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Suryabinayak-4, Bhaktapur, Nepal, Ph: 6634455, 6634663,
Email: info@ksl.edu.np, www.ksl.edu.np

An Analysis of Principle of Erga Omnes Partes with Special Reference to the Case of Belgium v. Senegal, 2012

*Prajwol Bickram Rana**

Abstract

In the Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal case), the International Court of Justice for the very first time declared the country's standing before the court on the basis of erga omnes partes as admissible. The court found that Belgium had the standing to claim the responsibility of Senegal for the alleged breach under the Convention against Torture on the basis of being a party of the same convention. The court described erga omnes partes as the obligation that the state party has to all the other state parties of the convention, the court further stated that it arises due to the common interest of the state parties of a convention. Many sitting judges of the court rejected the reasoning of the majority decision and some gave a dissenting opinion. The present paper assesses the concept of erga omnes partes in the public international law and the legal consequences of erga omnes partes in the future development of public international law. The scope of the present paper is limited within the issue of admissibility of the case with the specific focus on the concept of erga omnes partes and does not deal with the merits or other issues raised before the court.

Background:

The International Court of Justice (ICJ) was established by the United Nations Charter as the principal judicial organ of the United Nations.[1] The court came into existence in February 1946 after the election of its first members.[2] The International Court of Justice from its inception along with its predecessor, Permanent Court of Justice, has been actively involved in the development of international law. The court has extensively discussed the concept of use of force, nationality, state responsibility, and others. The ICJ's jurisprudence has been widely recognized as one of the sources for development and 'codification of international law'[3].

On 19 February 2009, an application was filed by Belgium instituting proceedings against Senegal in the registry of the International Court of Justice.[4] The case was

* Prajwol Bickram Rana is a B.A.LLB. 4th year student of Kathmandu School of Law, Nepal.

1 Charter of United Nations, art 92.

2 Hugh Thirlway, *The International Court of Justice*, Oxford University Press, Oxford, 2016, p.3.

3 Karin Oellers-Frahm, 'The International Court of Justice: Article 92', in Bruno Simma et. al. (eds), *The Charter of United Nations: A Commentary*, Oxford University Press, 3rd edition, United Kingdom, 2012, para 31.

4 See International Court of Justice, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)', 20 July 2012, *International Court of Justice Official Website,* available at https://www.icj-cij.org/en/case/144, accessed on 10 October 2018.

filed in relation to the alleged breach of Convention against Torture by Senegal for neither prosecuting nor extraditing Mr. Hissene *Habre*, who was granted asylum by the Senegalese government. When the case was registered in the court, Senegal had raised the issue of lack of jurisdiction and admissibility of the claim brought by Belgium. The court declared that it had the jurisdiction on the basis of Article 30 of Convention against Torture[5]and Article 36(2) of Statute of International Court of Justice[6]. The objection raised by Senegal in regards to the admissibility of Belgium's claim was refused by the court and the court declared Belgium's claim as admissible. The court based its reasoning on the principle of the *erga omnes partes* i.e. obligation of a state party of a convention towards another state party to fulfill the obligations of that particular convention. It was the first time in the history of ICJ that it recognized the principle of *erga omnes partes* as one of the basis for standing in the case.[7] This paper will analyze the judgment of the court in the Belgium v. Senegal case with the special focus on the legal consequences of the *erga omnes partes* in the public international law.

The principle of *erga omnes partes:*

The principle of *erga omnes partes* can be traced out on the Articles on Responsibility of States for Internationally Wrongful Act (ARSIWA), 2001. Article 48 (1) (a) of ARSIWA has been interpreted as an obligations *erga omnes partes* by the International Law Commission in the commentary of ARSIWA.[8] Article 48(1) (a) stipulates that:

> Any State other than an injured State is entitled to invoke the responsibility of another state in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group.[9]

The group of state this provision mentions about can be state parties of a convention. All the parties of a convention have the collective interest in regard to that particular convention, for. e.g. collective interest of the state parties of the Convention against Torture is to prevent the acts of torture and if they occur, to punish the wrongdoer.[10]

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5 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S 85, 10 December 1984, art 30.

6 *Statute of International Court of Justice*, 1055, 33 U.N.T.S.993, 1945, art 36(2).

7 Inna Uchkunova**,** 'Belgium v. Senegal: Did the Court End the Dispute between the Parties?', *European Journal of International Law*, 2012 available at https://www.ejiltalk.org/belgium-v-senegal-did-the-court-end-the-dispute-between-the-parties/, accessed on 10 June 2018.

8 International Law Commission Report on the Work of Its Fifty-Third Session, Commentary on Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. U.N. Document 10 A/56/10, chapter. IV.E.1. 2001, p.126.

9 International Law Commission Report on the Work of Its Fifty-Third Session, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Supplement No. 10 U.N. Document A/56/10, 2001, art 48(1)(a).

10 *Questions Relating to the Obligation to Prosecute or Extradite, Belgium v Senegal,* Merits, 2012, ICJ Rep, p.422, para 68.

Therefore, this provision stipulates that each state party of the convention has the responsibility towards another state party of the same convention for the fulfillment of its obligation under that convention which is known as *erga omnes partes* in the legal sense.

There is another concept, *erga omnes* which seems similar to *erga omnes partes* but they have some differences. The Institute of International Law has included the definition of *erga omnes partes* within the definition of *erga omnes*.[11] The "*erga omnes* obligation" is an obligation of a state towards the international community as a whole whose basis is customary law, on the other hand, "*erga omnes partes*" is the obligation of a state towards the parties of a particular convention only whose basis is conventional law. The *erga omnes* obligation can be traced in Article 48(1) (b) of ARSIWA.[12]

Facts of the Case:

Hissene Habre, former Chadian President was accused of committing torture, extrajudicial executions, enforced disappearance, rape, and sexual slavery during his rule as a President of Chad. After he was deposed from the position of the President, he came to Senegal as a political asylum seeker. Seven Chadian nationals along with the association of victims filed a case in the Senegalese court against *Habre*. Though he was kept under house arrest for some period, the Dakar Court of Appeal annulled the proceedings against him. On the other hand, on 30 November 2000, a Belgian national of Chadian origin filed a case against *Habre* with a Belgian investigating judge. The Belgium court had started the investigation and during the process of the investigation, it had asked help from Chad and Senegalese Government. On 19 September 2005, the Belgium investigating judge issued an international warrant for the arrest of Mr. *Habre*. The Belgium government transferred the international warrant to Senegal and requested for the extradition of *Habre* but the Senegalese court refused to extradite him. The main contention of this case is that Belgium requested Senegal to extradite Mr. *Habre* four times but they did not receive the positive response. Belgium wanted Senegal either to prosecute Mr. *Habre* in their court or to extradite him to Belgium for Belgium proceedings. Belgium proceeds to the ICJ claiming that Senegal had breached the Convention against Torture by neither prosecuting nor extraditing him.

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[11] According to the Institute of International Law erga omnes is a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action or b) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action. The second definition is of *erga omnes partes* not of erga omnes. International Law Institute of International Law, 'Obligations Erga Omnes in International Law', 27 August 2005, Institute De Droit International available at http://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf, accessed on 10 June 2018.

[12] Any State other than an injured States is entitled to invoke the responsibility of another state if (a) the obligation breached is owed to the international community as a whole. ARSIWA (n 9), art 48(1) (b).

Facts in relation to admissibility issue:

The basis on which the Senegal raised the issue of admissibility of Belgium's claim was that the victims for whom Mr. *Habre* was made attributable were not of Belgium nationality when the acts were executed. Belgium refutes Senegal by arguing that Belgian courts intend to exercise passive personal jurisdiction. It gives another argument that under the convention any state party is entitled to claim the performance of an obligation by another state party.

The judgment of the Court:

The Court first considers the arguments raised by Belgium as to whether a State being a party to the Convention suffices to bring a claim against another state in the court or not. The court interprets the preamble of the Convention against Torture to look at the object and purpose of that convention and according to the court's findings, the object and purpose were to make 'effective the struggle against torture throughout the world'. According to the court, the state parties to the Convention have a common interest to ensure that acts of torture are prevented and if they occur, their authors do not enjoy impunity. All the other state parties have a common interest in compliance with the obligation by the State in whose territory the offender is present. Here, the court refers to the obligations *erga omnes partes*, which the court defines as the obligation that is owed by any State party to all the other States parties of the Convention. The court further states that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*. Hence, the court declares that Belgium's claim is admissible.

Analysis:

There were many instances where the states had demanded the standing before the court on the basis of *erga omnes* obligations. Though the court had extensively discussed *erga omnes* obligations, it has not accepted it as the sole ground for the standing before the court. But the *erga omnes partes* which had not been widely discussed by the court in the past was easily accepted as a ground for standing. The court's decision is criticized on this very point that *erga omnes partes* lacks state practice, therefore, it should not have been accepted by the court at that moment.

Judge Xue also gives a similar dissenting opinion, she mentions that instead of interpreting Article 5(1) of the Convention, the court bases its reasoning on *erga omnes partes* which lacks the established jurisprudence of the court[13]and the state practice[14]. She further explains that *erga omnes partes* is a substantive matter and the right to bring a claim is a procedural matter.[15] She gives the example of *erga omnes* obligation which

[13] *Belgium v Senegal* (n 10), dissenting opinion of Judge Xue, p. 574.

[14] Ibid, p. 576.

[15] Ibid, p. 575.

has been extensively referred by the court in a number of cases but in none of them has the court mentioned that solely for the existence of a common interest a State can bring a claim in the court.[16] It is one thing that each state party has an interest in the compliance of the obligations, and it is another thing that every state has standing to bring a claim against another state.[17] She further states that the concept of *erga omnes partes*, in this case, has made the difference between the claimant and other state parties of the convention blurred because the court has given general right to invoke the responsibility.

Judge Skotnikov in his separate opinion mentions that court should not have applied *erga omnes partes*. He raises a question to the judgment of the court, does 'the judgment lead to a conclusion that a common interest is one and the same thing as a right of any State party to invoke the responsibility of any other State party before this Court?'[18].

Commentators have raised the question of consequences of obligation *erga omnes partes* when a state has made a reservation in the treaty.[19] If a state has made a reservation, that will prevent the obligations *erga omnes partes* from becoming binding on that state. Hence, the *erga omnes partes* has importance only when that obligations are *erga omnes* in nature because in such a situation the parties will have customary obligations and not merely conventional obligations which could be breached by mere reservation.

The primary legal consequences of this judgment could be described as follows: First, any state party could invoke the breach of responsibility by another state party. Second, the state party which invokes the responsibility under the basis of *erga omnes partes* has *ius standi* to bring a claim. Third, the element of 'injured state' is no more needed to invoke the responsibility of another state when the claim is brought under the basis of *erga omnes partes*.

All states are sovereign and have an equal sovereign right, therefore, one state should not be made responsible towards another state but this is the basic idea of *erga omnes partes*. Though in theory it is said all have an equal sovereign right but it is always the big powerful country that has more sovereign power. In this case, also it is one kind of domination by powerful country over other countries. Senegal lacked finance for the trial of Mr. *Habre* but Belgium was constantly repeating that Senegal cannot take the excuses of finance. These arguments show the dominating behavior of powerful countries over other countries. International law works for the wishes of powerful countries. If the United States of America does not enforce the decision of the ICJ in the case of Nicaragua v. U.S.A., no one could do anything to give pressure to the U.S.A. But when it comes to less powerful countries like Senegal even when it had assured that it would prosecute Mr. *Habre* but still it was dragged to the ICJ to give more pressure.

16 Ibid.

17 Ibid.

18 *Belgium v Senegal* (n 10), separate opinion of Judge Skotnikav, p. 483.

19 Diego Germán Mejías-Lemus, 'On 'obligations *erga omnes partes*' in public international law: *'erga omnes'* or *'erga partes*'?', vol. 10, no 1, *Ars Boni et Aequi* p.177,2014, p.180.

Conclusion:

The *erga omnes* obligations which has been extensively discussed by the court has not been applied even once by the court but the *erga omnes partes* obligation which lacks sufficient jurisprudence has been easily accepted by the court. In this case, the dominating role of Belgium over Senegal could be easily traced out. Therefore, through the analysis it could be concluded that the international law and all concepts related to it like the *erga omnes partes* are the tools of domination for less powerful countries by powerful one.