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ARTICLE

Enforcing the 'Community Interest' in Combating Transnational Crimes: The Potential for Public Interest Litigation

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Abstract
Transnational criminal law treaties could give rise to public interest litigation concerning the breach of an obligation *erga omnes partes*, meaning an obligation owed by one state party to all other states parties. This article aims to contribute to scholarship on the subject of *erga omnes* or 'community interest' norms by exploring the potential for international litigation concerning non-compliance with obligations under two transnational criminal law treaties in particular: the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Transnational criminal law treaties have been overlooked in the existing literature on community interest norms, even though states parties have a common interest in ensuring compliance with the obligations assumed under these instruments, and the treaties have the potential, at least in theory, to give rise to public interest litigation. International courts and tribunals, as well as scholars, can and ought to engage in deeper analyses of what constitutes an obligation *erga omnes partes* under a multilateral treaty.

Keywords Public interest litigation · Transnational criminal law · Jurisdiction · Admissibility · Standing · State responsibility

1 Introduction

Transnational crimes like corruption, money laundering, drug trafficking and organized crime have global implications—they destabilize societies, threaten sustainable economic development, and undermine public institutions and the rule of law. In addition, these forms of criminal conduct often involve cross-border elements.[1] In

[1] Transnational criminal law encompasses conduct that crosses borders, as well as conduct that has substantial effects in other states. See Boister (2018), p. 25. Public funds embezzled by a government offi-

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recognition of the transnational implications and cross-border elements of such crimes, states have concluded 'suppression conventions' or transnational criminal law treaties, including the 2000 United Nations Convention against Transnational Organized Crime (UNTOC), and the 2003 United Nations Convention against Corruption (UNCAC).[2] Like transnational criminal law treaties in general, UNTOC and UNCAC mainly require states parties to criminalize certain conduct in their domestic legal systems and to engage in various forms of international cooperation for the purposes of facilitating domestic investigations and prosecutions as well as asset recovery. UNTOC and UNCAC are premised on domestic legislative implementation, as well as enforcement and adjudication by domestic, as opposed to international prosecutors and judges.

To date, international law-making in the field of transnational criminal law has not been matched by international enforcement initiatives, despite a wealth of examples of inadequate compliance with these treaties and states' shared interests in combating such conduct.[3] Both UNTOC and UNCAC now benefit from review mechanisms involving peer review by states parties, but these mechanisms have their limitations and can only represent a part of the solution to the problem of insufficient compliance.[4] By design, the review mechanisms associated with UNTOC and UNCAC avoid definitive or sharply worded pronouncements concerning non-compliance by states parties under review, and they lack any tools for enforcing treaty obligations in cases of persistent or egregious non-compliance.[5]

Against this background, public interest litigation before international courts or tribunals could potentially play a small but important role in bringing about enforcement of states' treaty obligations under UNTOC and UNCAC, by creating legal as well as political momentum for change. The term 'public interest litigation' is used in this article to refer to the vindication, by one or more states parties to a multilateral treaty, of a right *erga omnes partes*, meaning a right that is shared by all states parties.[6] The International Court of Justice (ICJ) has come a long way from its *South*

Footnote 1 (continued)
cial, for example, are typically laundered through the international financial system and through the use of offshore companies. Moreover, while a drug trafficking cartel might be based in one state, it operates with a view towards exporting goods for international consumption.

[2] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003), 2225 UNTS 209; United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005), 2349 UNTS 41.

[3] On the enforcement of community interests, see Tams (2011); Wolfrum (2011).

[4] UNCAC's review mechanism began its first review cycle in 2010. UNTOC's review mechanism began its review process in 2020. For a discussion of the creation of the UNTOC review mechanism, see Rose (2020).

[5] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Resolution 9/1, Annex: Procedures and rules for the functioning of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto; Conference of the States Parties to the United Nations Convention against Corruption, Resolution 3/1, Annex: Terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption.

[6] See Gattini (2019); Ahmadov (2018). While the bilateral structure of proceedings at international judicial institutions such as the ICJ does not necessarily facilitate public interest litigation, it also does not necessarily preclude it. See Wittich (2008), p. 997; Paddeu (2017); Benzing (2006).

West Africa judgment of 1966, in which it held that Ethiopia and Liberia lacked standing to bring a claim against South Africa concerning its institution of apartheid policies in South West Africa (now Namibia).[7] Within the last decade, the ICJ has unmistakably opened the door to public interest litigation in the context of a number of cases, and has persuasively relegated *South West Africa* to the past.[8] These developments suggest that public interest litigation before the ICJ, as well as other international courts and tribunals, holds further potential, which merits exploration in both scholarship and practice.

Though UNTOC and UNCAC both contain dispute settlement clauses that could enable litigation before an arbitration tribunal or the ICJ, these provisions have never served as the basis for international proceedings.[9] By contrast, the Genocide Convention and the Convention against Torture, the structure of which resemble that of transnational criminal law treaties, have been the subject of public interest-style proceedings before the ICJ in the last decade.[10] The purpose of this article is to explore the extent to which states could pursue international litigation on the basis of the dispute settlement clauses in UNTOC and UNCAC, with a view towards enforcing the community interest of states parties in compliance with these treaties.

While such litigation may often be implausible, politically speaking, for a range of reasons that lie beyond the scope of this article, this piece explicitly focuses on what is possible in legal rather than political terms. In practice, decisions by states about whether or not to initiate inter-state litigation are often closely linked to political and financial considerations, including the impact that such litigation could have on bilateral relations between the disputing parties.[11] Whereas these political calculations can change over time, in sometimes unpredictable or surprising ways, the legal feasibility of public interest litigation in connection with these treaties promises, in all likelihood, to remain constant.

To date, much of the existing body of literature on community interest norms has focused mostly on obligations *erga omnes* under customary international law.[12] An aim of this piece is to contribute to the existing body of scholarship on the subject of community interest norms by exploring the potential for international litigation

[7] *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p. 6, para. 88. But see *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 3.

[8] The ICJ's notable recent jurisprudence includes *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 226; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, p. 3.

[9] But Equatorial Guinea unsuccessfully attempted to ground the ICJ's jurisdiction on UNTOC in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ Reports 2018, p. 292.

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, p. 3; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422.

[11] See e.g., Scott (2014); Miron (2014).

[12] See e.g., Tams (2010); Simma (1994).

concerning non-compliance with obligations under multilateral transnational criminal law treaties, in particular UNTOC and UNCAC. The following also considers how international courts and tribunals, as well as scholars, can engage in deeper analyses of what constitutes an obligation *erga omnes partes* under a multilateral treaty, and how this ought to be determined.

This article begins with two contemporary examples of circumstances in which a 'community' of states parties could be interested in bringing about compliance by Mexico and the United Kingdom with their obligations under UNTOC and UNCAC, respectively (Sect. 2). The article then discusses the legal feasibility of litigation by delving into the jurisdictional issues raised by the compromissory clauses in UNTOC and UNCAC (Sect. 3), and the issue of admissibility, namely the standing of states parties with respect to obligations *erga omnes partes* (Sect. 4).

2 Illustrations of Non-Compliance with UNTOC and UNCAC

The following examples of arguable non-compliance by Mexico and the United Kingdom demonstrate the need for international enforcement of treaty obligations, and the role that inter-state litigation could play, alongside the existing review mechanisms. The selected examples highlight different types of compliance problems, in both developing and developed countries. The first example concerns Mexico's implementation of its obligation under UNTOC concerning prosecutorial discretion, while the second example concerns the UK's implementation of its obligation under UNCAC concerning anti-money laundering measures. These examples are included for their expository value, and not for the purpose of advocating for the actual pursuit of litigation against Mexico or the United Kingdom, or because such cases would be politically realistic, or 'strategic' in the strategic litigation sense.[13]

2.1 Prosecutorial Discretion in Mexico

The first example of non-compliance focuses on the former defence minister of Mexico, General Salvador Cienfuegos Zepeda, who was arrested in the United States on drug trafficking charges in October 2020.[14] In his capacity as defence minister from 2012 to 2018, General Cienfuegos was responsible for leading the Mexican military's efforts to combat narcotics trafficking. A US criminal investigation reportedly revealed, however, that General Cienfuegos was allegedly involved with the H-2 drug cartel in Mexico. US authorities captured thousands of BlackBerry

[13] Duffy (2018).

[14] Azam Ahmed, 'Mexico's Former Defense Minister is Arrested in Los Angeles', *The New York Times*, 16 October 2020; see also Azam Ahmed and Alan Feuer, 'Who Was "El Padrino", Godfather to Drug Cartel? Mexico's Defence Chief, U.S. Says', *The New York Times*, 16 October 2020. See also Nathaniel Morris, 'Nayarit and the Making of a Narco State' (22 November 2020), Global Initiative against Transnational Organized Crime/Mexico Violence Resource Project, https://www.mexicoviolence.org/post/nayarit-and-the-making-of-a-narco-state (accessed 11 April 2022).

messages that allegedly evidenced General Cienfuegos's coordination with cartel leaders.[15] A US indictment charged General Cienfuegos with conspiracy to manufacture, import and distribute various drugs (heroin, cocaine, methamphetamines and marijuana) from December 2015 to February 2017.[16] In exchange for bribes, General Cienfuegos allegedly helped the cartel with maritime shipments, directed military operations away from the H-2 cartel and towards its rivals, and introduced members of the cartel to other Mexican officials who could facilitate their criminal activities in exchange for bribes.

In response to his arrest, the Mexican government demanded that US authorities drop their case against General Cienfuegos, and threatened to expel US federal drug agents from Mexico unless the case was dropped. One month later, in November 2020, the US Department of Justice abruptly reversed course by requesting the dismissal of the case, which was granted.[17] The US Department of Justice sought to allow Mexico to investigate and potentially prosecute General Cienfuegos in the first instance, and it shared evidence with Mexican investigators in order to facilitate such proceedings.[18] In January 2021, however, Mexico's Attorney General's office announced that they would not bring charges against General Cienfuegos. According to the Mexican authorities, General Cienfuegos 'never had any encounter with the members of the criminal organization', nor did he provide them with protection.[19]

Mexico's decision not to prosecute General Cienfuegos arguably brought it into conflict with UNTOC, which Mexico ratified in 2003. UNTOC not only requires states to criminalize certain conduct, such as participation in an organized criminal group, but it also imposes some limited obligations on states parties with respect to the enforcement of such domestic criminal laws. In particular, Article 11(2) requires each state party to:

> […] endeavor to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures

[15] Alan Feuer and Natalie Kitroeff, 'Mexico, Outraged at Arrest of Ex-Official, Threatened to Toss U.S. Agents', *The New York Times*, 18 November 2020.

[16] *United States of America v. Salvador Cienfuegos Zepeda*, Indictment, CR 19–366, 14 August 2019.

[17] Letter dated 17 November 2020, sent by Seth D. DuCharme, Acting United States Attorney, to Judge Amon, Re: United States v. Salvador Cienfuegos Zepeda, Criminal Docket No. 19–366 (CBA). In the letter, the US Department of Justice explained that the United States had 'determined that sensitive and important foreign policy considerations outweigh the government's interest in pursuing the prosecution of the defendant, under the totality of the circumstances'. The letter also references the US government's 'recognition of the strong law enforcement partnership between Mexico and the United States', and the interest in demonstrating its 'united front against all forms of criminality, including the trafficking of narcotics by Mexican cartels'.

[18] US Department of Justice, Press Release, 'Joint Statement by Attorney General of the United States William P. Barr and Fiscalía General of Mexico Alejandro Gertz Manero', 17 November 2020.

[19] Oscar Lopez, 'Mexico Exonerates Ex-Defense Chief Who Was Freed by the U.S.', *The New York Times*, 14 January 2021.

in respect of those offences and with due regard to the need to deter the commission of offences.[20]

This provision imposes an obligation of conduct, by obliging states parties to try to achieve the goal of ensuring that discretionary legal powers are exercised to maximize the effectiveness of law enforcement measures. Article 11(2) of UNTOC is arguably violated where no genuine effort is made to ensure that prosecutorial discretion is exercised to maximize law enforcement measures, especially in high-profile cases, such as the case of General Cienfuegos. Such measures could, for example, involve well-defined limits on prosecutorial discretion in cases concerning organized crime. Such measures would aim to protect prosecutors from the 'powerful interests associated with organized crime', by restricting their discretion, while at the same time still allowing prosecutors to offer concessions to lower-level members of criminal organizations, to enable the effective prosecution of the 'higher echelons' of the organization.[21]

Mexico's decision not to further investigate or prosecute General Cienfuegos suggests that in this instance, Mexico did not work to ensure that its prosecutors would exercise their discretionary legal powers for the purpose of maximizing the effectiveness of law enforcement measures concerning drug cartels. Instead, it appears that no real efforts were made to insulate Mexican prosecutors from the political and/or military considerations surrounding this case. Prosecutorial discretion seems to have been subordinated to political and/or military considerations, which led Mexican authorities not only to drop the case, but to characterize the existing evidence in terms that are completely at odds with the assessment of the evidence by US prosecutors. Whether such a line of argument about Mexico's non-compliance with Article 11(2) of UNTOC could be successfully pursued before an international court or tribunal would, of course, depend on the availability and strength of the evidence at hand.

Given the global ramifications of drug trafficking, Mexico's compliance with Article 11(2) of UNTOC is arguably of interest not just to the United States, but to the community of states parties to UNTOC. Although UNTOC benefits from a

[20] Art. 11(2) of UNTOC is nearly identical to Art. 3(6) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) (adopted 20 December 1988, entered into force 11 November 1990), 1582 UNTS 95. According to the United Nation's commentary on the Vienna Convention, Art. 3(6) reflects a compromise between two positions. On the one hand, this provision originated in a proposal to ensure that 'prosecution authorities strictly enforce the law on matters covered by article 3', especially in states where prosecutorial authorities exercise discretion, and might 'need a measure of protection from the powerful interests associated with organized crime'. On the other hand, this provision enables 'countervailing considerations' to be taken into account, such as where concessions (e.g., reduced penalties) 'to those involved in the lower echelons of organized crime could enable investigative agencies to identify and prosecute those in the higher echelons'. Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (UN, New York, 1998), paras. 3.124–3.126, available at https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf (accessed 11 April 2022).

[21] Ibid. Such an understanding of Art. 11(2) of UNTOC would be in keeping with the commentary to Art. 3(6) of the Vienna Convention, upon which Art. 11(2) of UNTOC is based.

review mechanism, this does not necessarily represent a promising means by which the United States or other states parties to the convention could bring about compliance by Mexico with Article 11(2) of UNTOC, either in the case of General Cienfuegos, or in the context of other specific enforcement actions. Because the review mechanism is more focused on the implementation of the convention, rather than on specific domestic enforcement actions, it is unlikely that this particular episode would attract significant commentary in the context of Mexico's country review.[22] Reviewers could, however, be expected to critically evaluate the measures that Mexico has put in place to regulate the exercise of prosecutorial discretion in organized crime cases, as required by Article 11(2).

Public interest litigation brought by another state party against Mexico would likely be geared towards obtaining a judgment or award that provides for specific legal remedies, namely cessation of wrongdoing and reparation, in particular satisfaction.[23] Cessation of wrongdoing would likely take the form of legislative or policy reform in Mexico, with a view towards ensuring that prosecutors exercise their discretion in keeping with Article 11(2) of UNTOC (i.e., by maximizing 'the effectiveness of law enforcement measures […] and with due regard to the need to deter the commission of such offences'). Satisfaction would likely take the form of a declaration of wrongdoing by the ICJ or an arbitration tribunal and could involve an authoritative judicial interpretation of the meaning of Article 11(2). Whether the operative paragraphs of such a judgment or award would have any practical impact would depend, in part, on the pressure brought to bear on Mexico by the applicant state and other states parties, international organizations, and civil society organizations.

[22] UNTOC's review mechanism is based in Art. 32 of UNTOC, which specifically conceives of the conference of parties agreeing on mechanisms for periodically reviewing implementation. Neither Art. 32, nor the review mechanism's Procedures and Rules cover the review of enforcement actions. During the review process, however, states parties may report on domestic enforcement actions, in the context of the self-assessment questionnaire. Mexico's implementation of UNTOC is due to be reviewed by the UNTOC review mechanism, which was established in 2018 and began operating at the end of December 2020. For a discussion of the creation of the UNTOC review mechanism, see Rose (2020).

[23] ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) Arts. 30, 37. In *Belgium v. Senegal*, which represents the most comparable ICJ case to date, the Court's operative paragraph 122 included three sub-paragraphs containing declarations regarding Senegal's breaches of the Convention against Torture (i.e., satisfaction) and one sub-paragraph finding that 'Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him' (i.e., cessation of wrongdoing). In the scenario involving Mexico, however, there would be no basis for a finding by the ICJ or an arbitration tribunal to the effect that Mexico must prosecute or extradite General Cienfuegos, as the United States has not requested his extradition by Mexico. Moreover, Art 11(2) of UNTOC would not provide a legal basis for a finding that Mexico must prosecute General Cienfuegos, as the provision only requires states parties to try to maximize the effectiveness of law enforcement measures.

2.2 Identification of Beneficial Owners of Offshore Companies Registered in the British Virgin Islands

A second example focuses on the role of the British Virgin Islands as an offshore haven for high-level public officials seeking to launder illicitly obtained wealth in part by purchasing and selling London real estate. The British Virgin Islands are an overseas territory of the United Kingdom, which is responsible for its international relations. The United Kingdom ratified UNCAC in 2006, and shortly thereafter declared that the treaty's application extends to the British Virgin Islands. According to the Pandora Papers, which were released by the International Consortium of Investigative Journalists (ICIJ) in October 2021, the British Virgin Islands are home to more than two-thirds of the 956 offshore companies that ICIJ was able to link to 336 different high-level public officials.[24]

The Pandora Papers specifically revealed that family members and associates of the President of Azerbaijan, Ilham Aliyev, have been owners of a fleet of offshore companies in the British Virgin Islands. Between 2006 and 2018, 44 companies registered in the British Virgin Islands were owned by the family members and associates of President Aliyev, who has long been the subject of corruption allegations.[25] The Pandora Papers showed that over the past 15 years, the family members and associates of President Aliyev have used this network of offshore companies to acquire and sell property in the United Kingdom worth nearly GBP 400 million.[26] The documents released through the Pandora Papers suggest that the British Virgin Islands companies owned by President Aliyev's family members and associates may have been used for the purpose of laundering the proceeds of corruption.

At present, UK law allows persons to buy and sell property in the United Kingdom by using offshore companies that obscure the identity of the beneficial owners, a term referring to 'the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted'.[27] In the case of the Aliyevs, the natural persons who owned or controlled the companies were close family members of the President of Azerbaijan, who is considered a 'politically exposed person', meaning a high-level public official. In July 2018 the UK Parliament published draft legislation that would have required the registration of the beneficial owners of overseas companies that own UK property, but it has not

[24] ICIJ, 'Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak', https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ (accessed 11 April 2022).

[25] ICIJ, 'Azerbaijan: President's Family, The Aliyev Children', https://www.icij.org/investigations/pandora-papers/power-players/?player=the-aliyev-children (accessed 11 April 2022).

[26] One particular transaction involved a 2018 purchase by the British crown estate, which paid GBP 66.5 million for a London property owned by Hiniz Trade & Investment, based in the British Virgin Islands. Ownership of Hiniz Trade & Investment had passed from President Aliyev's daughter, to his daughter's grandfather, who then placed the company in a trust in 2015.

[27] Financial Action Task Force (FATF), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations (March 2022), p. 119, available at https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (accessed 20 April 2022).

yet passed the bill.[28] The UK government also considered legislating, through the Privy Council, to require the overseas territories to publish registers before the end of 2023.[29] But the United Kingdom has not adopted such legislation, as the overseas territories voluntarily agreed to introduce registers—though the British Virgin Islands did so belatedly, and with some questionable caveats.[30]

The present legal regime in the United Kingdom is arguably in conflict with UNCAC's provisions concerning the prevention of money laundering. Article 14 of UNCAC requires each state party to institute an anti-money laundering 'regime which shall emphasize requirements for customer, and, where appropriate, beneficial owner identification', among other things.[31] Although the treaty only requires a regime that enables beneficial owner identification 'where appropriate', a strong argument could be made that such measures would be appropriate in the UK's case, given that the London property market is a well-known destination for laundered wealth. The UK's failure to implement necessary domestic legislation or to bring about reform in the British Virgins Islands has meant that foreign politically exposed persons, and their family members and associates, have been able to continue to rely on offshore companies registered in the British Virgin Islands as a means for making

[28] Draft Registration of Overseas Entities Bill, https://www.gov.uk/government/consultations/draft-registration-of-overseas-entities-bill (accessed 11 April 2022). For an overview of the history of this draft bill, see Ali Shalchi and Federico Mor, 'Registers of beneficial ownership', House of Commons Library, Briefing Paper, Number 8259, 8 February 2021, pp. 10–13.

[29] Statement made by Wendy Morton, Minister for European Neighbourhood and the Americas, Publicly accessible registers of company beneficial ownership in the British Overseas Territories, Statement UIN HCWS369, 15 July 2020, https://questions-statements.parliament.uk/written-statements/detail/2020-07-15/hcws369 (accessed 11 April 2022).

[30] Shalchi and Mor (above n. 28), pp. 19–20. Eight overseas territories had committed by July 2020 to implement a publicly accessible register of beneficial owners: Anguilla, Bermuda, Cayman Islands, the Falkland Islands, Montserrat, the Pictairn Islands and St Helena, Ascension Island and Tristan da Cunha, and the Turks and Caicos Islands. Statement made by Wendy Morton, Minister for the European Neighbourhood and the Americas, Publicly accessible registers of company beneficial ownership in the UK Overseas Territories, UIN HCWS643, https://questions-statements.parliament.uk/written-statements/detail/2020-12-14/HCWS643 (accessed 11 April 2022).

In September 2020, the Premier and Minister of Finance of the British Virgin Islands expressed willingness to work with the UK government 'towards implementation of a publicly accessible register of beneficial ownership for companies' by 2023. Government of the Virgin Islands, BVI Premier Reiterates Territory's Commitment to an Appropriate Framework for Publicly Accessible Registers, 22 September 2020, https://bvi.gov.vg/media-centre/bvi-premier-reiterates-territory-s-commitment-appropriate-framework-publicly-accessible (accessed 11 April 2022).

This statement, however, included caveats, and the minister envisions conditioning access to the data in such a register on a court-approved warrant. Such a condition would conflict with the Privy Council's draft legislation, which defines publicly accessible as accessible to the 'general public', through 'a request submitted through the internet', and with a delay 'no more than is necessary for the transmission of that information'. Draft Order in Council, The Overseas Territories (Publicly Accessible Registers of Beneficial Ownership of Companies) Order 20**, s. 4(8), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943307/SAMLA_s51_Draft_Order_in_Council.pdf (accessed 11 April 2022).

[31] See also FATF Recommendation 24 ('Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities […]').

anonymous purchases and sales of high-end London real estate. The case of the Aliyevs illustrates the extent of the problem, and the ramifications of the current regulatory regime in the United Kingdom.

Because of its global impact, the UK's anti-money laundering regime is of interest to the community of states parties to UNCAC. UNCAC's review mechanism has not, however, served as a means for pressuring the United Kingdom to undertake reform. The UK's rules concerning beneficial ownership have not the been the subject of criticism within the context of the UNCAC review process. Israel and Turkey, which reviewed the UK's compliance with the convention's chapters on prevention and asset recovery in 2019, noted that the United Kingdom had implemented a registry in 2016 for UK corporate entities, and that upcoming legislation would create a new public register for overseas entities that would like to purchase land in the United Kingdom.[32] The reviewers cited the planned extension of a public registry to overseas entities as an example of 'successes and good practices'.[33] Given that the United Kingdom has been a state party to UNCAC since 2006, the reviewers might have expressed concern about timely action. Their treatment of this issue may have reflected a general reluctance to level criticism in the context of the UNCAC review mechanism, but it also could have reflected a genuine conviction that the United Kingdom would promptly implement its plans.[34]

In this scenario, public interest litigation brought by a state party to UNCAC against the United Kingdom would serve the purpose of bringing about cessation of wrongdoing and obtaining satisfaction in the form of a declaration of wrongdoing. Cessation of wrongdoing would require legislative action by the United Kingdom, similar to the previous example involving Mexico. A declaration of wrongdoing by the ICJ or an arbitration tribunal would potentially serve a function beyond dispute settlement, as it would provide an authoritative judicial interpretation of Article 14 of UNCAC, and might, in particular, clarify when regimes for beneficial owner identification are 'appropriate' and required.

3 Consent to Jurisdiction by Means of Compromissory Clauses

This section explores the question of whether international courts and tribunals could exercise jurisdiction over disputes concerning compliance by states with their obligations under UNTOC and UNCAC. Although compliance with UNTOC and

[32] Country Review Report of the United Kingdom and Great Britain and Northern Ireland: Review by Turkey and Israel of the Implementation by the United Kingdom of Great Britain and Northern Ireland of articles 5–14 and 51–59 of the United Nations Convention against Corruption for the review cycle 2016–2021, p. 169, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935066/Country_Review_Report_of_the_United_Kingdom.pdf (accessed 11 April 2022).

[33] Ibid.

[34] The OECD Working Group on Bribery, which monitors the implementation and enforcement of the OECD Anti-Bribery Convention has, by contrast, been quite critical of the slow pace of the UK's efforts to reform its anti-corruption laws. Rose (2012).

UNCAC is monitored through their respective review mechanisms, these review processes cannot necessarily be expected or relied upon to identify significant instances of non-compliance and to press for change. The UNTOC review mechanism, for example, is yet to review Mexico's implementation of Article 11 of UNTOC, and is, in any event, unlikely to comment on a specific enforcement action. While the UNCAC review mechanism has reviewed the UK's compliance with Article 14 of UNCAC, the review may have been overly optimistic and positive in light of the fact that the UK's regulatory regime remains unchanged. Litigation before international courts and tribunals may therefore represent an important option in situations involving high-profile failures to implement obligations under transnational criminal law treaties. This section therefore looks at whether disagreements about compliance with UNTOC and UNCAC could give rise to disputes that fall under the jurisdiction of an international court or tribunal. Because the issue of the existence of consent to jurisdiction logically precedes the issue of the admissibility of the claim, this article therefore deals with jurisdiction before reaching the question of admissibility, in particular standing. Clearly separating these two issues also allows this article to emphasize the conceptual differences between these two procedural issues.

This section focuses on compromissory clauses as a method of consent to the jurisdiction of international courts and tribunals, while acknowledging that other methods of consent could also ground jurisdiction. States could, for example, consent to the ICJ's jurisdiction over disputes under UNTOC and UNCAC through the conclusion of a special agreement, or through optional clause declarations submitted to the ICJ under Article 36(2) of the ICJ Statute. The focus is nevertheless on the conventions' compromissory clauses because these treaties enjoy nearly universal participation; at present, UNTOC has 190 states parties and UNCAC has 188 states parties. In light of the very high levels of participation by states in these treaties, their compromissory clauses hold untapped potential for facilitating litigation before an arbitration tribunal or the ICJ. The number of states that has potentially consented to the jurisdiction of the ICJ with respect to a dispute arising out of these two treaties is far greater than the number of states that has accepted the ICJ's compulsory jurisdiction through the submission of an optional clause declaration.[35]

Like many multilateral treaties, UNTOC and UNCAC contain dispute settlement clauses that provide for the referral of disputes about the interpretation or application of the conventions to third party dispute settlement.[36] The two treaties contain identical compromissory clauses, which provide that:

> Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitra-

[35] As of December 2021, seventy-three states have deposited declarations recognizing the jurisdiction of the ICJ as compulsory. International Court of Justice, https://www.icj-cij.org/en/declarations (accessed 11 April 2022).

[36] UNTOC Art. 35(2); UNCAC Art. 66(2). For a general discussion of compromissory clauses, see Tams (2009). For commentary on Art. 66 of UNCAC, see Tams and Scheu (2019).

tion, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

Recourse to the ICJ is notably not the 'default' option under the compromissory clauses contained in UNTOC and UNCAC. These dispute settlement provisions allow for recourse to the ICJ, but only after states parties have first attempted negotiation for a 'reasonable time', and then arbitration for at least six months. Because recourse to the ICJ is formally conditioned on upon states parties first pursuing negotiation *and* arbitration, these conventions make recourse to the ICJ cumbersome and time-consuming, although certainly within the realm of possibility.[37] In 2017, for example, Ukraine instituted proceedings at the ICJ against Russia after attempting arbitration for six months, as required by the compromissory clause contained in the International Convention for the Suppression of the Financing of Terrorism.[38] Likewise, in 2009, Belgium instituted proceedings at the ICJ against Senegal after attempting arbitration for six months, as required by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[39] These relatively recent cases may be taken as signs that where the political will exists on the part of the applicant state, the conditions set out in such compromissory clauses represent relatively minor obstacles on the way to the courtroom.

The compromissory clauses set out in UNTOC and UNCAC also contain 'opt-out' provisions that allow states parties to declare that they do not consider themselves bound by the compromissory clause.[40] Such reservations operate reciprocally, meaning that states parties are not bound by the compromissory clause with respect to another state party that has made such a reservation.[41] This means, for example, that the United States could not rely on UNTOC's compromissory clause in order to pursue a case against Mexico concerning its failure to prosecute General Cienfuegos, because the United States itself entered a reservation with respect to UNTOC's compromissory clause.[42] In practice, a minority of states have opted out of the compromissory clauses contained in UNTOC and UNCAC, although in absolute terms, the numbers are significant. Thirty-nine of the 190 states parties to UNTOC (21

[37] UNTOC Art. 35(1); UNCAC Art. 66(1).

[38] *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, Judgment, ICJ Reports 2019, p. 558, paras. 76–77.

[39] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, paras. 56–62.

[40] UNTOC Art. 35(3); UNCAC Art. 66(3).

[41] Vienna Convention on the Law of Treaties, Art. 21(1)(b) ('A reservation established with regard to another party […] modifies those provisions to the same extent for that other party in its relations with the reserving State'); Tomuschat (2012), p. 653, para. 28.

[42] The reservation entered by the United States provides that '[i]n accordance with Article 35, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 35, paragraph 2'. For its part, Mexico has not entered any reservations with respect to UNTOC.

percent) have entered reservations with respect to the compromissory clause, and 40 of the 188 states parties to UNCAC (21 percent) have done so.[43]

The fact that UNTOC and UNCAC permit reservations to their compromissory clauses should be seen as a jurisdictional issue that remains separate from the admissibility issue of standing.[44] In other words, reservations with respect to the compromissory clauses in UNTOC and UNCAC preclude courts and tribunals from exercising jurisdiction, but they do not relate to whether states parties have standing to bring claims concerning matters of common interest. Where either party to a dispute has entered a reservation with respect to the compromissory clause of UNTOC or UNCAC, the ICJ would lack jurisdiction due to a lack of consent. In his separate opinion in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, however, Judge Skotnikov suggested that the Court ought to have explored the connection between the permissibility of reservations and the issue of standing. He wrote that:

> In order to confirm its view that the common interest shared by States parties to the Convention against Torture […] equates to a procedural right of one State party to invoke the responsibility of another for any alleged breaches of such obligations, the Court would need to explain, for example, how such treaties could simultaneously envisage the right of a State party to make reservations to its jurisdiction. No such explanation is provided.[45]

The thrust of Judge Skotnikov's critique seems to be that because the Convention against Torture permits reservations to its compromissory clause, whatever 'common interest' is shared by the states parties may not be robust enough to give rise to a procedural right of any state party to invoke state responsibility. This passage suggests that two separate procedural questions—jurisdiction and admissibility—should be seen as interlinked, and that the permissibility of reservations, which is a jurisdictional issue, has bearing on the standing of states to bring claims before the Court, which is an admissibility issue. Yet, the permissibility of reservations relates to the issue of consent, meaning the willingness of states to subject themselves to binding third-party dispute settlement. The permissibility of reservations is not necessarily a reflection of the extent to which states have a common interest in compliance with

[43] These figures represent the number of reservations to the compromissory clauses in UNTOC and UNCAC as of December 2021. The Holy See also entered a reservation with respect to Art. 35(2) of UNTOC and Art. 66(2) of UNCAC. Twenty-five states have entered reservations with respect to the compromissory clauses in both conventions.

[44] The entitlement of a state to bring a specific claim does not involve jurisdictional questions about whether the parties have consented to the exercise of jurisdiction, or the scope of that jurisdiction. Instead, the entitlement of a state to bring a specific claim concerns the appropriateness of the court or tribunal hearing the specific claim, brought by a particular state. The term 'standing' can, however, also be used to describe issues that are best categorized as jurisdictional questions, such as questions about whether a particular entity qualifies as a state, and therefore falls within the ICJ's personal jurisdiction (jurisdiction *ratione personae*). Because this article focuses on states parties to UNTOC and UNCAC, this aspect of standing is not explored here.

[45] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, Separate Opinion of Judge Skotnikov, p. 483, para. 14.

the convention's substantive provisions, and these two procedural issues (i.e., jurisdiction and standing) should not be conflated with each other.[46] Third-party dispute settlement is, after all, only one way in which states can bring about treaty compliance, along with non-binding dispute settlement methods (negotiation, mediation, etc.), countermeasures, and peer review in the context of treaty monitoring.

Finally, the ICJ's requirement of the existence of a dispute represents another jurisdictional obstacle for states that might wish to pursue litigation before the ICJ, as opposed to inter-state arbitration.[47] In the context of UNTOC and UNCAC, however, this requirement involves a negligible hurtle. According to the jurisprudence of the ICJ, the existence of a dispute is a jurisdictional issue which, as the Court clarified in the *Marshall Islands* cases, requires that 'the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant'.[48] At the very least, this requirement means that the applicant state must clearly communicate its views to the respondent state before submitting its application to the Court, whether in a multilateral forum or through a bilateral exchange, such as written diplomatic correspondence.[49] Given that the compromissory clauses of UNTOC and UNCAC require litigants to have attempted negotiation and arbitration before filing a case before the ICJ, it is unlikely that at the stage of litigation before the ICJ, a respondent state would have been unaware of the existence of a disagreement, at least to a degree. In general, the requirement of the existence of a dispute may bear relatively little significance in cases where consent to jurisdiction takes the form of a compromissory clause that contains preconditions with respect to negotiation and arbitration.

Moreover, the requirement of the existence of a dispute can be met with relative ease even in situations where negotiations, for example, have been very limited and have not necessarily involved explicit references to the treaty at issue. In such instances, the would-be applicant state could fulfill this requirement by sending a sharply worded letter to the would-be respondent state, prior to filing a case with the ICJ. Such a letter would have to explicitly address the legal and factual elements of the dispute, by reference to the treaty at issue, and allow the other party an

[46] In its 1951 *Genocide* Advisory Opinion, the Court did indeed link the 'common interest' of the states parties to the Genocide Convention to the jurisdictional question of whether reservations to the Genocide Convention are permissible. *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15, at p. 23. The Court famously noted that '[i]n such a Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'etre* of the convention'. In this passage, however, the Court was focused only on the jurisdictional issue of reservations, and it did not link the 'common interest' of the states parties with the issue of standing.

[47] For a discussion of whether the existence of a dispute requirement should be classified as an issue of jurisdiction or admissibility, see McIntyre (2018).

[48] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 883, para. 41; Becker (2017).

[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, p. 3, paras. 26–31.

opportunity to respond. Ultimately, the requirement of the existence of a dispute, as elaborated by the Court in the *Marshall Islands* cases, creates a jurisdictional barrier that can be easily surmounted by applicant states through diplomatic correspondence prior to filing.

4 Standing with Respect to Obligations *Erga Omnes Partes*

This section addresses the main question that motivates this article: could any state party to UNTOC or UNCAC pursue international litigation against another state party that has allegedly breached a treaty obligation, and under what circumstances? In cases where jurisdiction has already been established, the next question becomes whether a 'non-injured' state party could have standing to bring a claim before an arbitration tribunal or the ICJ. Could the Netherlands, for example, pursue a claim against Mexico regarding its compliance with UNTOC? As was established in the previous section, the United States, which is arguably most impacted by Mexico's conduct, cannot bring a claim before the ICJ because of the reservation that it entered with respect to UNTOC's compromissory clause (and because the United States withdrew its optional clause declaration accepting the compulsory jurisdiction of the Court). The Netherlands represents an interesting hypothetical example of a possible applicant in this situation because of its interest in combating narcotics trafficking, which is a significant problem for the Netherlands due, in part, to the role that the Port of Rotterdam plays as a transit point for drug trafficking. The Netherlands, which is also a party to UNTOC, may not be injured by Mexico's conduct in a legal sense, under the law on state responsibility. But pursuing enforcement through international litigation would not necessarily be out of alignment with the Netherlands' domestic and foreign policy concerns.[50]

The purpose of this section is to explore the issue of standing in light of recent ICJ decisions concerning *erga omnes partes* obligations, as well as the work of the International Law Commission (ILC) and the *Institut de Droit International*. This section begins by discussing the concept of standing and its relationship with the invocation of state responsibility, before turning to the identification of obligations *erga omnes partes* both in the abstract, and in the context of UNTOC and UNCAC.

4.1 Standing and Entitlement to Invoke Responsibility

The term 'standing' refers to the entitlement of an entity, such as a state, to be a party to judicial proceedings before an arbitration tribunal or the ICJ.[51] The standing of non-injured states with respect to breaches of *erga omnes* obligations under customary international law has generated significant scholarly commentary.[52] By

[50] Unlike the United States, the Netherlands has not entered any reservations with respect to UNTOC.

[51] Gaja (2018), para. 1.

[52] See e.g., Longobardo (2021); Urs (2021); Tanaka (2018); de Wet (2013); Tams (2010); de la Rasilla del Moral (2008); Simma (1994).

contrast, the standing of non-injured states with respect to breaches of obligations *erga omnes partes* found in multilateral treaties has often been set aside in the literature as a less pressing or complicated matter, as compared with obligations *erga omnes* under customary international law.[53] While obligations *erga omnes partes* may indeed be more easily ascertained, by virtue of being written down in multilateral treaties, aspects of their practical application still merit further consideration and elaboration.

The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) address the issue of standing in a somewhat indirect manner, as the term 'standing' does not actually appear in the most relevant provision, Article 48, or in its commentary. Article 48 of the Articles on State Responsibility concerns the invocation of responsibility by 'a State other than an injured State' (a non-injured state). According to Article 48(1) '[a]ny State other than an injured State is entitled to invoke the responsibility of another State […] 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'. The commentary indicates that this provision refers to 'obligations *erga omnes partes*'.[54]

Technically speaking, entitlement to invoke responsibility is not equivalent to standing to bring a claim before a court or tribunal. Litigation before international courts and tribunals represents just one means by which a state could go about invoking the responsibility of another state. Other methods for invoking responsibility could, for example, entail pursuing other forms of peaceful dispute settlement or countermeasures. In the assessment, however, of James Crawford, the ILC Special Rapporteur who brought the Articles on State Responsibility to their successful conclusion in 2001, entitlement to invoke responsibility can indeed be equated with standing to bring a claim in the context of Article 48. According to Crawford, Article 48 recognizes that 'in the case of obligations *erga omnes partes* every state party to the treaty has a procedural right, that is, *locus standi* to invoke its application on behalf and for the benefit of all the parties'.[55] This understanding is also reflected in the 2005 Resolution of the *Institut de Droit International* on 'Obligations and rights *erga omnes* in international law'.[56] Article 3 of the Resolution explicitly indicates that a state to whom an obligation *erga omnes* is owed has standing to bring a claim before the ICJ or another international judicial institution, provided that there is a basis for jurisdiction.

The following primarily focuses on the invocation of responsibility by a non-injured state under Article 48 of the Articles on State Responsibility, as opposed to an injured state, under Article 42 of the Articles. According to the commentary to Article 42, a state may be considered injured by the breach of a multilateral

[53] But see Tanaka (2018); Tanaka (2021); Longobardo (2021); Ruys (2021).

[54] ARSIWA Art. 48, commentary para. 6.

[55] Crawford (2013), p. 367; Crawford (2011), p. 227.

[56] *Institut de Droit International*, Fifth Commission, Resolution, Obligations and rights *erga omnes* in international law (2005), available at https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf (accessed 11 April 2020.

obligation when it is 'affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed'.[57] In other words, the breach of the multilateral obligation must have particular adverse effects for one state, or a small number of states. Where this is not the case, then all states parties may be considered non-injured states (or to use the terminology of Article 48 of the Articles on State Responsibility, 'a state other than an injured state'). In practice, a fine line may separate injured and non-injured states in some scenarios, which the example of Mexico and the Netherlands will help to illustrate.

4.2 The Identification of Obligations *Erga Omnes Partes*

One remaining question, for the purposes of this article, is which multilateral treaty obligations can be characterized as obligations *erga omnes partes*, the breach of which would allow non-injured parties to invoke responsibility and initiate litigation. The ILC commentary to Article 48 briefly elaborates on this issue, as it indicates that the term 'obligations *erga omnes partes*' refers to obligations established 'for the protection of a collective interest'.[58] According to the ILC, this means that the principal purpose of the obligation is 'to foster a common interest, over and above any interests of the States concerned individually'. Similarly, the *Institut de Droit International* describes obligations *erga omnes partes* in its 2005 Resolution as multilateral treaty obligations that a state party owes to all other states parties 'in view of their common values and concern for compliance […]'.[59] In addition, the multilateral, as opposed to bilateral, character of obligations *erga omnes partes* is emphasized by the ILC, which clarifies in its commentary that such obligations must 'transcend the sphere of bilateral relations of the States parties' to the treaty at hand.[60] Finally, the ILC commentary indicates that obligations concerning the environment and regional security could represent examples of obligations *erga omnes partes*, but the ILC does not go further than these limited examples, as it viewed a further enumeration of common interests as beyond the function of the Articles on State Responsibility.[61]

In practice, the ICJ has had limited opportunities to identify obligations *erga omnes partes*, and its analyses of this issue have been relatively parsimonious. Nevertheless, the ICJ's 2012 judgment in *Belgium v. Senegal* and its 2020 provisional measures order in *The Gambia v. Myanmar* provide some further analysis concerning how obligations *erga omnes partes* can be recognized. In *Belgium v. Senegal* the Court based its analysis on the preamble of the Convention against Torture, which provides that the object and purpose of the convention is 'to make more effective

[57] ARSIWA Art. 42, commentary para. 12.
[58] ARSIWA Art. 48, commentary para. 6.
[59] *Institut de Droit International*, Fifth Commission, Resolution, Obligations and rights *erga omnes* in international law (2005) Art. 1.
[60] ARSIWA Art. 48, commentary para. 7.
[61] Ibid.

the struggle against torture […] throughout the world'.[62] On the basis of this preambular language, the Court determined that the states parties to the convention have a 'common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity'.[63] The Court further determined that all the states parties to the convention have 'a common interest in compliance' with their obligations under the convention, in particular the obligations to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution. The Court's analysis did not involve further consideration of other substantive treaty provisions or the process by which the states parties concluded the convention.

In the provisional measures order in *The Gambia v. Myanmar*, the Court's analysis of the *erga omnes partes* character of the obligations contained in the Genocide Convention was even sparser. The Court merely noted that '[i]n view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity'.[64] This passage closely tracks the language of the parallel passage in *Belgium v. Senegal*, but the Court's analysis in *The Gambia v. Myanmar* is not grounded in the Genocide Convention's preambular language or in any of its other provisions. The Court's brevity is not surprising given that this was a provisional measures order, and it can be expected that the Court will address this issue at somewhat greater length at the preliminary objections stage.

The work of the ILC and the *Institut de Droit International*, as well as the very limited body of directly relevant ICJ jurisprudence, can be distilled into some guidance on what obligations *erga omnes partes* are and how to identify them. On the most basic level, obligations *erga omnes partes* must take the form of a multilateral rather than a bilateral treaty, as the obligations must be owed to more than one other state, by virtue of participation in the treaty. But obligations *erga omnes partes* do not necessarily have to take the form of a multilateral treaty that aspires to universal participation. Treaties concluded by certain groups of states, such as members of a regional organization, could also give rise to obligations *erga omnes partes*.

A given multilateral treaty could conceivably contain a mix of bilateral obligations and multilateral obligations that are obligations *erga omnes partes*. Transnational criminal law treaties, for example, contain provisions on international cooperation that entail bilateral rights and obligations for the state requesting assistance ('requesting state'), and the state that is requested to provide assistance ('requested state'). Such bilateral obligations do not constitute obligations *erga omnes partes* because they are owed to only one other state, not to the states parties as a whole.

In addition to taking the form of a multilateral treaty, the obligations must serve a common or collective interest, which means that their object and purpose must

[62] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, para. 68. See Andenas and Weaterall (2013).

[63] Ibid.

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, p. 3, para. 41.

be to protect certain shared values or to achieve certain shared goals. Because of their common or collective interest in achieving the object and purpose of the treaty, states parties also have a shared interest in compliance with the obligations assumed by states parties to the treaty. It could be argued that most, if not the vast majority of multilateral treaties will fit this description of instruments that serve a common interest. As the preambular language of multilateral treaties makes clear, nearly all multilateral treaties aim to achieve one or more shared goals, including disarmament; the protection of human rights, civilians in armed conflict, and the environment; freedom of the seas; and sustainable development through international trade and investment.[65]

This means that the sheer number and range of obligations *erga omnes partes* is far greater than the set of widely accepted obligations *erga omnes* under customary international law. By contrast to obligations *erga omnes partes*, obligations *erga omnes* are typically conceived of as a relatively limited set of norms that concern fundamental interests of the international community. Examples of obligations *erga omnes* recognized by the ICJ include the prohibitions on aggression, genocide, slavery, racial discrimination, and rules of international humanitarian law.[66] The ICJ has also recognized the *erga omnes* right to self-determination.[67] Whereas obligations *erga omnes* concern 'fundamental interests' of the international community, obligations *erga omnes partes* concern common or collective interests that do not necessarily rise to the level of fundamental importance for the international community. Because obligations *erga omnes partes* represent a broader category of international legal norms, their potential to give rise to public interest litigation is arguably much broader than obligations *erga omnes*.

With respect to the identification of obligations *erga omnes partes*, treaty interpretation represents just one basis for assessing the character of multilateral treaty obligations. Although the ICJ is yet to examine the procedural aspects of multilateral treaties, this could also be considered relevant for assessments of whether particular norms are obligations *erga omnes partes*. Relevant procedural issues could include the level of participation in the negotiation of the treaty and the process by which the delegations agreed on the treaty language.[68] Universal or nearly universal participation by states in the negotiation of a treaty, and decision-making by consensus may be seen as factors that support that proposition that the treaty text represents the common interests of states parties. Another relevant factor could be whether the treaty creates a body responsible for monitoring states parties' implementation of the obligations that the treaty imposes. The existence of a treaty monitoring body can be seen as a sign that the states parties share an interest in fostering compliance.

[65] Pauwelyn (2003).

[66] *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 3, para. 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, ICJ Reports 1996, p. 595, para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras. 155–157.

[67] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, para. 29.

[68] Simma (1994), pp. 325–327.

4.3 Obligations *Erga Omnes Partes* in UNTOC and UNCAC

A strong case can be made that most, but not all of the obligations contained in UNTOC and UNCAC represent obligations *erga omnes partes*, such that a non-injured state party could invoke the responsibility of another state party by instituting international proceedings. At first glance, the conventions' substantive provisions do not necessarily suggest that the states parties share common interests, as the obligations are, for the most part, to be performed by states parties independently, rather than in concert with each other. Generally speaking, the convention's provisions require states parties to undertake domestic law reform for the purpose of criminalizing certain conduct in their domestic legal systems; enabling investigations, prosecutions, and international cooperation; and preventing such conduct. Each state party is responsible for undertaking necessary implementation measures, the extent of which varies depending on the state's legal system and its existing laws. Sir Gerald Fitzmaurice described such 'law-making treaties' as containing 'integral' or 'absolute' obligations, meaning that performance of these obligations by states parties does not depend on corresponding performance by the other states parties.[69] Instead, integral or absolute obligations involve standard-setting, and require states to adopt parallel conduct within their own jurisdictions.[70] In the case of UNTOC and UNCAC, one state party's failure to implement the required laws, regulations or policies may not necessarily impact any other state party to the convention.

UNTOC and UNCAC nevertheless consist primarily of obligations *erga omnes partes* because of the states parties' common interest in combatting transnational organized crime and corruption. This is evidenced, for example, in the preamble to UNCAC, which provides that states parties are 'convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential'.[71] In addition, Article 1 of UNCAC, which sets out the convention's statement of purpose, further indicates that the convention aims:

(a) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; [and]
(b) to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery […]

Similar language appears in UNTOC's statement of purpose, which indicates that '[t]he purpose of the Convention is to promote cooperation to prevent and combat

[69] Third Report on the Law of Treaties by Mr G.G. Fitzmaurice, Special Rapporteur, *Yearbook of the International Law Commission* 1958, vol. II, A/CN.4/115, pp. 27–28; Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, *Yearbook of the International Law Commission* 1957, vol. II, A/CN.4/107, p. 31.
[70] Tams (2010), p. 56.
[71] UNCAC preambular, para. 4.

transnational organized crime more effectively'.[72] Taken together, these passages suggest that not only do states have a common interest in combating these forms of transnational crime, but that they cannot do so effectively without cooperating with each other because these are transnational phenomena. International cooperation in the form of extradition and mutual legal assistance, for example, requires states to have criminalized approximately the same conduct in their domestic legal systems, so that the requirement of dual criminality is met. Standard-setting treaties, such as UNTOC and UNCAC therefore facilitate domestic investigations and prosecution, the success of which may depend on international cooperation.

From a procedural perspective, the obligations set out in UNTOC and UNCAC can be seen as the outcomes of processes that were designed to reflect the common interests of the negotiating delegations. Negotiations were open to all UN member states, and the *travaux préparatoires* reveal that a wide range and significant number of member states contributed draft language. Moreover, decisions about the treaties' provisions were taken on the basis of consensus, rather than on the basis of a majority vote. While the conventions themselves do not create treaty bodies responsible for monitoring compliance, the conferences of states parties did ultimately create review mechanisms, which are predicated upon peer review. The creation of these review mechanisms was, however, relatively controversial, especially in the case of UNTOC, and revealed a significant degree of ambivalence among states parties about subjecting aspects of their criminal justice systems to formal review procedures.[73] Nevertheless, the very existence of these review mechanisms shows that states parties share a common interest in ensuring that other states parties abide by their legal commitments under UNTOC and UNCAC. The same is true of many other multilateral treaties that task associated treaty bodies with monitoring compliance, such as all of the core human rights treaties and many environmental law treaties.[74]

Although most of the obligations contained in UNTOC and UNCAC can be characterized as multilateral, certain provisions concerning extradition, mutual legal assistance, and asset recovery have a bilateral character and therefore do not represent obligations *erga omnes partes*.[75] These provisions serve as the legal basis upon which one state party may request another state party to transfer a suspect, share evidence, or freeze assets, for example. In instances where one state party relies on UNTOC or UNCAC in order to request another state to provide it with a particular form of international cooperation, the requested state owes a duty of cooperation to the requesting state, not to all of the states parties to the convention. The exceptionally lengthy mutual legal assistance provision in UNCAC, for example, can be conceived of as a treaty within a treaty.[76] This 'mini treaty' acts as a default option in situations where the requested and requesting states cannot otherwise rely on a

[72] UNTOC Art. 1. UNTOC does not include a preamble.
[73] See Rose (2020).
[74] See e.g., Ulfstein (2007).
[75] UNTOC Arts. 13, 16, 18; UNCAC Arts. 44, 46, 55, 57. Gaja (2010), pp. 943–944.
[76] UNCAC Art. 46; see also UNTOC Art. 18. Chrysikos (2019).

bilateral mutual legal assistance treaty. In other words, certain international cooperation provisions in UNTOC and UNCAC are designed, in part, to substitute for bilateral agreements. Because these provisions generate bilateral obligations, the breach of which necessarily injures a specific state party, other states parties cannot invoke responsibility for their breach. Instead, the breach of a provision that generates a bilateral obligation gives rise to an injured state, and would be governed by Article 42 of the Articles on State Responsibility.[77] This means that while most of the conventions' provisions set out obligations *erga omnes partes*, including criminalization provisions that are designed partly to facilitate international cooperation, some of the international cooperation provisions are themselves bilateral in character and do not qualify as obligations *erga omnes partes*.

The fact remains that most of the provisions of UNTOC and UNCAC set out obligations *erga omnes partes*, which are owed by each state party to all of the other states parties. Breaches of these obligations may or may not give rise to an injured state that is specially affected.[78] In cases where a breach gives rise to an injured state party, then both the injured state party and other, non-injured states parties would be entitled to invoke the responsibility of the state party that has breached its obligation.[79] In other words, the existence of a specially affected, injured state does not preclude non-injured states parties from invoking responsibility. As the examples of non-compliance by Mexico and the United Kingdom help to illustrate, injured states that are specially affected may be unable or unwilling to invoke the responsibility of the state in breach of its obligation for jurisdictional or political reasons. In such scenarios, non-injured states parties can nevertheless institute litigation in furtherance of the collective interest in bringing about compliance.

In the case of General Cienfuegos, the obligation that Mexico arguably breached was owed to all states parties, including the United States and the Netherlands. In this scenario, however, the United States would arguably constitute an injured state because it was specially affected by Mexico's conduct.[80] The United States did not just have a general interest in Mexico's compliance with UNTOC, but instead had a particular interest in the prosecution of General Cienfuegos, which was negatively impacted by Mexico's conduct. The impact felt by the United States can therefore be distinguished from the effect that Mexico's conduct had on the other states parties. Whether the ICJ would be persuaded by such a line of argumentation remains open to question, however, as it declined to follow such a line of reasoning in *Belgium v. Senegal*.[81] Regardless, the reservation that the United States entered with respect to

[77] ARSIWA Art. 42(a), commentary para. 6.

[78] ARSIWA Art. 42.

[79] Gaja (2010), p. 947. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, ICJ Reports 2020, p. 3, para. 41.

[80] If, however, Mexico had breached an obligation to extradite General Cienfuegos to the United States, then the United States would be an injured state, pursuant to Art. 42 of the Articles on State Responsibility.

[81] In *Belgium v. Senegal*, Belgium argued that it was an injured state that was 'in a particular position as compared to all other States parties to the Torture Convention because […] it has availed itself of its right under Article 5 [of the Convention against Torture] to exercise its jurisdiction and to request

UNTOC's compromissory clause would have the effect of leaving any potential litigation in the hands of another, non-injured state party.

A state like the Netherlands would, for example, be able to invoke Mexico's responsibility by pursuing negotiations, arbitration, and ultimately litigation before the ICJ. Although the Netherlands may have a particular interest in combating drug trafficking, it would be difficult to argue that the Netherlands is a specially affected state that has been injured by Mexico's conduct. The link between the Netherlands' capacity to combat drug trafficking in the Port of Rotterdam and Mexico's conduct is relatively remote, such that the Netherlands could not be seen as injured in a legal sense by Mexico's behavior. The Netherlands would therefore pursue such litigation as a non-injured state party. Such an invocation of responsibility by the Netherlands would not be without precedent. In September 2020, for example, the Netherlands announced that it was invoking Syria's responsibility for large-scale violations of the Convention against Torture during the conflict in Syria.[82] If the Netherlands were to eventually pursue litigation against Syria, which the announcement highlights as a possibility, the Netherlands would do so as a non-injured state party to the Convention against Torture.

The UK's obligation to fully implement its anti-money laundering obligations under UNCAC similarly represents an obligation *erga omnes partes*, which it owes to all other states parties. Azerbaijan could represent an injured party in this scenario, as the UK's arguable breach of its anti-money laundering obligation under UNCAC has reportedly had an impact on its public finances. But because the current regime in Azerbaijan has a vested interest in maintaining the anonymity of offshore companies registered in the British Virgin Islands, it is highly unlikely to invoke the UK's responsibility for a breach of UNCAC. Hypothetically, litigation could instead be pursued by another, non-injured state party to UNCAC, such as New Zealand or Denmark, both of which are perceived as 'very clean' or non-corrupt countries.[83]

Footnote 81 (continued)
extradition', CR 2012/6, p. 54, para. 60. Senegal, however, contested Belgium's status as an injured state because 'none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgium nationality at the time when the acts were committed'. This can be understood as an argument concerning Belgium's capacity to exercise jurisdiction on the basis of passive personality jurisdiction. *Belgium v. Senegal*, Judgment, ICJ Reports 2012, p. 422, para. 64. The Court never reached this question, as it first considered whether Belgium had standing as a state party to the Convention against Torture, and answered this question affirmatively.

[82] Government of the Netherlands, 'The Netherlands holds Syria responsible for gross human rights violations', 18 September 2020, https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations (accessed 11 April 2022).

[83] According to Transparency International's 2020 Corruption Perceptions Index, New Zealand and Denmark both rank number 1, meaning 'very clean'.

5 Conclusion

This article has shown that international litigation in the common interest is legally possible with respect to UNTOC and UNCAC, even if the costs and political ramifications of such litigation may make this prospect improbable. The compromissory clauses contained in UNTOC and UNCAC would unquestionably give the ICJ or an arbitration tribunal jurisdiction over a dispute between states parties to either treaty, provided that the relevant conditions are met, and neither party has entered reservations with respect to the compromissory clause at issue. Moreover, any state party to UNTOC or UNCAC would have standing to invoke the responsibility of another state party for breaches of obligations under these treaties, provided that the obligations have an *erga omnes partes* character, as opposed to a bilateral character, which would be the case for the provisions concerning extradition and mutual legal assistance.

The examples of General Cienfuegos and the British Virgin Islands help to illustrate the need for creative approaches to the enforcement of community interests in combating transnational crime, as well as the broad base of states parties that could initiate legal proceedings. Public interest proceedings concerning transnational crimes represent just one possible tool for bringing about improved compliance with states parties' treaty obligations, along with review mechanisms and countermeasures. Thus far, the UNCAC review mechanism has produced a very valuable set of data about levels of compliance with the treaty, but it has not resulted in definitive pronouncements of non-compliance or authoritative interpretations of treaty language. Proceedings before an international court or tribunal would therefore greatly contrast with, and potentially complement, the deliberately non-adversarial working methods of the UNTOC and UNCAC review mechanisms. Such litigation has the potential to play a role in bringing about domestic law reform by generating an authoritative judicial pronouncement that carries weight and can contribute to the larger fight against impunity for transnational crimes.

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