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LEGAL STANDING AND PUBLIC INTEREST LITIGATION: ARE ALL *ERGA OMNES* BREACHES EQUAL?

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Legal Standing and Public Interest Litigation: are all *erga omnes* breaches equal?

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Abstract

Public interest litigation over *erga omnes* breaches is commonly associated with abuses that are widespread or systematic, such as cases of genocide or crimes against humanity. By contrast, the prospect of such litigation over more isolated breaches of *erga omnes* norms, especially those that cause harm to specific individuals, is mostly ignored. Imagine, however, inter-State proceedings over (proven or alleged) human rights abuses in highly politicized and mediatized cases involving figures such as Julian Assange, George Floyd, Alexei Navalny or Jamal Khashoggi. An alluring prospect to some; *lex horrenda* for others? The present paper tackles two questions that arise in this context. First, are such proceedings subject '*mutatis mutandis*' to the same admissibility requirements applicable to the exercise of diplomatic protection (as the ILC has suggested in the past)? Second, is or should public interest litigation be limited to serious and widespread breaches, to the exclusion of more 'isolated' ones?

Keywords

Erga omnes – Public Interest Litigation – Legal Standing – International Responsibility – Diplomatic Protection

1 Introduction

Building on the little seed planted by the International Court of Justice in its 1970 *Barcelona Traction* judgment,[2] Article 48(1)(b) of the International Law Commission's Articles on State Responsibility (ARSIWA) asserts that any State is entitled to invoke the responsibility of another State if "the obligation breached is owed to the international community as a whole."[3] This provision, which paves the way for public interest litigation at the inter-State level, has been put into practice in a number of cases, including, most recently in *The Gambia v Myanmar,* currently pending before the ICJ. Significantly, in its Order on Provisional Measures[4] in the former case, the ICJ does away with the suggestion that a third State should have a 'special interest' in order to bring proceedings over breaches of community

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[2] ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), (1970) ICJ Rep. 3, para. 33. The Court's embracing of the concept of obligations owed to the international community as a whole is widely regarded as a fundamental overhaul of its more conservative (and heavily criticizes) approach to legal standing in the judgment on the merits in the *South West Africa* cases. ICJ, *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa), (1966) ICJ Rep. 6.
[3] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', reproduced in (2001) *Yb. I.L.C.* Vol. II, Part Two, at 126.
[4] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v Myanmar), Order of 23 January 2020, (2020) ICJ Rep. 3.

norms. Supporters of the international rule of law can only welcome such precedent, and hope that it will inspire others to follow suit. In late 2020, the Netherlands announced its decision to hold Syria responsible for widespread torture, stressing that if negotiations with the Syrian authorities were to prove unsuccessful, it would trigger judicial proceedings under Article 30(1) of the UN Convention against Torture.[5] It was joined in this effort by Canada in March 2021.[6]

Recent events have again raised the hope that States will finally discover and utilize the enormous – yet mostly untapped – potential of Article 48(1)(b) ARSIWA, and that public interest litigation may finally be moving from the world of the 'ought' to the 'is'.[7] In parallel, this has sparked renewed scholarly interest in the – yet unsettled – outer bounds of such litigation, including with respect to the conditions under which third States can assert the required *locus standi* to challenge breaches of *erga omnes (partes)* norms before an international court (Section 2).

One question that has received less attention in this context is whether all breaches of *erga omnes* norms must be treated equally, or whether, at least for some of these, further limitations (should) apply. In particular, while *erga omnes* breaches are commonly associated with unlawful conduct that is systematic or widespread in nature (e.g, genocide or crimes against humanity), such breaches can in reality be much more diverse (Section 3). Thus, for many *erga omnes* obligations, a breach need not necessarily take on a collective dimension, but can equally consist of a more 'isolated' breach, causing harm to one or more specific individuals. This is the case for the prohibition of torture (compare the systematic torture in Syria to an isolated case of torture of a detainee in country X or Y). Yet, it also holds true for a variety of norms that are sometimes regarded as possessing an *erga omnes (partes)* character, such as the non-refoulement principle, the right to life or the freedom of navigation.

The purpose of the present paper is precisely to take a closer look at the possibility of public interest litigation in respect of more 'isolated' *erga omnes* breaches affecting specific individuals or companies. Two questions are addressed in turn. First, how does such litigation square with the doctrine of diplomatic protection, and to what extent are the admissibility requirements for diplomatic protection equally applicable (Section 4)? A remarkable paradox would indeed result if, for instance, an 'indirectly injured' State wishing to bring proceedings before the ICJ in the exercise of its right of diplomatic protection (or seeking to bring inter-State proceedings before the ECtHR) would

[5] Government of the Netherlands, 'The Netherlands holds Syria responsible for gross human rights violations', 18 September 2020, available at https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations.

[6] Government of the Netherlands, 'Joint statement of Canada and the Kingdom of the Netherlands regarding their cooperation in holding Syria to account', 12 March 2021, available at https://www.government.nl/documents/diplomatic-statements/2021/03/12/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account.

[7] Paraphrasing the oft-quoted observation of Bruno Simma that '[v]iewed realistically, the world of obligations erga omnes is still the world of the 'ought' rather than of the 'is''. B. Simma, 'Does the UN Charter provide an adequate legal basis for individual or collective responses to violations of obligations erga omnes?', in J. Delbrück (ed.), *The Future of International Law Enforcement* (Berlin: Duncker & Humblot) (1993), at 125.

need to wait for the affected national(s) to first exhaust local remedies, while the local remedies rule would not apply to a third State seeking to initiate public interest litigation.

Second, leaving aside the foregoing paradox, the broader question is whether it is ultimately permitted, or *should* be permitted, for third States to bring public interest claims against other States in respect of relatively isolated breaches of *erga omnes* norms (Section 5). It is not difficult to conceive of highly politicized cases that could result if an affirmative answer is given (imagine inter-State proceedings over the deaths of George Floyd or Jamal Khashoggi, or the detention of Alexei Navalny). Should we welcome this as furthering the international rule of law, and perhaps assume that States will exercise self-restraint and only bring public interest claims over grave and widespread breaches? Or are we witnessing a *lex horrenda* in the making, and a potential opening of the 'floodgates of litigation'? These are the questions which the paper seeks to explore.

2 Clarifying the conditions for public interest litigation: a work in progress

Notwithstanding the progressive and open-ended language of Article 48(1) ARSIWA, the extent to which customary international law grants third States legal standing to initiate public interest litigation, and the conditions under which this may be done, remains fraught with uncertainty.[8] Even if recent case-law has lifted a tip of the veil, clarifying third States' *locus standi* over breaches of *erga omnes (partes)* norms indeed remains a work in progress.

One Gordian knot that has been cut by the ICJ is whether a third State must somehow be 'specially affected' by the wrongful conduct – that is, whether it must be "affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed".[9] In *Belgium v. Senegal*, relating to Senegal's refusal to extradite former Chadian dictator Hissène Habré in accordance with the *aut dedere, aut judicare* obligation under the UN Torture Convention, the ICJ first seemingly dismissed the need for a special interest.[10] The precedential value of that judgment was, however, questioned as Belgium had claimed to be acting *both* in the community interest in the sense of Article 48 ARSIWA, as well as in pursuit of a 'special interest' in the sense of Article 42(b)(i) ARSIWA,[11] and

[8] For a fuller treatment of some of these questions, see in particular: P. Urs, 'Obligations *erga omnes* and the question of standing before the International Court of Justice', (2021) 34 *Leiden J.I.L.*, pp. 505-525; Y. Tanaka, 'The legal consequences of obligations erga omnes in international law', (2021) 68 *N.I.L.Rev.*, pp. 1-33, at 20 ff; M. 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', forthcoming in (2021) 23 *International Community L.Rev.*, pre-publication version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3774942, 27 p.

[9] ILC, *loc. cit.*, supra n. 3, at 119.

[10] ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), (2012) ICJ Rep. 422, at para. 69: "The common interest in compliance with … 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."

[11] This 'special interest' supposedly stemmed from the fact the Belgian courts were actively seized of the Habré case which also involved torture victims of Belgian nationality, and from the fact that Belgium had formally requested Habré's extradition. ICJ, *Case concerning Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), Memorial Kingdom of Belgium, 1 July 2010, para. 5.17, available at https://www.icj-cij.org/public/files/case-related/144/16933.pdf.

some believed such 'special interest' to be present indeed.[12] In its recent Order on Provisional Measures in *The Gambia v. Myanmar*, however, the ICJ removed any lingering doubt, by asserting unequivocally that 'any State party to the Genocide Convention, and not only a specially affected State' has the required *locus standi* under the latter Convention[13] – a 'sweeping conclusion' heavily criticized by Judge Xue.[14] The clear language used by the Court, in combination with the absence of any 'special interest' claimed by The Gambia, confirm that a 'special interest' is no *sine qua non* for third States to initiate public interest litigation.[15]

Still, related questions do remain. One such question is whether the foregoing also holds true where a 'specially affected' State can easily be identified, e.g., where a case involves a breach of the prohibition on the use of force (can States other than the attacked State bring proceedings?) or torture against one or more individuals that are neither nationals of the wrongdoing State, nor of the third State seeking to bring proceedings (can third States other than the State of nationality bring proceedings?). Again, the Order in *The Gambia v. Myanmar* suggests that even then, any third State has legal standing to bring proceedings. After all, the Court confirms The Gambia's legal interest irrespective of Myanmar's claim that only Bangladesh, "as the State being specially affected by the events forming the subject-matter of the Application"[16] (given the refugee flow caused by Myanmar's persecution of the Rohingya) would have been entitled to invoke Myanmar's responsibility. The Court thus appears to endorse the position that "[a]n *erga omnes* right is … a series of separate rights *erga singulum*" which "are in no way dependent upon the other".[17] It remains to be seen, however, if at the stage of the preliminary objections, the Court will confirm its earlier *dictum*, and whether it will further elaborate on whether the presence, and conduct, of a 'specially affected' State puts a brake on the resort to public interest litigation by other third States.[18] Specifically, even if the presence of a specially affected State does not automatically rule out proceedings by States 'other than the injured State' *per se*, what are the repercussions of the specially affected State could in principle bring proceedings but refrains from doing

[12] See, for instance, ICJ, *The Gambia v Myanmar*, *loc. cit.*, supra n. 4, Separate Opinion of Judge Xue (2020) ICJ Rep. 32, at paras. 4-5. Further M. Longobardo, *loc. cit.*, supra n. 8, at 22-23/27.
[13] ICJ, *Gambia v Myanmar, loc. cit.,* supra n. 4.
[14] ICJ, *The Gambia v* Myanmar, *loc. cit.*, supra n. 4, Separate Opinion of Judge Xue (2020) ICJ Rep. 32, at paras. 4-5.
[15] This is also the position put forth in Article 2 of the resolution of the *Institut de Droit international* on 'Obligations erga omnes in international law' adopted at the IDI's Krakow Session in 2005, and available at https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf.
[16] ICJ, *loc. cit.*, supra n. 13, at para. 39.
[17] ICJ, *Case concerning East Timor* (Portugal v Australia), Dissenting Opinion of Judge Weeramantry, (1995) ICJ Rep. 139, at 172.
[18] See e.g. M. Longobardo, *loc. cit.*, supra n. 8, at 24/27 Longobardo notes in this context that one could also question whether Bangladesh truly qualifies as a specially affected State in the case concerned.

so,[19] or issues a waiver or acquiesces in the lapse of the claim?[20] Additionally, what are the consequences with regard to the possibility to seek reparation?[21]

Another crucial issue that remains to be addressed by the ICJ is whether public interest litigation is possible, not only in respect of *erga omnes partes* norms under conventional law, but also in respect of *erga omnes* norms under customary international law. An affirmative answer is found in the works of the International Law Commission and the *Institut de droit international*.[22] Until now, however, relevant precedents have confirmed legal standing only in respect of breaches of obligations *erga omnes partes* (e.g., breaches of the UN Torture Convention or the Genocide Convention) – in part because the ICJ has hitherto simply never been required to address legal standing in respect of customary *erga omnes* norms. Clearly, if the above question were answered in the negative, that could severely limit the prospect of public interest litigation. Standing would indeed be reserved to States parties to a limited number of treaties.[23] Inasmuch as no qualitative distinction exists between *erga omnes* norms and *erga omnes partes* norms, the logical conclusion that violations of *both* can be challenged by third States awaits confirmation by the Hague Court.[24] It is difficult to escape the impression, however, that the ICJ has so far been reluctant to endorse the views of the ILC reflected in Article 48 ARSIWA and its Commentary.[25]

Other unsettled questions have been subject to academic scrutiny, including, for instance, the possibility for third-State intervention under Articles 62-63 of the ICJ Statute in cases involving breaches of *erga omnes (partes)* norms.[26]

3 On the diversity of *erga omnes* breaches

Of course the extent to which the possibility for 'non-injured' States to bring proceedings at the international level over breaches of *erga omnes (partes)* norms is subject to restrictions becomes all the more relevant the broader that category is construed. As far as *erga omnes partes* norms are concerned, the ARSIWA Commentary refers to obligations

[19] Recall that with respect to Myanmar's persecution of the Rohingya, Bangladesh could not in any case bring proceedings against Myanmar under the Genocide Convention due to a Declaration made in connection with the compromissory clause of the Genocide Convention (and requiring "consent of all the parties to the dispute … in each case").

[20] See further P. Urs, loc. cit., supra n. 8, at 522. Note: this question was also raised by the United Kingdom in the context of the ILC's *travaux*. See in particular the interventions of the UK in (1998) *Yb. I.L.C.* vol. 2, Part I, at 142 (suggesting that "it would be helpful for the Commission" to consider the impact of a waiver by 'the State principally injured'); (2001) *Yb. I.L.C.* vol. 2, Part I, at 81 (suggesting that acquiescence/waiver by the injured State prevents other States from raising a claim: "If there is an injured State, it can make the claim itself. If it chooses not to claim, the position should be treated as analogous to a waiver under draft article 46 and, just as the injured State loses thereby the right to invoke the responsibility of the claim, so should the possibility of the claim being made by others on its behalf be extinguished.").

[21] See P. Urs, loc. cit., supra n. 8, at 521-2.

[22] IDI, *loc. cit.*, supra n. 15, Articles 1 and 2.

[23] M. Longobardo, *loc. cit.*, supra n. 8, at 20/27.

[24] P. Urs, loc. cit., supra n. 8, at 518, M. Longobardo, *loc. cit.*, supra n. 8, at 21/27; Y. Tanaka, *loc. cit.*, supra n. 8, at 23.

[25] M. Longobardo, *loc. cit.*, supra n. 8, at 25. The ICJ's reluctance can, for instance, be contrasted to the express reliance on Article 48 ARSIWA in the Advisory Opinion issued by ITLOS' Seabed Disputes Chamber in 2011: ITLOS, *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, (2011) ITLOS Reports 10, at para. 180.

[26] See e.g. P. Urs, loc. cit., supra n. 8, at 523; Y. Tanaka, *loc. cit.*, supra n. 8, at 28.

established 'in some collective interest', which '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').[27] Building on the case-law of the ICJ, the Commentary further identifies the following examples of *erga omnes* norms: the prohibition of aggression, the prohibition of genocide, the right of self-determination, and 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.[28] It is evident that the category of 'basic rights' is itself open-ended, and that there are a variety of rights, other than the prohibition of slavery and racial discrimination, that may qualify as such.[29] What is more, the ARSIWA Commentary emphasizes that the examples are not intended as a closed list of obligations which are owed to the international community as a whole under existing international law, and that such list would in any case be of limited value, as the concept 'will necessarily evolve over time'.[30]

Case-law and doctrine effectively put forward a range of other potential candidates that might fit the label of *erga omnes* norms.[31] First, broad agreement exists that any peremptory norm of general international law will simultaneously give rise to obligations *erga omnes*.[32] It can thus be reasonably presumed that all of the norms included in the ILC's (provisional) list of peremptory norms,[33] such, for instance, 'the prohibition of crimes against humanity', 'the basic rules of international humanitarian law', 'apartheid' and 'the prohibition of torture', also qualify as such. Precedents from international and domestic courts or expert bodies also highlight several other candidates for *jus cogens* – and therefore also *erga omnes* – character. The principle of non-refoulement, for example, and the prohibition of arbitrary deprivation of life have been identified as such by the International Criminal Court,[34] and, among others, the Human Rights Committee.[35] The Special Tribunal for Lebanon has arrived at the same conclusion in respect of the principle of legality (*nullum crimen sine lege*).[36] It has also determined that the right to access to

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[27] ILC, *loc. cit.*, supra n. 3, at 126, para. 7.

[28] *Ibid.*, at 127.

[29] As Tams observed in 2005, of the various candidates he category of 'basic humanitarian standards' was 'by far the most disputed' in academic debate. C. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP)(2005), at 89. Tams further observes that "[w]hile commentators have criticised the underlying distinction between basic and other human rights it is difficult to ignore the fact that, at least in 1970, the Court was not prepared to admit the erga omnes character of all human rights." *Ibid.*, at 138.

[30] ILC, *loc. cit.*, supra n. 3, at 127.

[31] According to the preamble of the *Institut's* 2005 resolution on *erga omnes* obligations (IDI, *loc. cit.*, supra n. 15), "a wide consensus exists to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination and obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values."

[32] See in this sense Conclusion 17(1) of the ILC's draft conclusions on peremptory norms, as adopted on first reading ("Peremptory norms of general international law (jus cogens) give rise to obligations owed to the international community as a whole (obligations erga omnes), in which all States have a legal interest."). Reproduced in ILC, 'Report of the International Law Commission. Seventy-first session (29 April-7 June and 8 July-9 August 2019), UN Doc. A/74/10, at 190. See also in this sense: C. Tams, *op. cit.*, supra n. 29, at 151; Y. Tanaka, *loc. cit.*, supra n. 8, at 10-11.

[33] ILC, *loc. cit.*, supra n. 32, at 208.

[34] ICC, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-34-05-tENg, Decision on the Application for the Interim Release of Detained Witnesses of 1 October 2013, Trial Chamber II, at para. 30

[35] Human Rights Committee, General Comment No. 24, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, at para. 10.

[36] Special Tribunal for Lebanon, *Prosecutor v. Ayyash, et al.*, Case No. STL-11-01/I, Interlocutory Decision of 16 February 2011 on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, at para. 76.

justice constitutes a *jus cogens* norm,[37] as has the Inter-American Court of Human Rights.[38] The latter Court has similarly confirmed the peremptory and *erga omnes* nature of the principle of equality and non-discrimination.[39]

While there appears widespread recognition – including by the ILC[40] – that the list of *erga omnes* norms is not exclusively confined to those recognized as having peremptory character, the identification of *erga omnes* obligations *not deriving form* jus cogens *norms* remains more problematic, with one author describing it as 'uncharted territory'.[41] One complicating factor is the reluctance of the ICJ to shed further light on the factors that determine when an obligation can be said to be 'owed to the international community as a whole' or to be established for the 'protection of a collective interest' of a group, and to instead opt for an ad hoc approach ('surely we'll recognize an *erga omnes (partes)* norm when we see one…'). As Tams explains, two distinct approaches can *grosso modo* be identified.[42] A first approach – the 'structural approach'[43] – focuses on the non-reciprocal or the non-bilateralisable character of the obligations at hand. Thus, for Arangio-Ruiz '[t]he concept of erga omnes obligation is not characterized by the importance of the interest protected by the norm (as is typical of jus cogens) but rather by the 'legal indivisibility' of the content, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others."[44] One problem with this approach is that it appears to cast the net too wide, and ignores the emphasis in 'the bulk of ICJ jurisprudence'[45] on the 'importance' of the obligations concerned. The second approach, the 'material approach'[46], also reflected in the 2005 IDI Resolution,[47] stresses in turn that the importance of the interests protected by the norm constitutes an integral element of what makes an *erga omnes* norm. At the same time, this approach hardly solves the conundrum, but merely kicks the can down the road. In particular, this remains a subjective test, the contours of which only become visible to the extent the *erga omnes* concept is in fact invoked by States or employed by domestic or international courts.[48]

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[37] President of the Special Tribunal of Lebanon, *El Sayed*, Case No. CH/PRES/2010/01, Order of 15 April 2010 assigning Matter to Pre-Trial Judge, at para. 29.

[38] Inter-American Court of Human Rights, Case of Goiburú, et al. v. Paraguay, Judgment of 22 September 2006 on Merits, Reparations and Costs, Series C, No. 153, at paras. 21-29.

[39] Inter-American Court of Human Rights, Advisory Opinion OC-18/03, 17 September 2003, requested by the United Mexican States, *Juridical Condition and Rights of Undocumented Migrants*, available at https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf, at 113, para.5 of the dispositive.

[40] ILC, *loc. cit.*, supra n. 32, at 192: "For example, certain rules relating to common spaces, in particular common heritage regimes, may produce erga omnes obligations independent of whether they have peremptory status."

[41] C. Tams, *op. cit.*, supra n. 29, at 151. An example provided by the ILC in its work on peremptory norms are 'certain rules relating to common spaces, in particular common heritage regimes'. According to the ILC, these rules may produce erga omnes obligations independent of whether they have peremptory status. ILC, *loc. cit.*, supra n. 32, at 192.

[42] C. Tams, *op. cit.*, supra n. 29, at 117 et seq. See also Y. Tanaka, *loc. cit.*, supra n. 8, at 8-10 (favouring a conjunctive approach combining the non-reciprocal character and the importance of the obligations over a disjunctive approach singling out one of the two elements).

[43] C. Tams, *op. cit.*, supra n. 29, at 130.

[44] ILC, 'Fourth Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur', (1992) *Yb. I.L.C.*, Vol. II, Part One, at 34, para. 92.

[45] C. Tams, *op. cit.*, supra n. 29, at 129.

[46] *Ibid.*, at 136 ff

[47] IDI, *loc. cit.*, supra n. 15, Art. 1.

[48] In this sense: C. Tams, *op. cit.*, supra n. 29, at 156.

Be that as it may, some observations can be made in connection with the foregoing.

First, the catalogue of *erga omnes* norms is potentially broad, and extends beyond the perhaps more visible candidates such as the prohibition of aggression or the prohibition of genocide. Consider, for instance, the expansive claim made by the Netherlands in the course of the *Arctic Sunrise* arbitration. In that case, Netherlands took the view that "the obligation to respect the freedom of navigation, including the right to peaceful protest at sea" had an '*erga omnes (partes)* character'.[49] The same was held to be true in respect of 'the right to freedom of expression, the right not to be arbitrarily detained, and the freedom to leave a country'.[50] Since the Arbitral Tribunal held that the contested acts gave rise to direct injury on the part of the Netherlands as the flag State of the *Arctic Sunrise*, the Tribunal ultimately did not take a position on the above claims.[51]

The category of community interest norms can moreover be expected to expand over time as the international legal order gradually moves away from a purely bilateralist conception of international obligations. In particular, once an international court (such as a regional human right court) has identified a norm as having an *erga omnes* character, it is more likely that other actors at the international or national level will follow suit than that they will arrive at the contrary conclusion. A snowball effect thus seems plausible (albeit that it cannot be excluded that the ILC's drawing up of a list of peremptory norms – even if illustrative only – may produce an indirect chilling effect).

Second, taking at face value some of the examples of *erga omnes* norms, it is clear that they present a strong diversity.[52] One aspect of that diversity concerns the fact that some norms inherently presuppose a collective dimension. For example, the prohibitions of aggression and genocide 'by their very nature require an intentional violation on a large scale'.[53] Likewise, a crime against humanity presupposes acts that are part of a 'widespread or systematic attack directed against any civilian population'.[54] A similar observation can be made in respect of the right of self-determination, which is essentially a group right. On the other hand, for other norms, such 'collective' aspect is not indispensable in order to establish a breach. Thus, torture can take the form of a widespread policy at the level of a State's security apparatus (as has been the case in Syria over the past years[55]), but it may also take the form of one or more isolated abuses against 'one or more clearly identified or identifiable persons'.[56] The same holds true for several other norms mentioned above.[57] Thus, the non-refoulement principle can be breached because of a single

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[49] *Arctic Sunrise Arbitration* (Netherlands v Russian Federation), PCA Case N° 2014-02, Award on the Merits, 14 August 2015, at para. 182.
[50] *Ibid*., para. 183.
[51] *Ibid*., para. 186.
[52] Compare to M. Longobardo, *loc. cit*., supra n. 8, at 19 (stressing that the pool of norms is 'quite uniform').
[53] ILC, *loc. cit*., supra n. 3, at 113.
[54] See e.g., Article 7(1) of the ICC Rome Statute.
[55] See e.g., UN Human Rights Council, 'Out of sight, out of mind: deaths in detention in the Syrian Arab Republic', 3 February 2016, UN Doc. A/HRC/31/CRP.1.
[56] To paraphrase ECHR's judgment in *Slovenia v Croatia*. ECtHR, *Slovenia v Croatia*, Application No. 54155/16, Decision of the Grand Chamber of 16 December 2020, at para. 67.
[57] Interestingly, when addressing questions of legal standing in his Third Report to the ILC, Special Rapporteur James Crawford expressly acknowledged the possibility that acts of torture be of an 'isolated' nature, whereas it is 'difficult to conceive of a minor case of

unlawful expulsion of a person to his or her country of nationality where this person faces a risk of torture or inhuman or degrading treatment. Yet, such breach may also result from an organized 'push-back' policy at or beyond a State's external borders. Similar observations can be made *mutatis mutandis* for other human rights norms, such as the right to life, the prohibition of arbitrary deprivation of liberty, or the right of access to justice. Beyond the sphere of human rights law too, *erga omnes* norms need not necessarily entail a collective dimension. By way of illustration, if one were to accept that the freedom of navigation constitutes an *erga omnes* right,[58] it is clear that breaches can be of a more or less isolated nature (as in the case involving the arrest of the *Arctic Sunrise* and the detention of its crew) or of a more widespread, systematic nature (consider, for instance, a policy of harassment of fishing vessels in a contested maritime area).

The abovementioned diversity is often overlooked in legal doctrine. A number of authors in fact go as far as to limit *erga omnes* breaches to 'gross violations of a widespread scale'.[59] Such limitation, however, finds no support in the case-law of the ICJ or in the work of the ILC,[60] and must be dismissed: an obligation acquires *erga omnes* status because it protects important rights, not because – or if – violated in a serious way.[61] Put differently: breaches of *erga omnes* norms do not necessarily presuppose conduct that is particularly grave, widespread or systematic. And while, admittedly, there has as yet not been any clear-cut case where a State has brought inter-State proceedings, e.g., before the ICJ or an arbitral tribunal, over a breach of an *erga omnes* norm committed against one or more clearly identified or identifiable persons (or companies or vessels for that matter), such demarches are not *a priori* excluded and may well materialize in the future (as the *Arctic Sunrise* case appears to forewarn).

The scenario sketched above raises two important questions from an international law perspective that have yet to be addressed in case-law, and which form the focus of the present paper.

First, how does this square with the rules governing the exercise of diplomatic protection? In particular, do the twin admissibility requirements that apply in the latter context – viz., the existence of a bond of nationality and the exhaustion of local remedies – equally apply where a third State brings a case over a human rights violation against one or more specific individuals? If both requirements were deemed to apply, this would substantially curtail the possibility for third States to litigate breaches of community norms. If the answer is negative, however, the resulting

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genocide'. There is, however, no further discussion as to whether this distinction might have repercussions for the legal standing of third States to invoke international responsibility. ILC, 'Third Report on State responsibility, by Mr. James Crawford, Special Rapporteur', 2000, UN Doc. A/CN.4/507, at 37.

[58] See infra note 103, and accompanying text.

[59] K. Oellers-Frahm, 'Comment: the erga omnes applicability of human rights', (1992) 30 *Archiv des* Völkerrechts, pp. 16-37, at 35; P.N. Okowa, *State responsibility for transboundary air pollution in international law* (Oxford: OUP)(2000), at 215-216 (finding that the qualification of environmental obligations as erga omnes norms hinges on the seriousness of the breach). Also implicitly: A. Vermeer-Künzli, 'A matter of interest: Diplomatic Protection and State Responsibility erga omnes', (2007) 56 *I.C.L.Q.*, pp. 553-582, at 556 (limiting the scope of Article 48 ARSIWA to 'serious breaches of peremptory norms').

[60] See also *infra*, notes 113-117 and accompanying text.

[61] C. Tams, *op. cit.*, supra n. 29, at 137.

paradox could be that the State of nationality would only be able to bring proceedings over injury caused to its national(s) after local remedies are duly exhausted, whereas third States would not be so restricted. Further clarification of the relationship between public interest litigation and the exercise of diplomatic protection is therefore in order.

Second, the question remains more generally whether international law allows, and *should* allow, third States to bring proceedings at the international level over 'individualized' breaches of *erga omnes* norms. It is not overly difficult to conceive of hypothetical high-profile and highly politicized cases of this sort. Consider, for the sake of the argument, the example of a State bringing proceedings against Saudi Arabia over the murder of journalist Jamal Khashoggi by a Saudi death squad at the Saudi consulate in Istanbul (prohibition of torture?; right to life?). Or what about proceedings against the Russian Federation over the conviction and incarceration of opposition leader Alexei Navalny (arbitrary deprivation of liberty?; freedom of expression?). Or consider a country lodging inter-State proceedings against the United States over the killing of George Floyd, suffocated to death during a police arrest (right to life?), or over the alleged human rights abuses of Wikileaks founder Julian Assange at the hand of multiple countries?[62] One might object of course that jurisdiction would probably be lacking in the above examples, e.g., because the supposed respondent States have not accepted the compulsory jurisdiction of the International Court of Justice, yet this is besides the point. It is indeed at least theoretically possible that a State might bring inter-State proceedings against another over an individualized breach of an *erga omnes* norm. A State could do so because it altruistically aspires to promote better protection of such norms, or because it seeks to delegitimize or stigmatize a political opponent in the eyes of the international community, or to advance its own (political or economic) agenda, or a combination of the foregoing. While some might see this as a *lex horrenda* unfolding that will erode States' trust in international dispute settlement, others may herald this as being exactly what the concept of community norms was created for.

The next two sections take a closer look at the two questions identified above. Section 4 looks at the relationship between public interest litigation and the admissibility requirements applicable to the exercise of diplomatic protection. Section 5 next examines whether public interest litigation is – or should be – limited to breaches that are systematic or widespread in nature.

4 Public interest litigation and the admissibility requirements for Diplomatic Protection

In its Articles on State Responsibility, the ILC observes how Article 48(1)(b) was intended "to give effect to the statement by the ICJ in the *Barcelona Traction* case, where the Court drew an 'essential distinction' between obligations owed to particular States and those owed 'towards the international community as a whole'."[63] What the

[62] See e.g., UNOHCHR, 'UN expert says "collective persecution" of Julian Assange must end now', Geneva, 31 May 2019, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665.
[63] ILC, *loc. cit.*, supra n. 3, at 127.

foregoing statement omits, however, is that, in its oft-quoted dictum, the ICJ was more specifically contrasting *erga omnes* obligations to obligations vis-à-vis other States '*in the field of diplomatic protection*'.[64] In other words, the very emergence of the idea of public interest litigation essentially finds its origins in the ICJ's juxtaposition of such litigation to the exercise of diplomatic protection. In spite of the foregoing, the relationship between public interest litigation and diplomatic protection has received scant attention.[65] The ILC for its part has addressed the issue in a haphazard manner.

As is well-known, diplomatic protection refers to the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. While originally limited to alleged violations of the minimum standard of treatment of aliens, owing to the substantive development of international law, its scope has widened to include internationally guaranteed human rights.[66] Typical examples would be cases where a company incorporated under the laws of State A is the victim of unlawful expropriation in State B, or where a natural person with the nationality of State A is the victim of human rights violations (e.g., arbitrary detention or torture) in State B. In such scenarios, State A can exercise diplomatic protection – including by bringing judicial proceedings at the international level – because 'an injury to a national is deemed to be an injury to the State itself', even if that assimilation 'obviously … is a fiction',[67] and the injury to the State is more accurately regarded as an 'indirect' one.[68] While it may at times be difficult to decide whether one is confronted with an 'indirect' injury, or whether there has been a direct breach of the obligations owed to a State under international law, and 'mixed' claims may arise,[69] the exercise of diplomatic protection is generally subject to two cumulative preconditions. First, a State can only exercise diplomatic protection if a bond of nationality exists with the injured (natural or legal) person. Second, said person must in principle have exhausted (available and effective) local remedies before the State of nationality can exercise diplomatic protection.

In its 2001 Articles on State Responsibility, the ILC acknowledges, in line with established case-law that, when a State brings an international claim on behalf of an individual or corporation injured by acts contrary to international law by another State, the admissibility of such claims is normally subject to the twin requirements identified above, viz. the nationality requirement and the local remedies rule (Article 44 ARSIWA). The ARSIWA do not further specify *when* these requirements must be fulfilled. They rather state the obvious by asserting, for instance, that the nationality requirement is 'a general condition for the invocation of responsibility *in those cases where it is applicable*' (our

[64] ICJ, *Barcelona Traction, loc. cit.*, supra n. 2, para. 33.
[65] For rare analyses, see: E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning Tradition?', (2004) *N. Yb. I.L.*, pp. 85-142; A. Vermeer-Künzli, *loc. cit.*, supra n. 59.
[66] ICJ, *Case concerning Ahmadou Sadio Diallo* (Guinea v DRC), 24 May 2007, (2007) ICJ Rep 582, at para. 39.
[67] ILC, Draft Articles on Diplomatic Protection with Commentaries (2006), reproduced in (2006) *Yb. ILC* vol. II, Part Two, at 27, para. 3.
[68] *Ibid.*
[69] See *Ibid.*, at 45-6.

emphasis).[70] This circular and open-ended approach is unsurprising, inasmuch as the ILC deliberately deferred these questions to its separate project devoted specifically to the question of diplomatic protection, which had just been launched as the work on State responsibility was brought to conclusion. It is clear, however, that the ILC conceived these requirements primarily through the lens of diplomatic protection.

Do the above requirements also apply when a State triggers public interest litigation over breaches of *erga omnes (partes)* norms? The answer provided in the ARSIWA is both surprising, and surprisingly short. Indeed, Article 48(3) ARSIWA, asserts that '[t]he requirements for the invocation of responsibility by an injured person under articles 43, 44 and 45 apply to an invocation of responsibility by" a State other than an injured State in the sense of Article 48(1). No further guidance is provided in the Commentary. Instead, the Commentary merely reiterates that the invocation of State responsibility by States other than the injured State is subject to 'the conditions that govern the invocation by an injured State', specifically Articles 43, 44 and 45 ARSIWA on notice of claim, admissibility of claims and loss of right to invoke responsibility.[71] These articles are "to be read as applicable equally, mutatis mutandis, to a State invoking responsibility under article 48."[72]

Notwithstanding the brevity of this passage, which has hardly been noted in legal doctrine, the ramifications are potentially far-reaching. Indeed, when taken at face value, Article 48(3) ARSIWA and the concomitant text in the Commentary suggest that the admissibility requirements applicable in the sphere of diplomatic protection apply equally when a State lodges proceedings over an alleged breach of an obligation owed to the international community as a whole (or to a group of States). The reference to the admissibility requirements of Article 44 ARSIWA in Article 48(3) indeed appears to dismiss *a priori* the idea that claims over breaches of *erga omnes (partes)* norms must necessarily be seen as *direct* claims, to which these requirements do not apply. What is more, the fact that the ILC does not distinguish between the requirements of nationality and exhaustion of local remedies would appear to indicate that *both* are applicable to public interest litigation. This would mean that, when a third State is bringing proceedings over an internationally wrongful act that has caused injury to one or more individual persons, it would have to wait for the persons concerned to have exhausted local remedies (inasmuch as effective and available). This would be required, for instance, when the wrongful act involves an isolated case of torture, as opposed to, for instance, a breach of the prohibition of the use of force (which involves direct injury to another State). The requirement to exhaust local remedies might in certain circumstances delay proceedings at the international level, but would not necessarily prevent them (that is, assuming the required action is taken at the domestic level). The situation is different of course for the nationality requirement. If the nationality requirement were to apply '*mutatis mutandis*' to public interest litigation (as per Article 48(3) ARSIWA) this would arguably exclude such litigation in respect of

[70] ILC, *loc. cit.*, supra n. 3, at 121, para. 2.
[71] *Ibid.*, at 128, para. 14.
[72] *Ibid.*

wrongful acts causing injury to one or more specific persons. Indeed, even if the local remedies requirement would be fulfilled, only the State of nationality would be able to bring proceedings, notwithstanding the *erga omnes (partes)* character of the norm(s) breached. Whereas the local remedies rule merely entails a procedural obstacle, the nationality requirement effectively limits the scope of possible public interest litigation.[73] In a more extreme form, Article 48(3) ARSIWA could theoretically be read as suggesting that the nationality requirement applies whenever a State litigates over an internationally wrongful act that does not cause direct injury to *a* State, even where the act involves widespread injury to individuals (e.g., if a State engages in a campaign of racial discrimination against part of its own population).[74] Clearly, such extreme interpretation would render the entire idea of public interest litigation nugatory – many, if not most, breaches of *erga omnes* norms do not normally entail direct injury to a State, but rather cause harm first and foremost to individuals –, and would undermine the project towards the humanization of international law. It is also rejected implicitly, for instance, in the ICJ's judgment on preliminary objections in *Gambia v Myanmar* (where no suggestion whatsoever was made that a nationality bond was in any way required between the claimant State and the injured individuals).[75] Even so, one can provisionally conclude that, at least in respect of isolated breaches of *erga omnes (partes)* norms causing harm to individual natural or legal persons, Article 48(3) ARSIWA maintains both the requirement of exhaustion of local remedies, as well as the nationality requirement – with the result that only the State of nationality will ultimately be able to bring proceedings.

A second instrument that informs our discussion are the ILC's 2006 Draft Articles on Diplomatic Protection (DADP).[76] Whereas the DADP elaborate at length on the two admissibility requirements for the exercise of diplomatic protection, no special treatment or attention is given to breaches of human rights norms, let alone to breaches of *erga omnes* norms or peremptory norms. In fact, virtually no mention is made of either of these terms throughout the DADP or its Commentary. At the same time, it is clear that there is a potential overlap between the exercise of diplomatic protection and public interest litigation. As the ICJ has unequivocally confirmed, the scope of diplomatic protection has over the past decades expanded to include human rights.[77] What is more, Article 19(a) DADP specifically recommends States to exercise their right of diplomatic protection 'when a significant injury has occurred'. The original proposal of ILC Special Rapporteur John Dugard provided for an actual *duty* to exercise diplomatic protection vis-à-vis 'grave breaches of *jus cogens* norms'.[78] Such progressive development of the law proved a bridge too far for

[73] In a similar vein, Milano finds that the nationality requirement imposes 'an insurmountable obstacle' for public interest litigation, and that 'very little' room is left for litigation by third States in respect of violations of human rights. According to Milano, the approach adopted by the ILC suggests that the mechanisms of diplomatic protection are accorded 'pre-eminence' over those of human rights law. E. Milano, *loc. cit.*, supra n. 65, at 106-107.

[74] That is, if one were to adopt a broad reading of the notion of 'diplomatic protection' as encompassing all actions undertaken by states in their own right or legal interest, in order to protect non-State interests, whether belonging to an individual, to a corporation, or to a people. See *Ibid.*, at 110.

[75] ICJ, *Gambia v Myanmar, loc. cit.,* supra n. 4.

[76] ILC, *loc. cit.*, supra n. 67.

[77] See supra note 66 and accompanying text.

[78] ILC, 'First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur', UN Doc. A/CN.4/506, Draft Article 4, at 223.

several Commission members, some of whom confirmed the need not to unnecessarily confuse diplomatic protection with human rights and the controversial legal issues that the notion of *jus cogens* would raise.[79] Although Article 19(a) DADP, as adopted, makes no reference to *erga omnes* norms or peremptory norms, it is clear that the desire to strengthen mechanisms of protection in case of violations of such norms provided the motive for its genesis.[80] The Commentary to Article 19(a) DADP indeed explicitly places the provision in the context of the protection of human beings as one of the principal goals of the contemporary international legal order.[81] Instead of suggesting that breaches of *erga omnes (partes)* norms can never give rise to the exercise of diplomatic protection, the ILC is instead – at least implicitly – recommending that States should exercise this right when their nationals abroad are injured by such breaches. In the margin: nothing in the DADP (or its Commentary) indicates that the admissibility requirements for the exercise of diplomatic protection do not apply where breaches of peremptory norms or *erga omnes* norms are concerned.

Furthermore, against the idea that diplomatic protection and public interest litigation are mutually exclusive, Article 16 DADP moreover stresses that the exercise of the former does not affect the right of States or natural or legal persons to resort to other actions or procedures under international law. The ILC indeed specifies that the exercise of diplomatic protection does not interfere with the rights of individuals to have recourse to applicable human rights procedures, such as individual complaints with the treaty bodies, or available procedures before regional human rights courts.[82] In the same breath, the DADP Commentary also mentions the possibility of public interest litigation under Article 48(1)(b) ARSIWA. In particular, the latter provision is said to allow a State other than the injured State to invoke the responsibility of another State in respect of a breach of an *erga omnes* norm "without complying with the requirements for the exercise of diplomatic protection."[83] If the latter wording appears to be diametrically opposed to the text of Article 48(3) ARSIWA (and the related Commentary), that contradiction is only exacerbated by the assertion in a footnote to the DADP Commentary that "Article 48, paragraph 1(b) is not subject to Article 44 [ARSIWA], which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles."[84]

In other words, and to be clear, while Article 48(3) ARSIWA stresses that the admissibility requirements of Article 44 ARSIWA (nationality *and* exhaustion of local remedies) apply 'mutatis mutandis' to public interest litigation, the DADP Commentary says the exact opposite. Mirroring the brevity of the Commentary to Article 44 ARSIWA, no further explanation is provided for this ostensible volte-face.

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[79] E. Milano, *loc. cit.*, supra n. 65, at 95.
[80] A Vermeer. -Künzli, *loc. cit.*, supra n. 59, at 563-4.
[81] ILC, *loc. cit.*, supra n. 67, at 54.
[82] *Ibid.*, at 50-51.
[83] *Ibid.*
[84] *Ibid.*, at 51, note 240. In a similar vein, Vermeer-Künzli takes the view that 'the rules applicable to diplomatic protection do not apply to [community interest] claims'. A. Vermeer-Künzli, *loc. cit.*, supra n. 59, at 580.

What are of the consequences of the approach suggested in Article 16 DADP and Commentary? First, by setting aside the requirement of nationality in respect of breaches of community norms, it becomes possible once again for third States to bring proceedings over isolated breaches by other States causing injury to their own nationals. For example, State A can invoke the responsibility of State B in respect of the latter's torture of one of B's nationals. What is more, when an individual of State A is the victim of torture at the hand of State B it would in principle be possible *both* for State A to exercise its right of diplomatic protection as well as for State C (not connected to the actual victim by a bond of nationality) to engage in public interest litigation.[85] The result is a potentially broader scope for such litigation than the text of Article 48(3) ARSIWA would appear to suggest. In turn, the non-application of the local remedies rule to public interest litigation removes a procedural obstacle that could delay proceedings brought by third States. On closer scrutiny, however, a strange paradox results.[86] Let us return, for instance, to the hypothetical scenario of a national of State A that is subject to torture by agents of State B. In such scenario, as noted above, the DADP Commentary suggests that both State A and a third State C have the required *locus standi* to bring proceedings against State B (A in the exercise of its right of diplomatic protection; C by way of public interest litigation). Yet, State A would be required to delay such procedure until the actual victim has exhausted local remedies, while State C could in principle act instantaneously, irrespective of the use or non-use of available local remedies. This difference in treatment results *notwithstanding* the fact that State A has a closer connection with the victim through the bond of nationality – and, one might say, a stronger interest in bringing proceedings – than State C, and is in fact *caused* by that connection. The resulting difference in treatment strikes as wholly counter-intuitive.

Having contrasted the approaches in the ARISWA and the DADP, let us move fast forward to the ILC's Draft Articles on the Responsibility of International Organizations (DARIO), adopted in 2011, where the ILC confirmed the extension of *locus standi* in respect of *erga omnes (partes)* norms to international organizations (Article 49).[87] In so doing, the Commission had the opportunity to revisit the question whether public interest litigation is subject to the admissibility requirements applicable to the exercise of diplomatic protection. The relevant provision (Article 49(5) DARIO) appears to be formulated quasi-identically to the corresponding provision in the ARISWA (Article 48(3)), be it for one important nuance: Article 49(5) confirms the applicability of *only one* of the two well-known admissibility requirements, namely, the local remedies rule, while deliberately leaving out the second, i.e., the nationality requirement. The related Commentary reads as an *erratum* to Article 48(3) ARSIWA:[88]

[85] That is, unless one takes the view that the presence of a 'specially affected' State precludes other third States from initiating public interest litigation. See further on this *supra*, notes 19-20 and accompanying text. The question is not addressed in the Commentary to Article 16 DADP.

[86] In a similar vein: E. Milano, *loc. cit.*, supra n. 65, at 105.

[87] ILC, 'Draft articles on the responsibility of international organizations, with commentaries', 2011, reproduced in (2011) *Yb. I.L.C.*, Vol. II, Part Two, at 46.

[88] *Ibid.*, at 91, para. 13.

> "While article [48(3) ARSIWA] makes a general reference to the corresponding provisions (arts. 43–45), it is not intended to extend the applicability of "any applicable rule relating to the nationality of claims", which is stated in article 44, subparagraph (a), because that requirement is clearly not relevant to the obligations dealt with in article 48. Although this may be taken as implied, the reference in paragraph 5 of the present article has been expressly limited to the paragraph on admissibility of claims that relates to the exhaustion of local remedies."

In short, while the ARSIWA appeared to suggest that *both* admissibility requirements apply 'mutatis mutandis' to public interest litigation, and the DADP Commentary suggested that *neither* applies, the DARIO assert that *only the local remedies rule* is applicable (and that the ARSIWA were never meant to suggest otherwise). Might one conclude that the ILC got it right the third time? Arguably so.

First, as far as the nationality requirement is concerned, it is clear that it would go against the very essence of public interest litigation. It would of course be patently absurd for the ILC to affirm, on the one hand, that '*each State* is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of' *erga omnes* obligations,[89] only to make such demarche impossible (for all States, save for the State(s) of nationality) by re-introducing a nationality requirement. Such reading would reduce the introduction of public interest litigation (in *Barcelona Traction* and the ARSIWA) to a chimera, depriving it of any added value in comparison to the far older doctrine of 'diplomatic protection', which reaches 'far back into the history of international law'.[90] It is entirely plausible then that the odd relation between Article 44 and 48 ARSIWA reflects a simple 'oversight' on the part of the International Law Commission.[91]

Second, as far as the local remedies rule is concerned, it must first be recalled that there is ample practice from human rights treaty bodies and regional human courts – including practice taking the form of inter-State proceedings – confirming that the obligation to exhaust local remedies does not apply where the contested conduct does not involve isolated incidents causing injury to identifiable persons, but rather constitutes a 'generalized policy and practice' of the respondent State, or a 'pattern of conduct' (such as a systematic policy of discrimination against certain groups).[92] Beyond the domain of human rights law (and the *lex specialis* of specific human rights instruments),

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[89] ILC, *loc. cit.*, supra n. 3, at 127, para. 9.

[90] J. Dugard, 'Articles on Diplomatic Protection', 2013, available at https://legal.un.org/avl/pdf/ha/adp/adp_e.pdf, at 1. The DADP Commentary notes, for instance, how, already in 1758, Vattel observed that "[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen". Cited in ILC, *loc. cit.*, supra n. 67, at 27.

[91] In this sense: E. Milano, *loc. cit.*, supra n. 65, at 106-107.

[92] See e.g., ECtHR, Georgia v Russia (II), Application No. 38263/08, Judgment of the Grand Chamber of 21 January 2021, at paras. 98-103; ECtHR, Ireland v UK, Application No. 5310/71, Judgment of 18 January 1978, at para. 159; Committee on the Elimination of Racial Discrimination, Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel, 20 May 2021, UN Doc. CERD/C/103/R.6, at para. 63 (confirming that the exhaustion of domestic remedies is not a requirement where a "generalized policy and practice" has been authorized).

as similar approach can be detected, for example, in the ICJ's judgment on preliminary objections in Ukraine v Russia.[93] *Pro memorie,* Russia argued that the Ukrainian claims over racial discrimination by Russia against the Crimean Tatar and ethnic Ukrainian communities in Crimea were inadmissible for failure to exhaust local remedies. The Court dismissed the argument since "Ukraine [did] not adopt the cause of one or more of its nationals, but [challenged] … the alleged pattern of conduct of the Russian Federation with regard to the treatment of" said communities in Crimea.[94] The Court's wording – coupled with the recognition of the prohibition of racial discrimination as an *erga omnes* norm – raises the question whether it considered Ukraine to be exercising its right of diplomatic protection vis-à-vis its nationals in Russian-administered territory, or as involved in public interest litigation, or both. It is somewhat surprising indeed that the case is generally overlooked in literature engaging with the ICJ's case-law on *erga omnes* norms. Either way, the Court clearly confirms that the local remedies rule has no place in litigation involving wrongful acts in the form of composite acts and/or patterns of conduct.

The question remains whether the local remedies rule does and should apply to public interest litigation over isolated incidents involving injury to one or more specific individuals. Leaving aside the ILC's position (or rather position*s*) as detailed above, a number of arguments suggest an affirmative answer. First, it is noted that, in the sphere of human rights law, the local remedies rule is not exclusively applicable to complaints/applications brought by individuals, but also in the context of inter-State proceedings. By way of illustration, Article 11(3) CERD stresses that the Committee will only deal with inter-State complaints 'after it has ascertained that all available domestic remedies have been invoked and exhausted…' Similar provisions can be found in other UN human rights instruments providing for an inter-State procedure (e.g, Article 41(1)(c) ICCPR, Article 10(1)(c) of the Optional Protocol to the ICESCR, Article 21(1)(c) CAT, Art. 76(1)(c) CMW). Likewise, Article 46(1)(a) of the American Convention on Human Rights makes clear that the local remedies rule applies both to individual petitions under Art. 44 ACHR and inter-State communications pursuant to Art. 45 ACHR. Similar observations can be made with regard to the African Charter on Human and Peoples' Rights (Art. 50 ACHPR[95]) and the European Convention on Human Rights (Art. 35 ECHR). The application of the local remedies rule rarely draws much, if any, discussion in actual inter-State human rights proceedings, since these cases will often, if not always, ponder upon structural deficiencies rather than isolated human rights violations, implying that the abovementioned exception relating to 'patterns of conduct' will often apply.[96] That being said, there is some case-law expressly confirming its relevance. For example, the Grand Chamber of the Strasbourg Court confirms in its Decision in *Slovenia v Croatia* that "the only reasons for which an inter-State application can be rejected at the

[93] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination* (Ukraine v Russian Federation), Preliminary Objections, 8 November 2019, (2019) ICJ Rep. 558.
[94] *Ibid*., at para. 130.
[95] The local remedies requirement under Article 50 ACHPR is, however, not absolute. In particular, it will apply 'unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged'.
[96] In a similar sense: Jan Eiken, 'Breaking new ground – again? The CERD Committee's decision on admissibility in Palestine v. Israel', 31 May 2021, EJIL:Talk!, available at https://www.ejiltalk.org/breaking-new-ground-again-the-cerd-committees-decision-on-admissibility-in-palestine-v-israel/.

admissibility stage on the basis of Article 35 [ECHR] are the non-exhaustion of domestic remedies and the failure to comply with the six-month time-limit…."[97] Notwithstanding the fact that the various treaty provisions on inter-State human rights complaints constitute *lex specialis* vis-à-vis the *lex generalis* of the ARSIWA, it is telling that the local remedies rule in principle applies in such context. Indeed, given the linkage that exists between such procedures and the general concept of public interest litigation under the law of international responsibility, it could be argued that its application should be extended accordingly to all inter-State litigation (even if the requirement is not expressly reiterated in the compromissory clauses of the UN human rights treaties, such as Art. 22 CERD, Art. 29 CEDAW or Art. 30 CAT).

A second argument to suggest that the local remedies rule equally applies to public interest litigation over isolated breaches of *erga omnes* norms causing injury to one or more specific individuals concerns the paradox identified above. Even if public interest litigation can provide a useful tool to protect and promote community norms, it seems illogical and counter-intuitive that it would be easier to bring proceedings for a third State than for the State of nationality of the actual victim(s) (which combines the general community interest of a third State with the *additional* and specific interest in protecting its nationals abroad).

Third and last, the rationale underlying the local remedies rule is equally valid in the context of public interest litigation. Indeed, the *raison d'être* of the rule is to ensure that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".[98] It reflects the idea that the State's domestic courts will normally be best placed to consider the situation and provide redress, and that international dispute settlement plays a subsidiary role only, particularly where no effective domestic remedies exist, or where available remedies remain inadequate. This perception of international dispute settlement as a last resort rather than a first choice is rooted in considerations of sovereign equality and non-intervention, arguably in combination with considerations of procedural economy. The above rationale appears valid for *all* alleged breaches that do not operate purely at the inter-State level, but that 'preponderantly' involve injury to specific natural or legal persons.[99] This would hold true *a fortiori* where a third State bringing public interest proceedings were to claim reparation in the interest of the injured individuals as per Article 48(2)(b) ARSIWA.[100] Yet, the DADP confirm that the local remedies rule does not apply exclusively when a State exercising diplomatic protection is making a claim for damages, but equally where it is 'merely' requesting a declaratory judgment.[101] A similar approach seems warranted

[97] ECtHR, *Slovenia v Croatia*, *loc. cit.*, supra n. 56, at para. 40.
[98] ICJ, *Interhandel Case* (Switzerland v United States of America), Preliminary Objections, (1959) ICJ Rep. 6, at 27.
[99] See further ILC, *loc. cit.*, supra n. 67, at 46, para. 11
[100] See further on the possibility to claim compensation: ILC, *loc. cit.*, supra n. 3, at 127, para. 12 (where the ILC acknowledges that it this involves 'a measure of progressive development').
[101] ILC, *loc. cit.*, supra n. 67, at 46.

in case of public interest litigation involving a breach of an *erga omnes* norm involving injury to one or more specific individuals.

In conclusion, notwithstanding the confusion sowed by the ILC in respect of the admissibility requirements for public interest litigation, the (third) approach set forth in the DARIO seems to be the correct one. In short: even where the *erga omnes* breach is one that causes injury to one or more identified or clearly identifiable individuals, there is no place for the nationality requirement in this context. To hold otherwise would amount to ignoring the very *raison d'être* of *erga omnes* norms. Second, where the alleged *erga omnes* breach is one that causes injury to specific individuals, as opposed to the (more likely) scenario involving a pattern of unlawful conduct, public interest litigation will be admissible only after the individual(s) concerned have exhausted local remedies, under the same conditions as applicable in the context of diplomatic protection and as applied in the context of inter-State human rights complaints.

5 Public interest litigation in respect of isolated *erga omnes* breaches: *lex horrenda* or much ado about nothing?

The foregoing section has looked at the admissibility requirements applicable to public interest litigation at the international level. The broader question nonetheless remains whether international law of responsibility recognizes – and/or *should* recognize – that third States have *locus standi*, not just in respect of *erga omnes* breaches that are widespread in nature (e.g., systematic torture of political opponents) and/or that entail 'intentional violation on a large-scale' (e.g., genocide), but also in respect of breaches of *erga omnes* norms that are more isolated in nature, and that cause injury to a limited number of natural or legal persons, or even a single such victim.

While the question is to some extent related with that discussed in the previous section, there are also important distinctions. First, conceptually, the former question dealt with issues of admissibility, whereas the present one rather concerns the intrinsic scope (*ratione materiae*) of public interest litigation. Second, the relevance of the present question is not limited exclusively to cases involving 'indirect injury' of the sort that could also give rise to the exercise of diplomatic protection when committed against a foreign national (such as an isolated instance of torture). By way of illustration, consider the hypothesis of a commercial vessel sailing international waters that is unlawfully detained by State X. Assuming that flag State Y and State X are both parties to the UNCLOS Convention, it will be possible for Y to bring proceedings against X pursuant to the UNCLOS dispute settlement provisions. Such proceedings are not regarded as an exercise of diplomatic protection. Rather, the unlawful detention of a vessel sailing the flag of State Y is seen as causing *direct* injury to Y, harming the latter in the exercise of its *own* rights, explaining why the local remedies rule does not apply in this context.[102] Now, if one accepts, for the sake of the argument, that the freedom of

[102] See e.g., *Arctic Sunrise*, *loc. cit.*, supra n. 49, at paras. 159-173; ILC, *loc. cit.*, supra n. 67, at 52-53.

navigation has an *erga omnes (partes)* character,[103] the answer to the question above will determine whether State Z (possibly the State of nationality of the owner of the vessel, or a member of its crew, or even lacking any link whatsoever with the ship or its crew) will also have the *locus standi* to bring proceedings against X. The substantive overlap between the two questions is, in other words, only partial.

It is recalled at the outset that, while the possibility for States to protest against breaches of certain fundamental norms, and to institute proceedings to hold offenders responsible, 'has long been accepted',[104] and crystallized in its modern formulation in the *Barcelona Traction* case,[105] the precise scope left for public interest litigation remains to some extent unsettled, largely for want of practice. It is clear in this context that, when drafting Article 48 ARSIWA, the ILC felt that it was engaging, at least partly, in an exercise of progressive development of the law. Thus, in the words of the former Special Rapporteur James Crawford, the provision was meant to achieve 'a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation disputes'.[106]

Its drafting was not without criticism. Some States indeed expressed the view that legal standing should be reserved to States 'directly affected in their rights by violations of international law',[107] or that the ILC's original proposal reflected 'unacceptable and overbroad conceptions of injury'.[108] That being said, States were mostly concerned with the prospect (based on the initial draft Article 40) that third States would be permitted to claim reparation (in addition to 'merely' claiming cessation of the wrongful conduct)[109] and, for some, the possibility for third States to take countermeasures against the wrongdoing State.[110] The compromise brokered by Crawford was in turn greeted by many States as 'a reasonable solution'.[111]

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[103] Some support for this position can be found in the PCIJ's Wimbledon case (*SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 20, 28, 30), where the court found that the applicant States 'had a clear interest in the execution of the provisions relating to [access to] the Kiel Canal since they all possessed fleets and merchant vessels flying their respective flags'. Crawford identifies the freedom of navigation as 'one of the classical examples of a communitarian norm'. J. Crawford, *State Responsibility – the General Part* (Cambridge: CUP) (2013), at 363.

[104] J. Crawford, *op. cit.,* supra n. 103, at 365.

[105] ICJ, *Barcelona Traction, loc. cit.*, supra n. 2.

[106] J. Crawford, *op. cit.,* supra n. 103, at 367.

[107] See the comments reproduced in (1999) *Yb. I.L.C.*, Vol. 2, Part I, at 138 (Austria: "[D]oubts may be raised as to whether this concept is also workable in cases where a directly affected State cannot be singled out, such as in the case of human rights violations and the breach of obligations owed to the community of States parties as a whole."). In a similar vein, *Ibid.*, at 141 (France: "It is in fact completely inappropriate to allow States to intervene so in situations which are not of direct concern to them.").

[108] Statement of the United States, reproduced in (1998) *Yb. I.L.C.*, Vol. 2, Part 1, at 142. Conversely, some scholars found the outcome lacking in ambition, and an unfortunate step back in comparison to the earlier proposals pertaining to 'State crimes'. See e.g. A. Cassese, *International Law* (Oxford: OUP) (2005; 2nd ed.), at 269-71.

[109] See the statements reproduced in (1998) *Yb. I.L.C.*, Vol. 2, Part I, at 142 (United States), 143 (Germany), 143-4 (United States: warning of "judicial 'overkill'"); (1999) *Yb. I.L.C.*, Vol. 2, Part I, at 108 (Japan); (2001) *Yb. I.L.C.*, Vol. 2, Part I, at 82 (UK).

[110] See the statements reproduced in (1999) *Yb. I.L.C.*, Vol. 2, Part I, at 108 (Japan); (2001) *Yb. I.L.C.*, Vol. 2, Part I, at 79 (China).

[111] Statement reproduced in (2001) *Yb. I.L.C.*, Vol. 2, Part I, at 79 (Argentina). In a similar vein: *ibid.,* at 79 (Austria, finding that the Special Rapporteur "ha[d] reduced the concept of erga omnes obligations to a viable, realistic level"); 80 (Denmark, on behalf of the Nordic countries), 80 (Netherlands).

In any case, the basic framework put in place by the ILC remained to be confirmed and refined in actual practice. Until now, judicial practice does not provide a clear-cut precedent denying or confirming the possibility of public interest litigation in respect of isolated breaches of *erga omnes* norms causing injury to one or more identified/identifiable persons. Indeed, previous cases have rather involved alleged breaches of a more widespread nature, or involving a collective dimension (e.g., allegations of genocide in the ongoing *Gambia v Myanmar* case). And while the *Arctic Sunrise* proceedings involved a single breach of the freedom of navigation, the case was ultimately decided without relying on the concept of *erga omnes (partes)* norms (see *supra*).[112] The question thus remains: is there an additional 'filter' that would limit the scope for such litigation?

Returning to the ILC's work on State responsibility, the Commentary to Article 48 ARSIWA does not offer any indications to suggest that the Commission had in mind such additional filter.[113] Instead, the suggestion that a third State might also claim reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached' (Art. 48(2)(b)) appears to implicitly acknowledge public interest litigation over *erga omnes (partes)* breaches involving identifiable beneficiaries other than States.[114] The absence of any further constraining factors in Article 48 ARSIWA or its Commentary stands in marked contrast to Part Two, Chapter III of the ARSIWA on the specific consequences relating to 'serious breaches of obligations under peremptory norms of general international law'. In particular, the scope of this chapter is deliberately limited only to those breaches of peremptory norms that are 'serious', meaning that they involve 'a gross or systematic failure by the responsible State to fulfil the obligation' (Art. 40(2) ARSIWA). The Commentary explains that the word 'serious' "signifies that a certain order of magnitude is necessary".[115] And further:

> "To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be

[112] See *supra* note 49, and accompanying text.

[113] In discussing 'collective obligations', the Commission does refer to 'situations in which States, attempting to set general standards of protection *for a group or people*, have assumed obligations protecting non-State entities' (our emphasis) (Commentary at 127…), but this appears to be illustrative only.

[114] The same observation can be made in respect of the corresponding clause in the 2005 IDI Resolution on obligations *erga omnes* (IDI, *loc. cit.*, supra n. 15). Article 2(b) indeed suggests that third States can claim reparation 'in the interest of the State, entity or individual which is specially affected by the breach' (thus also envisaging, at least implicitly, the possibility of an erga omnes breach causing injury to a single 'entity or individual').

[115] ILC, *loc. cit.*, supra n. 3, at 113. The limitation is deemed to find in support in State practice: "For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies."

> borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale."

It follows that, in the view of the ILC, the obligations listed in Article 41 ARSIWA – e.g., the duty not to recognize as lawful a situation created by such serious breach, or to render aid or assistance in maintaining it – are not triggered by an isolated instance of torture in another State, or, for instance, a single breach of the non-refoulement principle (assuming *arguendo* that it constitutes a peremptory norm). The lack of similar requirement of 'seriousness' in Article 48 ARSIWA (or the Commentary) that the breach be 'gross or systematic' for a third State to have *locus standi* is particularly revealing when considering the close relationship between peremptory norms and *erga omnes* norms.[116] In any case, the serious, systematic or collective dimension of an *erga omnes* breach is not identified as a relevant factor to assess *locus standi* under Article 48 ARSIWA.[117]

The absence of any additional 'filter' in Article 48 ARSIWA is also remarkable when contrasted to the drafting of Article 8 DADP. Article 8 is one of a handful of provisions that waters down the standard nationality requirement for the exercise of diplomatic protection,[118] specifically by asserting that with respect of Stateless persons and refugees, diplomatic protection can be exercised by the State of refuge (i.e., the State where the person is lawfully and habitually resident). Article 8(3) nonetheless provides an important carve-out by stressing that the State of refuge cannot exercise diplomatic protection 'in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee'. Interestingly, the DADP Commentary explains that this carve-out was inspired in part by policy considerations: as most refugees have serious complaints about their treatment at the hand of their State of nationality, allowing diplomatic protection in such cases would 'be to open the floodgates for international litigation' (which might in turn deter States from accepting refugees).[119] Presumably, having regard to Article 16 DADP, that carve-out only applies for injuries caused by breaches not of an *erga omnes* nature[120] – even if it is entirely plausible that the breaches which lead many refugees to flee their State of nationality effectively qualify as such. It is striking nonetheless, that whereas the 'floodgate' factor guided the drafting of Article 8(3) DADP, it was not put forward in the ILC's discussions over Article 48 ARSIWA as an argument to limit that provision's scope.

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[116] It is telling, for instance, that Chapter III of Part Two was first labelled 'serious breaches of obligations to the international community as a whole', and referred to obligations *erga omnes* as the issue underlying Article 40. It was only later that the language was modified to refer to peremptory norms, in part on the ground that the Chapter was concerned with substance, rather than standing. See J. Crawford, *op. cit.,* supra n. 103, at 371. Note: Article 5 of the 2005 Resolution of the *Institut de Droit international* on erga omnes norms (IDI, *loc. cit.*, supra n. 15) for its part still refers to 'a widely acknowledged grave breach of *an erga omnes obligation*' (our emphasis) as triggering the various consequences also found under Article 40 ARSIWA.

[117] In a brief passage, Special Rapporteur James Crawford suggests that a requirement that the breaches be 'serious' had 'greater force' in respect of claims for reparation, than for claims to cessation. In general, "[i]t does not seem disproportionate to allow all States to insist upon the cessation of a breach of an obligation owed to the international community as a whole." Yb ILC 2001 Vol. 2, Part I, at 11, para. 41.

[118] Other examples are Article 7 (in relation to cases of multiple nationality) and Article 11(b) DADP (in the context of the protection of shareholders).

[119] ILC, *loc. cit.*, supra n. 67, at 37. See also: E. Milano, *loc. cit.*, supra n. 65, at 100-101.

[120] In this sense, see e.g. A. Vermeer-Künzli, *loc. cit.*, supra n. 59, at 557.

Aside from the ILC's *travaux* and the absence of a judicial precedent, what can be gleaned from State practice? In particular, does State practice provide any guidance as to whether the alleged occurrence of a breach of an *erga omnes (partes)* obligation is of itself sufficient to establish the legal interest on the part of third States to institute public interest litigation, or whether it is additionally required that the situation transcends the level of 'mere' injury to one or more identifiable individuals or entities for such community interest to be triggered? The short answer is: no, it does not. Indeed, while States have hitherto generally refrained from invoking Article 48(1) ARSIWA in respect of isolated breaches of *erga omnes (partes)* norms - save for a rare exception such as the Dutch argument raised in the *Arctic Sunrise* proceedings[121] – this does not necessarily entail that customary international law does not so permit: these 'omissions' may indeed be inspired by a variety of reasons (political and other – see further), without necessarily reflecting a legal conviction that custom would preclude such proceedings. Indications to the contrary are hard to detect in the ARSIWA's *travaux*. Recall indeed that many States embraced Article 48 ARSIWA as a reasonable compromise (see above).[122]

Given the lack of a clear answer in case-law or State practice, the question remains whether there *should* be an additional filter for public interest litigation along the lines discussed above. From a policy perspective, the main (hypothetical) argument in favour is the concern that, if the bar is placed (too) low, this may result in an exponential increase of the number of inter-State proceedings brought by third States, including with respect to more 'isolated breaches' of *erga omnes* obligations (whether for purely altruistic reasons or not). This could, in theory at least, result in a substantial increase of the workload of, for example, the International Court of Justice, possibly over-stretching the resources at its disposal. More disconcertingly perhaps, respondent States hailed before the ICJ or an arbitral tribunal, might engage in strategies of non-participation in such proceedings (a strategy seemingly on the rise in international dispute settlement), withdraw from dispute settlement mechanisms (e.g., by revoking a declaration accepting compulsory ICJ jurisdiction or withdrawing from treaties containing compromissory clauses), or otherwise seek to delegitimize the international framework for the peaceful settlement of disputes. In an era that is regrettably witnessing a 'backlash'[123] against international courts and tribunals this is a concern not to be taken lightly.

Against this, fears that Article 48 ARSIWA would open the 'floodgates' of public interest litigation have clearly proven exaggerated and at odds with reality.

First, it is recalled that Article 48 ARSIWA does not set aside the necessity of identifying a proper jurisdictional basis in order to bring proceedings against a State accused of breaching *erga omnes (partes)* norms. Indeed, even where community interests are at stake, a claimant State will still need to demonstrate that the respondent State has

[121] Supra notes 49-50 and accompanying text.
[122] For a rare counter-example of a State expressly arguing that legal standing over community norms should be limited to a 'serious breach' of an obligation owed to the international community of States as a whole, see: (2001) *Yb. I.L.C.*, Vol. 2, Part I, at 80 (France).
[123] See e.g., M.R. Madsen, P. Cebulak and M. Wiebusch, 'Backlash against international courts: explaining the forms and patterns of resistance to international courts', (14) *Int'l J. of Law in Context*, pp. 197-220.

consented to jurisdiction in one way or another (e.g., on the basis of a declaration accepting compulsory jurisdiction or the ratification of a compromissory treaty,...). This is a such uncontested in legal doctrine,[124] and is confirmed unequivocally by the ICJ: 'the mere fact that rights and obligations *erga omnes* may be at issue would not give the Court jurisdiction to entertain that dispute',[125] as 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things'.[126] Related to the foregoing, the fact that community interests are at stake cannot be used to circumvent the *Monetary Gold* principle, according to which the Court cannot exercise jurisdiction over a dispute in which the legal interests of a State that is not a party in the proceedings form 'the very subject-matter' of those same proceedings.[127] The controversial judgment in *Marshall Islands v UK* further asserts that the claimant State must establish the existence of a 'dispute' by demonstrating that the respondent State 'was aware, or could not have been unaware' that the former was accusing it of breaching its obligations.[128] Furthermore, if one were to accept that in situations where a 'specially affected' State exists, only the former would have the requisite legal standing to bring proceedings to the exclusion of other third States – a question as of yet unsettled, but which may (or may not) be addressed in the pending proceedings between The Gambia and Myanmar[129] –, that could again act as a brake on public interest litigation.[130]

Second, even where a dispute and a jurisdictional basis exist, public interest litigation remains very much the exception. Indeed, as Simma and Pulkowski observed in 2006, "so far, States have hardly shown the excessive human rights 'vigilantism' dreaded by some".[131] Notwithstanding the slightly increased recourse to inter-State human rights procedures and the growth in ICJ proceedings involving an *erga omnes (partes)* dimension, this finding still holds true today.

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[124] E.g., IDI, *loc. cit.*, supra n. 15, Article 3; Y. Tanaka, *loc. cit.*, supra n. 8, at 24; C. Tams, *op. cit.*, supra n. 29, at 159-60
On possible reservations to compromissory clauses so as to exclude public interest litigation, see e.g. P. Urs, loc. cit., supra n. 8, at 519-20.

[125] ICJ, *Cse concerning armed activities on the territory of the Congo (new application: 2002)* (DRC v Rwanda), (2006) ICJ Rep. 6, at para. 64.

[126] ICJ, *Case concerning East Timor* (Portugal v Australia), (1995) ICJ Rep. 90, at para. 29. See, however, the Separate Opinion of Judge Weeramantry in the *Gabcikovo-Nagymaros* case, where he suggests that in relation to erga omnes norms, "international law will need to look beyond procedural rules fashioned for purely inter partes litigation." ICJ, *Case concerning the Gabcikovo-Nagymaros Project* (Hungary v Slovakia), Separate Opinion of Judge Weeramantray, (1997) ICJ Rep. 88, at 118.

[127] ICJ, *Case of the Monetary Gold removed from Rome in 1943* (Italy v France, UK and USA), (1954) ICJ Rep. 19, at 32-33; ICJ, *Case concerning East Timor* (Portugal v Australia), (1995) ICJ Rep. 90, at para. 29. But see, for instance, Judge Weeramantry's Dissenting Opinion in the *East Timor* case (*loc. cit.*, supra n. 17), expressing the critique that upholding the indispensable third party rule in litigation over *erga omnes* norms could substantially deprive these norms of their effectiveness. As Urs points out, however, in cases in which obligations *erga omnes* require that states take action individually, the indispensable third party rule is unlikely to apply. P. Urs, loc. cit., supra n. 8, at 519.

[128] ICJ, *Obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament* (Marshall Islands v UK), Preliminary Objections, 5 October 2016, (2016) ICJ Rep. 833, at § 57.

[129] See supra, notes 19 and 20 and accompanying text.

[130] Such approach – *if* accepted – would arguably preclude the exercise of public interest litigation by third States in cases involving human rights violations against one or more individuals where another State fulfils the nationality requirement and can therefore exercise the right of diplomatic protection vis-à-vis the offending State. See also supra, note 85.

[131] B. Simma and D. Pulkowski, 'Of planets and the universe: self-contained regimes in international law', (2006) 17 *E.J.I.L.*, pp. 483-529, at 528-9.

For starters, the absolute number of such proceedings remains overall limited. In particular, half a century after the ICJ rendered its *Barcelona Traction* judgment and two decades after the adoption of the ARSIWA, the number of successful claims brought by a non-injured State in the sense of Article 48 ARSIWA can still be counted on the fingers of a single hand. The picture is not that different when considering inter-State human rights procedures. As far as the inter-American human rights system is concerned, for instance, '[t]he practice of inter-State communications … is virtually non-existent'.[132] Only two such cases were introduced, neither of which reached the inter-American Court[133] (albeit that requests for advisory opinions by the Inter-American Court have to some extent served as a substituted for inter-State communications proper[134]). In a similar vein, to date, no-inter-state case has been submitted to the African Court on Human and Peoples' Rights, and the African Commission has considered only three inter-State communications (with only one resulting in a finding of a violation).[135] As far as the UN human rights treaty bodies are concerned, it was not until 2018 that the first inter-State communications were lodged, viz. the complaints brought by Qatar against Saudi Arabia and the United Arab Emirates respectively, and the Palestinian complaint against Israel.[136] All of these communications were brought under the Convention against the Elimination of Racial Discrimination, which is the only UN human rights treaty to provide for a compulsory inter-State human rights procedure. This last element, however, can only partly explain the absence of similar communications pursuant to the optional inter-State complaints mechanisms under other UN human rights treaties. Admittedly, for some treaties the number of States that have accepted these optional mechanisms borders on the insignificant– this is especially true for the Convention on Migrant Workers (5) and the Optional Protocol to the ICESCR (5), and to lesser extent for the Optional Protocol to the CRC (13) and the Convention on Enforced Disappearances (23).[137] For the Convention against Torture and the ICCPR, however, the figure is substantially higher, however, at 61 and 48 respectively (including countries such as the Philippines, Russia, the UK and the US).[138] The most 'popular', or at least most used, inter-State complaint mechanism is that of the ECHR. Since its inception, no less than 27 inter-State applications have been filed under Article 33 ECHR.[139] The number of such applications moreover appears to be on the rise: more than half were lodged in the last fifteen years – although it must be acknowledged that many involve the same States parties and relate to the same factual context (cf. there are at present 4-5 cases each between Georgia and Russia and Ukraine

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[132] J. Contese, 'Inter-State cases in disguise under inter-American Human Rights Law. Advisory Opinions as Inter-State disputes', *Völkerrechtsblog,* 27 April 2021, doi: 10.17176/20210427-220952-0.

[133] Further: *Ibid.*

[134] J. Contese, *loc. cit.*, supra n. 132. In a similar vein: S. Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or wishful thinking?', (1988) 10 *Human Rights Quarterly*, pp. 249-303, at 261-2 (noting that an advisory opinion can yield the desired results without any of the potentially harmful effects associated with state communications).

[135] F. Viljoen, 'A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System', *Völkerrechtsblog,* 27 April 2021, doi: 10.17176/20210427-221127-0. According to the author "it seems unlikely that there will, in the near future', be a dramatic increase in the use of the inter-State mechanism in Africa".

[136] See Committee on the Elimination of Racial Discrimination, 'Inter-state communications', available at https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx.

[137] These figures are calculated by the author on the basis of the information available in the United Nations Treaty Database as per 4 July 2021.

[138] *Idem.*

[139] For an overview, see: https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf.

and Russia respectively). For the sake of completeness, reference can also be made to the complaint procedure provided for in Article 26 of the Constitution of the International Labour Organization. While this procedure lay mostly dormant for the ILO's first forty years (with only a single use before 1961),[140] the total number of complaints has since risen to more than 30, with thirteen such complaints resulting in the creation of a Commission of Inquiry.[141] It must be emphasized, however, that only a small number of these complaints were actually filed by governments. Most were instead submitted by worker delegates of the International Labour Conference.[142] Indeed, it was precisely to mitigate the possible reluctance of governments to lodge complaints against other governments, that the final wording of the relevant provision was broadened to allow for the procedure to be triggered by the ILO's Governing Body 'of its own motion' or 'on receipt of a complaint of a delegate to the Conference'.[143]

The modest number of (genuine) inter-State cases and complaints is hardly surprising. Indeed, leaving aside jurisdictional hurdles, there are various explanations why States may have little incentive to make use of this mechanism.[144] To engage in such proceedings may require a significant investment in terms of human and financial resources e.g. for legal services at the level of a State's Ministry of Foreign Affairs, which may already be overburdened.[145] Such proceedings also risk causing a significant downturn in the relations – diplomatic, economic and other – between the applicant and the respondent State. This may be especially problematic when the two States previously maintained good relations, and/or when the respondent State is an important trade partner or a more powerful State that could easily retaliate in one way or another to the perceived 'provocation'. (Some) States may also be disinclined to embark on a path that could ultimately turn against them, and expose themselves to similar proceedings as respondent State (after all, 'let him who is without sin cast the first stone…'?). For various historical or cultural reasons, some regions are particularly averse to the prospect of politically motivated litigation that is at odds with a general culture of non-intervention and that is perceived as encroaching upon a thick understanding of State sovereignty.[146] States will therefore often prefer less confrontational avenues, e.g., by pursuing quiet forms of diplomacy or restricting financial assistance with the State concerned, or will prefer to leave the matter to be tackled through other available procedures (e.g., reporting procedures or individual complaint procedures under human rights instruments).[147]

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[140] S. Ago, 'Complaint Procedure: International Labour Organization', *MPEiPro,* May 2020, Para. 6.

[141] See ILO, 'Complaints', available at https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm.

[142] S. Ago, *loc. cit.,* supra n. 140, at para. 7.

[143] Zarras, *Le contrôle de l'application des Conventions internationales de travail* (Paris : Receuil Sirey)(1937), at 266.

[144] See generally S. Leckie, *loc. cit.,* supra n. 134, at 251 and following. See also F. Viljoen, *loc. cit.,* supra n. 135

[145] See e.g. S. Leckie, *loc. cit.,* supra n. 134, at 254-5. In connection with inter-State human rights complaints, Leckie draws attention to the need for (1) intensive legal research and fact-finding ; (2) the garnering of sufficient parliamentary and administrative support ; (3) a well-planned and coordinated effort between various branches of government, and ; (4) continuous involvement in the procedure.

[146] See e.g. *Ibid*., at 261 (on the importance of non-intervention in Latin-Ameria), 263.

[147] *Ibid*., at 252-3, 261.

The foregoing explains, for instance, why inter-State human rights procedures are predominantly used where the applicant State's own interests are clearly at stake, e.g. because the alleged breaches are related to a recent or ongoing armed conflict between the two States, or are committed on territory of the claimant State that is occupied by the respondent State, and/or because the victims are nationals of the claimant State. Thus, the two Qatari communications and the Palestinian communication against Israel under the CERD illustrate this strong self-interest on the part of the applicant States.[148] The same is true for the inter-State complaint procedures under the ECHR and within the ILO system.[149] With very few exceptions (such as the cases brought by the Scandinavian States and the Netherlands against Greece in 1967 and 1970, or the case brought by Denmark, France, Norway, Sweden and the Netherlands against Turkey in 1982)[150] all inter-State applications under the ECHR involve an undeniable element of self-interest. In other words, these cases are more akin to an exercise of diplomatic protection under the law of international responsibility than to actual public interest litigation in the sense of Article 48 ARSIWA. This is further exemplified by the fact that some of these inter-State human rights proceedings have gone hand in hand with simultaneous inter-State proceedings before the ICJ or arbitration under PCA auspices (e.g., the various cases brought by Georgia and Ukraine against Russia, or by Qatar against the UAE, Saudi Arabia and others), in which these same States claim to have suffered *direct* injury pursuant to wrongful conduct on the part of the same respondent States.

A last important observation in this context is that inter-State human rights proceedings have rarely involved 'isolated' breaches of human rights obligations (potentially of an *erga omnes* character), but have mostly related to administrative practices or patterns of conduct, or, put differently, to breaches of a systematic or widespread nature (the same observation applies *mutatis mutandis* to the ILO complaints). A handful of exceptions do exist. In *Latvia v Denmark*, for instance, Latvia complained that the extradition of a Latvian national detained in Denmark to South Africa would breach various provisions of the ECHR.[151] In *Slovenia v. Croatia*, the applicant State claimed breaches of the ECHR vis-à-vis the Ljubljana Bank, a bank founded under the laws of the then People's Republic of Slovenia.[152] And in *Denmark v Turkey*, Denmark argued that the ill-treatment in custody of a Danish citizen by the Turkish authorities infringed Article 3 ECHR, while simultaneously arguing that the incident constituted an example of a widespread

[148] J. Eiken, *loc. cit.,* supra n. 96.

[149] *Ibid*.; Further S. Leckie, *loc. cit.,* supra n. 134, at 271-282 (with regard to the ILO, Leckie finds only one case (involving Ghana and Portugal) that was not based on political interests of states or the interests of a State's own nationals – ibid., at 282).

[150] Based on the overview of inter-State applications (at https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf), there appear to have been no such applications by 'non-injured' States (in the sense of Article 48 ARSIWA) under Article 33 ECHR since 1982. For a discussion of the 'Greek cases' and the 'Turkey case', see e.g. Leckie, at 289-297 (observing inter alia that these are the only inter-State cases under the ECHR where political or economic interests did not play a dominant role in the decision to initiate the complaints). It is no coincidence that both cases were brought by several States acting jointly. In the words of the then Dutch Foreign Minister: '[i]t is simply for political reasons that it is not easy to do it alone, because then you get the full blast from the regime… it is never pleasant for a government to be the only one.' Cited in S. Leckie, *loc. cit.,* supra n. 134, at 295. In a similar vein, it is worth recalling that in March 2021, Canada joined the Netherland's initiative to invoke the responsibility of Syria under the UN Torture Convention. See *supra*, note 6 and accompanying text.

[151] ECtHR, *Latvia v Denmark,* Application No. 9717/20, Decision of 9 July 2020 (noting that the matter had been resolved and striking the case of the list).

[152] ECtHR, *Slovenia v Croatia*, *loc. cit*., supra n. 56.

practice in Turkey.[153] The foregoing examples illustrate that States will normally only bring procedures against other States involving isolated instances resulting in injury to one or more identified natural or legal persons, if and when a nationality link exists. As before, these cases are more akin to an exercise of diplomatic protection, rather than actual public interest litigation.

In all, fears that Article 48 ARSIWA would somehow open the 'floodgates' for an escalation of public interest litigation have not materialized. This is all the more true as far as potential claims concerning *isolated* breaches of *erga omnes (partes)* norms are concerned that cause injury to specific natural or legal persons – that is, persons other than the State's own nationals. Of course, it is not written in the stars that this situation will persist over time. It is worth recalling, for instance, that investor-State arbitration was very slow on the uptake, only to witness a steep increase as of the start of the 21st century. In the 24 years following the first case in 1972, the number of ICSID cases registered on a yearly basis varied between zero and four.[154] In the more recent fifteen years, however, the figure has ranged between 20 and 54 new cases initiated per year.[155] While several factors may explain for this evolution, one lesson learned from the ISDS example is that it may take (a long) time to raise awareness with regard to the availability of certain judicial avenues, and for potential applicants to come to embrace the benefits thereof. Whether recent cases at the level of the ICJ, especially the case between the Gambia and Myanmar (and a potential further case between the Netherlands and Syria) will mark a watershed moment towards an increased recourse to public interest litigation nonetheless remains to be seen. Admittedly, the larger one construes the category of *erga omnes* norms, the more leeway is created for States to engage in public interest litigation. Even so, a veritable 'inflation' of the category of *erga omnes* norms is implausible. Even were the category to expand, States will in all likelihood continue to refrain from bringing public interest proceedings over isolated incidents that lack a collective or systematic dimension of breach. Furthermore, in those regions that have their own inter-State complaints procedure for human rights violations, States are likely to prioritize these pre-existing human rights mechanisms (albeit that no such mechanism exists for Asia, where most of the world population is concentrated).[156] In sum, there appears to be no compelling need to impose an additional filter on Article 48 ARSIWA, requiring an element of gravity or (collective) scale for finding *locus standi* in respect of breaches of *erga omnes* norms.

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[153] ECtHR, *Denmark v Turkey*, Application No. 34382/97, Decision on admissibility of 8 June 1999. The Court did not consider the local remedies rule to apply since the complaint regarding the ill-treatment of Mr. Koc was closely related to the broader administrative practice which Denmark equally claimed to contravene Article 3 ECHR. The case was ultimately settled out of Court between the two States. See: ECtHR, *Denmark v Turkey*, Application No. 34382/97, Judgment of 5 April 2000 (striking the case of the list).

[154] ICSID, 'The ICSID Caseload- Statistics. Issue 2021-1', available at https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf, at 7.

[155] *Ibid.*

[156] E. Milano, *loc. cit.*, supra n. 65, at 89.

6 Conclusion

Public interest litigation over *erga omnes* breaches is commonly associated with the scenario of third States triggering judicial proceedings at the international level over breaches that are widespread or systematic in nature. Thinking of possible examples, we instinctively envisage cases of genocide, crimes against humanity, widespread torture or systematic racial discrimination and apartheid policies. These examples are, however, not the sole possible manifestations of public interest litigation. Instead, the present article has sought to address the quite different scenario of public interest litigation in respect of more isolated breaches of *erga omnes* norms, specifically breaches that cause harm to one or more identified or identifiable individuals (or companies). In particular, the prospect that has mostly informed the present analysis is that of litigation over (proven or alleged) human rights abuses in highly politicized and mediatized cases involving figures such as Julian Assange, George Floyd, Alexei Navalny, Jamal Khashoggi (evidently, the list goes on much longer).

It is beyond contestation of course that, when an individual suffers human rights abuse at the hand of another State, his or her State of nationality can exercise diplomatic protection, including by bringing judicial proceedings at the inter-State level against the offending State. To what extent is the same course of action open to a third State if we assume that the norm breached is one 'owed to the international community as a whole'? And to what extent can third States engage in public interest obligation if the abuse is imputable to the individual's own State of nationality?

The present paper has first sought to address the interplay between public interest litigation and diplomatic protection, in particular by examining whether the twin admissibility requirements that apply to the latter – viz. the nationality requirement and the local remedies rule – equally apply to the former. As discussed, this matter was addressed - albeit largely *en passant* - on three different occasions by the ILC, with a different answer given each turn: in the ARSIWA, the ILC suggested (at least implicitly) that both requirements to apply to public interest litigation; in the DADP it found neither to apply; lastly, in the DARIO, the ILC upheld only the obligation to exhaust local remedies, while confirming the non-applicability of the nationality requirement. In the end, it appears that the ILC got it right the third time, correcting what may have been a mere oversight in the ARSIWA. The nationality requirement had no place in the context of public interest litigation and would undermine its very *raison d'être*. By contrast, it makes perfect sense conceptually to subject third-State proceedings over *erga omnes* breaches to the local remedies rule. It is worth recalling in this context that this rule requires the exhaustion only of remedies that are available and effective, and need not be addressed when the breach complained of forms part of a general/administrative practice. This latter point also holds true where a State invokes another's international responsibility over a single human

rights abuse, while simultaneously claiming that this specific incident forms part of a broader practice that is contrary to *erga omnes* norms.[157]

Second, in addition to the relevance of admissibility requirements, the paper has sought to examine whether customary international law permits – or should permit – public interest litigation over isolated breaches of *erga omnes* norms that cause harm to one or more specific individuals (or, for that matter, companies or vessels). As to the 'is', an authoritative answer is as yet lacking in judicial practice – and no guidance is to be expected from the pending *Gambia v Myanmar* case. Staring down the pensieve of *opinio juris* does not make us much wiser: while States have hitherto generally refrained from invoking Article 48(1)(b) ARSIWA over isolated breaches, such omissions do not necessarily reflect a sense of legal obligation. Nor do State comments during the drafting of Article 48(1)(b) provide strong indications that they thought legal standing for third States should be limited to large-scale or widespread breaches. The ILC for its part clearly saw no need to install an additional filter (in stark contrast to its approach in Article 40 ARSIWA on the obligation of non-recognition et al.).

Must we conclude that the ILC improperly ignored the 'floodgate' factor – a factor that nonetheless influenced its approach to the exercise of diplomatic protection vis-à-vis refugees? Hardly. Practice illustrates that public interest litigation remains slow on the uptake and that there is a general reluctance – due to political and economic reasons, or the fear of becoming a target for counter-allegations of wrongful conduct oneself – to invoke international responsibility over *erga omnes* breaches in judicial proceedings. The existing use of inter-State complaints under different international and regional human rights instruments confirms that there is even less incentive to raise another State's international responsibility in respect of more isolated breaches, such as single instance of ill-treatment in detention. Rather, States tend only to utilize this possibility when their own interests are somehow involved, e.g., when it is their own nationals abroad that suffer human rights abuse. This practice is therefore more closely resembling of diplomatic protection than genuine public interest litigation. One may also presume that in regions that have their own inter-State human rights procedure, States are likely to prioritize such instruments over, e.g., ICJ proceedings on the basis of Article 48(1)(b) ARSIWA. Conversely, in regions that do not have such human rights mechanism, the prevailing general cultural of reciprocal non-intervention reduces such proceedings to an even more remote prospect. In sum, an additional filter limiting public interest litigation to widespread or systematic *erga omnes* breaches is neither needed nor desirable.

[157] See *supra*, note 153 and accompanying text on the ECtHR's Decision in *Denmark v Turkey* (Application No. 34382/97).