

## Analysis of Article 48 in the 2001 Draft Articles on State Responsibility: Nicaragua v. Germany Case (Original Research)

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### Extended Abstract

The recognition of obligations *erga omnes* in international law was first raised in the *Barcelona Traction* case, as obligations to the international community as a whole, which all international actors benefit from the implementation of them, gradually affected the international responsibility of States. These effects have been reflected in two Articles of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). First, Article 41 of the Draft outlines the obligation of other States to bring to an end, through lawful means, any serious breach of obligations arising from peremptory norms, to not recognize as lawful a situation created by such a breach, and to not render aid or assistance in maintaining that situation. It is important to mention that all peremptory norms include obligations *erga omnes*. Another effect of this recognition is the possibility of invoking international responsibility by non-injured States for the violation of such obligations, as mentioned in Article 48 of the Draft Articles on International Responsibility of States. In other words, not only are third States committed to cooperating to end, and not recognize situations conflicting with obligations *erga omnes*, but in cases of violation of such obligations, contrary to the common and traditional legal procedures where only injured States initiate lawsuits, all States can bring suit. This issue has been precedent in the ICJ procedure, especially in the cases of *Belgium v. Senegal* and *Gambia v. Myanmar*. The events after the October 7, 2023 Operation by Hamas against Israel, and the latter's severe military action in the Gaza Strip, which led to grave violations of

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international human rights and humanitarian law by Israel, once again raised the possibility of filing a lawsuit by non-injured States before the ICJ. Consequently, two cases were filed before this important international authority: the first, by South Africa against Israel, and the second, by Nicaragua against Germany. Based on this, the main question that this research seeks to answer is how to apply the capacity of Article 48 of the Draft Articles on International Responsibility of States in the context of violations of obligation *erga omnes*, with emphasis on the recent case before the ICJ, i.e., *Nicaragua v. Germany*. In this case, Nicaragua, based on Germany's sale of weapons to Israel and the suspension of German financial aid to UNRWA, claims that Germany violated the obligation to prevent genocide, and participated in the commission of this crime under the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and also the obligation to ensure respect for International Humanitarian Law under the Geneva Conventions (1949). The assessment of the ICJ's findings in this case, and its effect on the evolution of international law surrounding the litigation in cases of violation of obligation *erga omnes* constitutes the purpose of the present article. The method adopted in this research is descriptive-analytical, and the discussions are mainly based on the description of the conditions of Article 48 of the Draft Articles on International Responsibility of States and jurisprudence, as well as the analysis of the parties' claims and the findings of the ICJ in the case of *Nicaragua v. Germany*. The results show that while the ICJ was initially cautious in accepting the application of concepts such as obligations *erga omnes*, it has found a way to overcome the practical complications of recognizing them. Currently, due to necessity and in the form of some charts, it seems to be pursuing its mission to develop and evolve international law and impose the existence of this international order on a decaying world with more seriousness. The Court, which had introduced concepts within the scope of obligations *erga omnes* in decisions such as the *Wall* Advisory Opinion, and the *East Timor* case, took initial steps to confirm the possibility of invoking responsibility resulting from the violation of obligations *erga omnes* in practical scope by adhering to basic rules with fundamental normative value, such as the prohibition of torture and genocide in the cases of *Belgium v. Senegal* and *Germany v. Nicaragua* respectively. However, Nicaragua's claim against Germany elevates this issue to a level far beyond this limit. Because Nicaragua, as a State not directly injured by the genocide in Palestine, in addition to the confirmed level of the possibility of invoking the violation of obligations *erga omnes* in the Court's procedure (i.e. the obligation to prohibit the commission and punishment of genocide as raised within the framework of the 1948 Convention), has also paid attention to the violation of the obligation to ensure respect for International Humanitarian Law, and the violation of the right to self-determination as obligations *erga omnes*. In other words, in this case, the Court has gone beyond its precautionary approach of identifying the possibility of invoking responsibility by a non-injured State only in cases of violation of well-known peremptory norms of genocide and torture,

and has accepted the filing of cases by non-injured States concerning other kinds of obligations *erga omnes* as well. The approval of this request by the Court can be likened to opening Pandora's box—a unique event with intertwined and inseparable happy and sad effects. While such approach can lead to the stability of the pillars of the international order, it is not unlikely that, due to the lack of capacity to accept its ramifications, it will echo the strange voice of the collapse of all that was built with hard work.

### Keywords

Obligations *erga omnes*, Invocation of Responsibility, Non-injured State, International Court of Justice, Genocide

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