, "Third Parties in International Law" (1995), 215; D. Gray, "Judicial Remedies in International Law" (1990), 214.

<sup>29</sup> F.A. Mann, "The Doctrine of *jus cogens* in international law, Further Studies in International Law" (1977), 96; Schwelb, "The *Actio Popularis* and International Law", 2 Israel Yearbook of Human Rights (1972), 46–55.

<sup>30</sup> Christine Tams, "Enforcing obligations *erga omnes* in International Law" (2005), pp. 76–79.

<sup>31</sup> Farid Ahmadov, (ed. Malgosia Fitzmaurice & Sarah Singer) "The Right of *Actio Popularis* before the International Courts and Tribunals" (Brill Nijhoff, 2018), 315.

<sup>32</sup> European Convention on Human Rights, Article 33.

<sup>33</sup> *S.S. Wimbledon, Britain et al. v. Germany* (1923) PCIJ Series A01.

Versailles Convention had a legal interest in performance with essential obligations under the treaty. More specifically, the right of each State party to the Convention to have a free access to Keil Canal.<sup>34</sup> In that case there were four Applicants: Italy, Japan, United Kingdom and France, the Court has found that each of them had a legal interest and thus had a right to institute proceedings. Under Article 386 of Versailles Convention:

“In the event of violation of any of the conditions of Articles 380–386, or of disputes as to the interpretation of these articles, *any interested Power* can appeal to the jurisdiction instituted for the purpose by the League of Nations”.

Thus, “each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags”.<sup>35</sup>The *S.S. Wimbledon* is the only decision, where *actio popularis* category was accepted by the Court because of the express treaty provisions to protect a common interest.

While, the Court’s position is clear with the cases of express treaty stipulation, our concern is related to cases when there are no such express treaty provisions. Following the analysis of the *Barcelona Traction* case, we refer to situations, where the Court finds standing by interpreting a jurisdictional clause and substantial provisions of the treaty. Moving back to the initial question, can this approach be used with any treaties, which are designed to protect a collective interest?

In *Questions relating to the obligation to Prosecute or Extradite* case, the Court granted Belgium’s standing merely on the fact that it was a State party to the Torture Convention and therefore it has a legal interest in performance of *erga omnes partes* obligations.<sup>36</sup> Moreover, the Court established a test on identification of *erga omnes partes* obligations. *Erga omnes partes* obligations are those obligations, which are incorporated to fulfill the object and purpose of a treaty and, therefore, to preserve State parties’ common interest.<sup>37</sup>

Under strict analysis, it is clear that there first question, which the Court addressed itself was: is the Torture Convention designed to protect a common interest? The answer was positive: “As stated in its Preamble, the object and purpose of the Convention is to make more effective the struggle against torture . . . *throughout the world*.”<sup>38</sup> Moreover, in order to make a parallel, the reference

<sup>34</sup> Series A, No. 1, August 17th, 1923, p. 23.

<sup>35</sup> *Ibid.*, p.20.

<sup>36</sup> *Belgium v. Senegal*, [68].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

was given to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 1951*, by reaffirming that:

“In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest.”<sup>39</sup>

We suppose that this is done so to demonstrate the importance of the rights involved and thus *erga omnes partes* standing must be granted to protect a common interest. This leads to conclusion that in cases of protection of collective interest significance of the rights play essential role. However, there was a dissent to majority’s opinion from several judges, namely from Judge Xue and Judge Scotnikov.

Judge Skotnikov cast doubt on the Court’s conclusion that the entitlement of States to invoke responsibility of other States parties to the Torture Convention may be implied (inferred) from the mere fact that it is a State party to the Convention. His Excellency’s concern in this regard is that such approach would lead to making declarations to exclude the Court’s jurisdiction in future cases.<sup>40</sup> Moreover, he refers to the question whether it is possible to compare and equal Torture Convention with Genocide Convention.<sup>41</sup> We believe that His Excellency’s concern in this matter, especially with excluding the Court’s jurisdiction, is a valid one. Overall, His Excellency’s disagreement goes to the fact the Torture Convention was interpreted in a way that more it can bear, i.e. treaty’s ability to institute proceedings for protection of a common interest. As it was stated above, such interpretation is a liberal interpretation of jurisdictional clause in conjunction with a character of the substantial provisions. Following Judge Scotnikov’s opinion, in order to grant standing for protection of a collective interest, this right must be specifically provided in the treaty itself:

“[i]n order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State.”<sup>42</sup> Thus, Judge Scotnikov concluded that a reasoning of Belgium’s standing before the Court has not found in law, be it conventional or

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<sup>39</sup>*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Rep (1951), p. 23.

<sup>40</sup>Declaration of Judge Scotnikov, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012) ICJ Rep 422, [15].

<sup>41</sup>*Ibid.*

<sup>42</sup>Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 127.

customary.<sup>43</sup> Again, in that case the Court has used an approach of liberal interpretation of a treaty by extending its ability to cover disputes for protection of a common interest, which are based on application and interpretation of the treaty. Since the question of the broad interpretation of the jurisdictional clause for protection of a common interest is clear, the turn goes to substantial provisions themselves, i.e. *erga omnes/erga omnes partes* obligations.

There are two things to keep in mind with regards to this category of obligations: *Erga omnes partes* obligations are incorporated to protect a collective interest, i.e. to fulfill the object and purpose of the treaty.<sup>44</sup> Even listing the Court's decisions, where *erga omnes partes* standing was recognized, the Conventions in question were Genocide Convention or Torture Convention:

- *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case: Torture Convention;
- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* case: Genocide Convention;
- *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)* case: Torture Convention;
- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* case: Genocide Convention.

From the listed case law, it can be concluded that the Court recognizes *erga omnes partes* standing in relation to *jus cogens* norms. Thus, the Court while interpreting the jurisdictional clause to grant standing, the character of the norm is significantly involved. This is done so to avoid policy issue, when any State party to any treaty can institute proceedings to enforce collective interest.

However, there is one particular case when a non-injured State brought a claim before the ICJ to protect a collective interest: *Whaling* case.<sup>45</sup> The essentiality of this case is the claim was brought to protect a collective interest, not involving *jus cogens* norms. This seems to be an implicit recognition of standing for protection a collective interest regardless of the significance of the rights involved.

Australia invoked Japan's responsibility for violations of Whaling Convention. Respondent did not challenge Applicant's standing for protection of a collective

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<sup>43</sup>Declaration of Judge Scotnikov, [22].

<sup>44</sup> ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) A/56/49, Article 48(1)(a).

<sup>45</sup>*Whaling in Antarctica* (Australia v. Japan: New Zealand intervening) (2014) ICJ Rep 226.

interest. Nevertheless, the Court itself raised this issue during the hearings, specifically judge Bhandari addressed the question of *locus standi*. The Counsel's answer was following:

"Every party has the same interest in ensuring compliance by every other party with its obligations under the 1946 Convention. Australia is seeking to uphold its collective interest, an interest it shares with all other parties".<sup>46</sup>

In the text of the judgement, the Court did not refer to Australia's standing, because it was not challenged by Respondent. However, the Court could do so under the principle of *proprio motu* (own motion). In accordance with this principle, *the Court must satisfy itself that it has jurisdiction to hear the case and the claim is admissible*.<sup>47</sup> Despite the fact that the Respondent or the Court did not raise a question of the Applicant's standing, Australia's claim was still admissible, it seems that it was an implicit recognition of *erga omnes partes* standing. Commentaries to Article 48 of the Articles on State Responsibility for Internationally Wrongful Acts list the category of treaties, which are specially designed to protect a 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)".<sup>48</sup> However, in the above listed cases the ICJ did not refer to Article 48 of ARSIWA, moreover, the commentaries itself recognizes that the rule of standing under this article is *a de lege ferenda*.

### **Conclusions**

The first conclusion comes from the analysis of *erga omnes partes* standing is, in order to bring a claim for protection of a collective interest, there must be a legal dispute between the parties. It is not fully, but partially decides the issue of opening the Court's floodgates to bring a claim for protection of a common interest. Indeed, it is true that a liberal interpretation of jurisdictional clauses can include disputes that are based on a mere contradiction of opinions between the State parties, however, the Court will address other features of the treaty. For example, as it is done so in the *Belgium v. Senegal* case, the Court first identified whether the parties intended to protect a common interest by referring to its preamble. Thus, the existence of the dispute between the parties partially decides policy issue of opening the floodgates. The other point is, in all of the cases, where the ICJ expressly established an *erga omnes partes* standing were concerning the application and interpretation of the Genocide or Torture

<sup>46</sup> Presentation by Henry Burmester, Verbatim Record, CR 2013/18, 9 July 2013, 28, [19].

<sup>47</sup> *South West Africa*, [8].

<sup>48</sup> Yearbook of the International Law Commission, 2001, vol. II, Part Two, p.126.

Convention. The only case, where the ICJ did not deal with human rights treaty, however, implicitly recognized an *erga omnes partes* standing was *Whaling* case. A concern is directed to *Whaling* case, because there is a possibility that in future cases, this Court will grant standing for protection of a common interest regardless of the significance of the rights involved. Thus, the floodgates for *erga omnes partes* claim will be open. In cases, where *jus cogens* norms involved, the recognition of protection of a collective interest is necessary due to the fact that those are concern of the international community as whole. Especially, in the present stage of development of international law, it transcends the bilateral concept till a community interest.<sup>49</sup> Even if there is a concern of the international community for opening the floodgates, today's tendency of development of inter-State relations lead to the recognition of community interest based claims.

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<sup>49</sup>Fastenrath, Ulrich, and others (eds), "*From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*" (Oxford, 2011), p.25.

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