



The Concept of Erga Omnes Obligation in International Law: A Brief Jurisprudential Inquest

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ABSTRACT

Erga omnes obligation is one of the general principles of international law – ‘obligation towards all’. It means that a State is under an obligation to follow the provisions of a treaty to which it has consented to follow. It is not only an obligation, but a right to ensure that other Member States are following or not. These attributes are found either in general international law or in any multilateral treaties. However, there prevails misconception on the understanding of the term “*erga omnes* obligation” in international law. For instance, often *erga omnes* obligation is correlated with either customary law or *jus cogens*. Therefore, this paper would seek to identify and attempt to address the gaps, by following content-finding approach, to make the readers understand the concept in a clear way. This content-finding approach would enhance the students of international law to clearly identify the principles that attained the status of *erga omnes* obligation.

I. Introduction

The concept of modern ‘State’ has emerged with the establishment of the Treaty of Westphalia (1648) in the Europe between 15th and 17th centuries. Since then, the big powers engaged in acquiring a vast number of territories likely to be placed under their control. They functioned as States as well as dominions. The later status (dominions) of the States got diminished after the II world war that have initiated the process of decolonization. New States have emerged in large numbers. At present, more



than 197 States exist independently. As per Article 2(1) of the Charter of the United Nations, States big or small, irrespective of the size and economic condition, are considered to be equal. They have equal voting rights in any international forum. States maintain their benevolent relationship with each other by adhering to the fundamental principles of international law. This relationship has been reached out of reciprocity, *i.e.*, giving something out of receiving/ expecting to receive something. International law seems to have been constructed on the normative-relationship between States.

Similarly, States tend to support their neighbour's cause in any difficult situation, in any international forum, such as United Nations General Assembly (UNGA), United Nations Security Council (UNSC), United Nations Human Rights Council (UNHRC), etc. For instance, the human rights issue of Sri Lanka before the UNHRC could be a relevant example in this respect. The Resolution proposed in the Human Rights Council dated 14 October 2015, A/HRC/RES/30/1 (the Resolution) in 2015 against the Sri Lanka was defeated, which divided the Members of the Council to a wider extent (Sri Lanka Campaign for Peace & Justice, 2019). States were busy in extending their hands with their supporters, but expressing concern towards the victims of the human rights violations is considered to be vague. They exercised their right to vote or abstentions, but seem not to bother about their obligation (*erga omnes*) towards their commitment towards human rights instruments to which they are Party. To have a check on such similar instances, the International Court of Justice (ICJ) in the "*Case Concerning the Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain) Second Phase*" in 1970 (1970 *Barcelona Traction Case*) has initiated the debate on the concept of *erga omnes* obligation. Though it received extensive criticism among the scholars in international law, still it has relevance and credibility in the jurisprudence of international law.

Some Insights

Every State has its version of understanding international law. They work for their own benefit or interest. One may say that the UNGA is engaged in the welfare of all the Member States. However the fact that there found no binding force on those resolutions, it could only be taken as guiding factors by the States. In contrast, the UNSC resolutions are binding on the Member States; ironically, on some significant occasions, at least one of the five permanent Members would reject the resolution by casting a negative vote. For instance, the issue of Hafeez Saeed (residing in Pakistan) before the UNSC had created a massive set back to the States (such as India) in combating terrorism. However, after a long battle, India could succeed in her efforts.



In recent years, some heads of the African States are being prosecuted by the International Criminal Court (ICC). To this effect, States have signed the Statute of the ICC; one of the reasons could be that the respective States have shown ‘inability’ in prosecuting the culprits. There could be, mainly, two reasons for such situation, *viz.* financial burden and impartial adjudication at local judiciary. Besides, issues pertaining to impartial adjudication and inadequate monetary resources have required the States to accept the jurisdiction of the ICC. Hence, they have agreed to be bound by the ICC’s jurisdiction to prosecute the perpetrators. Still, a question may arise as to why not the heads of the powerful nations are exempted from the prosecution for their acts in Iraq, Syria, Libya, etc. The reason could be that either the alleged States are not Party to the ICC or refusing to accept the jurisdiction of the ICC. In view of the above, it seems that some States in the international legal order has sidelined the obligations and it turned to be self-interest rather than selfless-interest.

Thus, the insights mentioned above help us to realize that there is no fault in the architect of international law, but the stake holders. Ironically, it is the State that violate the rules and principles of international law; they tend to justify their acts citing the rules of international law itself. States think that more than obligations, they do have rights in the international arena.

United Nations (UN) and its organs such as UNGA and its International Law Commission, UNSC, ICJ, etc., have contributed much in nurturing the concepts of international law. It has led to the emergence of new ideas such as *jus cogens*, *erga omnes* obligations, etc. In particular, the obligation *erga omnes*, an emerging concept, has placed the responsibility on the States to a higher level. The concept of obligations towards ‘community as a whole’ and ‘respective States’ has led the international scholars to discuss and debate the viability and its practical relevance to a wider extent. However, there is no much understanding on the concept of *erga omnes* obligations in international law. Often, this concept opens the debate whether it is similar to that of *jus cogens* or customary international law. Some used to raise doubt about the credibility of its existence. This paper attempts to fulfil these gaps prevailing in understanding the concept of *erga omnes* obligation. The following paragraphs deal with the concept and contents of the principle of *erga omnes* obligation.

II. The Concept of Erga Omnes Obligation

The idea of ‘*erga omnes*’ is derived from the *Latin* term “towards everyone”. As per the Oxford Reference, it means “Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole” (Reference, 2025). ICJ in the *1970 Barcelona Traction Case* has given a significant and historical beginning to the concept of *erga omnes*



obligations (Barcelona Traction, Light and Power Company, Limited, Judgment, 1970, pp. 32, para. 33). In this case, the ICJ has mentioned four distinctive prohibitions that could be named as *erga omnes* obligations, such as, the outlawing of acts of aggression and genocide; principles and rules that govern the fundamental rights of human beings, such as the protection from slavery, and protection from racial discrimination (Barcelona Traction, Light and Power Company, Limited, Judgment, 1970). The judgement was criticized by few scholars on the ground whether the Court felt necessary to refer to the *erga omnes* obligations to conclude the arguments that relate to *jus standi* (Nuhija, 2013). However, Judge Lachs mentioned that it was unnecessary to incorporate the concept of the obligations *erga omnes* in the judgement. It seemed to be an excellent opportunity to quote specific provisions of law to state that the States have obligations towards others or towards the international community as a whole (Nuhija, 2013, pp. 35-36).

Despite the criticism that *erga omnes* obligations do not change any groundbreaking effects in international law, still, it gets quoted in an increasing number of decisions by the international judicial bodies, such as *1995 East Timor Case*; the *2004 Palestine Wall Case* [the obligation to respect the principle of the Right to Self-Determination (RSD)]; the 2012 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (*2012 Belgium v. Senegal Case*), the “*Furundzija Case*” (obligation prohibiting the use of torture) in International Criminal Tribunal for Former Yugoslavia, etc. Also, it is considered that the concept of *erga omnes* obligation is an already existing fact and the situations have been named newly (R, 2011, p.238).

III. UN Charter and the Obligations

It has been considered that the *erga omnes* obligation had its presence since the incorporation of the UN Charter. For this, the objective (that of *erga omnes* obligations) of the UN Charter could be understood through its preamble. The first paragraph in the first part of the Preamble mentions that States must strive “to save succeeding generations from the scourge of war”. Primarily, the UN Charter reiterates the prohibition of the armed conflicts and promotes States for the engagement towards the benefit of the people. For this purpose, the third paragraph in the same part states “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. It explicitly mentions about creating conditions for the obligations arising out of the treaties and other sources.

Similarly, other sources such as customs, general principles of international law, etc., are taken into consideration for the smooth relationships between States. The words “respect for the obligations” would



mean that there appears a duty on States to respect the obligations arising out of the treaties and other sources. This could be made possible only when all the States engage collectively towards the above-mentioned common goals. Also, it is viewed in the last paragraph of the same part (Preamble of the UN Charter), *i.e.*, “to promote social progress and better standards of life in larger freedom”.

To achieve such standards, the second part of the preamble (of the UN Charter) requires States Parties to the UN Charter - to practice tolerance and live as good neighbours, to unite for the maintenance of peace and security, do not use armed force by accepting to the principles and the methods derived by the institutions (bilateral or multilateral agreements), to promote the economic and social development of the people through international machinery. For a society, only ‘rights’ cannot be the sole criteria to achieve peace. Instead, the word ‘rights’ must adhere to the duties to build a prosperous society.

In view of the above, the preamble indicates the imperative norms as duties towards others. Otherwise, the very notion of the establishment of the UN Charter would fail. For this, Articles 1 and 2, respectively, of the UN Charter speak about the purposes and principles wherein the States are required to carry forward them in achieving the goals towards humanity. These obligations are considered as *erga omnes* because those are duties towards the international community as a whole.

International Instruments for the Purpose of the UN Charter

To achieve the objectives that appear in the preamble to the UN Charter, the UN under its auspices has incorporated landmark instruments, such as: Convention on the Prevention and Punishment of the Crime of Genocide (1948); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Convention on the Rights of the Child (1989) (Zemanek, 2000, p. 3). Besides these instruments, the four Geneva Conventions and its Additional Protocols related to armed conflict, Conventions associated with the regulation of weapons of mass destruction, etc., have contributed much to the purposes of the UN Charter. The scholars have identified the four Geneva Conventions and its Additional Protocols [or International Humanitarian Law (IHL) in its entirety] as *erga omnes partes* (Wet, 2015, Foot Note No. 17 in p. 4), (Tams, 2005, p. 120). The standards mentioned in the above Conventions meant for armed conflicts are said to have attained the status of *erga omnes* obligations as they have sought to achieve the goals (fundamental principles) set out in the preamble of the UN Charter. Also, they are considered to be the essential elements of humanity.



Similarly, Christian J. Tams stated that the ICJ had identified the rules of “elementary considerations of humanity” as *erga omnes* obligations. (Tams, 2005, p. 118). These “elementary considerations of humanity” would mean the basic tenets of the principles (*i.e.*, not subject to violation) of customary law (As emphasized by the Court by citing ‘1996 Nuclear Weapons Case’ in 2004 Palestine Wall Case, at p. 199, para. 157), without which it would become difficult to understand the nature of human beings. The obligations arising out of these connotations are owed toward all the States. In this line, as already discussed, the obligations set out in the preamble of the UN Charter owe duties towards States as a whole.

To have a clear view of what is *erga omnes* obligation, beforehand, it is pertinent to look into the distinct features that seem to be similar with the concept of *jus cogens*.

IV. Distinction between the Erga Omnes Obligation and Jus Cogens

It is a fact that the concept of *erga omnes* obligations got its inception from the famous ICJ decision in the 1970 *Barcelona Traction Case*. This judgement was delivered just one year after the conclusion of the Vienna Convention on the Law of Treaties, 1969 (VCLT). Notably, the 1970 *Barcelona Traction Case* did not have a mention about the *jus cogens* or Article 53 while discussing the concept of *erga omnes* obligations (Picone, 2011, pp. 414-415) (Elias, 1974, pp. 45-46).

Firstly, ICJ has clearly stated that the obligation of a State is towards the international community as a whole. Also, ICJ distinguished the said obligations from other general international law rules that include peremptory norms; secondly, the ICJ has not illuminated the rule meant for *erga omnes* obligations as a peremptory norm, instead stated that the States have an interest in the implementation of those norms and moreover, without imposing an obligation on the States (States may bring a claim either individually or collectively), ICJ has stated that the States on behalf of the international community have functional power to claim other States whenever they are violating the norms; thirdly, the rules of *erga omnes* obligation not only protect the high esteemed norms of international law as like *jus cogens* but also pave the way to take action collectively against any violations; the fourth aspect is that of the non-derogable status of a norm - *erga omnes* obligations could not be considered as a non-derogable norm but tend to produce the community values (Picone, 2011, pp. 414-416). It is possible for a State, in certain situations, to derogate from the rules that are contrarily provided under the conditions allowed by the international community itself (Picone, 2011, p. 416). In this regard, *jus cogens* would produce both community values and non-derogable status to a norm.



Both the concept of *erga omnes* obligation and *jus cogens* seem to be similar but have conceptual differences within them. *Erga omnes* obligation represents explicitly the community obligation, which forms part and parcel of a principle. But, *jus cogens* would only recognize a principle which has a highly humanistic or community values and not beyond that.

V. Definition of Erga Omnes Obligation

So far, there is no concrete definition of “*erga omnes* obligation” in the codification of international law. However, the Institute of International law sought to have come up with the explanation in its 2005 Krakow Session.

In 2005, the Krakow Session (fifth session) contained the resolution of “Obligations and Rights *Erga Omnes* in International Law”. It defined the term ‘*erga omnes* obligations’. Article 1 of the said resolution described the term as:

For the purposes of the present articles, an obligation *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 (Gaja, Krakow Session - 2005, pp. 1-2).

There are two components in the above definition. They are obligations of a State under general international law towards the international community as a whole, and the obligations of a State towards other States derived from a multilateral treaty.

Obligation under General International Law

In the 1970 *Barcelona Traction Case*, judges have carefully handled the concept of *erga omnes* without determining its content. The Court said that *an erga omnes* obligation has arrived from the general international law. The Court has mentioned that all States, *i.e.*, members of the international community, have the legal interest towards the *erga omnes* obligations. (*Barcelona Traction, Light and Power Company, Limited, Judgment, 1970, pp. 32, para. 33*). Also, the Court did not address the third parties,



i.e., as per Article 35 of the VCLT (Tams, 2005, p. 120). Besides, all the States have a legal interest because they are bound to abide by those obligations (Tams, 2005, p. 120). Similarly, the Court in the *2004 Palestine Wall Case* held that the principle set out in the UN Charter, GA Res. 2625 (XXV), and Common Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights related to the RSD have attained the status of *erga omnes* obligation (Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, 2004, pp. 172, para. 88). The resolution reads as:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle (Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, 2004, p. 199).

In the above UNGA resolution, it was stressed that States have a duty to promote the RSD according to the provisions of the UN Charter. The attributes mentioned here reflects the nature of ‘general international law’. Not all the obligations that are called as *erga omnes* would address the importance of the principles. The principles set out in the UN Charter are considered fundamental in nature or representing general international law. This notion could be derived through understanding the history of the UN Charter.

In the *1996 Nuclear Weapons Case*, ICJ held that even though States had not ratified the Conventions that contained the rules of IHL, rules fundamental to the dignity of human person and rules of elementary considerations of humanity have to be observed by all the States (Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, 2004, p. 199). Hence the Court held that the obligations set out in the above decision reflect the character of *erga omnes* obligations (Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, 2004, p. 199). Therefore, ‘general international law’ would mean the recognition received through the practice of the UN as well as through the jurisprudence prevailing in international law.

The features as mentioned earlier about the IHL bring to the fore two attributes that would suit for all the obligations of such nature (*erga omnes*). Therefore, for being an *erga omnes* obligation under general international law, such a rule may primarily contain elements such as rules fundamental to the human person as well as the rules of elementary considerations of humanity.



Obligation under Multilateral Treaty

Obligation under the multilateral treaty is another aspect to which a State is bound to adhere to. Obligations set out in a multilateral treaty could also be called as *erga omnes parte*. Here, a State has a responsibility towards all States Parties to a treaty. If in case any of the State has violated the principles set out in that treaty, other State may bring a claim against the former for rectification or compliance.

For this, in the *2004 Palestine Wall Case*, as regards the obligations set out in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the ICJ observed that:

The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with (*Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 2004, p. 199).

Thus, it seems, even though States are not Parties to the armed conflict, they are under an obligation to ensure that the requirements mentioned in the Convention are being followed by other States (Parties to the armed conflict) properly. In case of any violations that have taken place, other States could very well make a claim before the competent Court for rectification or compliance.

There are distinctive obligations mentioned in this definition. Firstly, the aforementioned precepts are duties owed towards other States. Secondly, it has become a ‘duty of States’ individually or collectively not to recognize any violations committed by a State towards such norm. For instance, the ICJ in the same *2004 Palestine Wall Case* stated:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem (*Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 2004, p. 199).

Therefore, an obligation arising out of a multilateral treaty is multi-faceted. Firstly, the obligation owes towards all other States. Secondly, in case of violations occurred, other States have obligations not to



recognize the situation. Thirdly, though not necessarily an obligation, the situation pertains to the violation would also result in bringing claims against that particular State, which violated the *erga omnes* obligations. For instance, Namibia brought a claim against the Myanmar for the genocidal acts committed against its own people.

Contents of the Erga Omnes Obligation

From the above analysis, the content of the *erga omnes* obligation may be derived as below:

Rule 1: (General Definition)

Erga omnes obligation means the fundamental obligation towards all States, which is derived from general international law or multilateral treaty recognized by international jurisprudence or UN practice.

Rule 2: (Fundamental in Nature)

The concerned obligation must be a rule fundamental to the human person and elementary considerations of humanity.

Rule 3: (Rule of Law)

The concerned obligation needs to be present in any of the Conventions that reflect fundamental norms of international law, that confirm rule 2.

Rule 4: (Exceptions)

1. A State need not be directly affected by the violations committed by other States.
2. Any State may bring a claim before the ICJ or any international judicial bodies if the said norm violated is reflecting *erga omnes* obligations. Therefore, the concerned obligation must be worth capable of being executed before international judicial bodies and international governmental organizations, such as UNGA and UNSC.

Rule 5: (Exclusions)

The said norm may or may not include a customary norm or a *jus cogen*, i.e., a peremptory norm.

VI. Conclusion



Principles of international law - customary principle, *jus cogens* and obligation *erga omnes* - are intertwined in one way or other. However, they are different in their concepts. Indeed, *Jus cogens* and *erga omnes* obligations have their roots from the customary principles. These principles could be said to have been developed through either international organizations or judicial bodies. However, scholars of international law seem to have been divided whenever there appears debate on these undefined concepts in international law. In general, their arguments would stress the factors on undefined concepts as lack of procedural content, lack of enforcement mechanism, lack of knowledge, etc. Even the established principles in international law have been violated by States. Still, international law has not failed in its entirety. There required something more beyond the established rules for making States comply with fundamental principles. In view of the above, the general principles that include *erga omnes* obligation need to be considered as a guiding factor and States are required not to violate as it represents the guardian of humanity.

Finally, for the scholars of international law, there should be consensus of minds while addressing the global issue pertaining to the protection of vulnerable, especially during the war times. Besides developing difference of opinions on certain principle or concepts in international law, the present issue before the table must be addressed without having looking into the validity of those principles. Irrespective of the roots and background of the principle in question, the soul of such principles needs to be taken into consideration. Even, the content finding approach handled in this piece of work is not an exhaustive one as the requirement will change constantly according to the changing societies and circumstances. Citing technical fault in the concepts, thus developing friction within the scholastic world, would result in adverse consequences for the people who are in vulnerable situations. Moreover, it seems that scholars take legislative powers in their hands. Scholastic views ought to insist the States, who violate the set-standards for their own benefit, to not to violate the same. Also, they ought to strive for seeking peace for the benefit of the people. The humanistic approach towards these life-saving humanistic principles would be to urge the States to respect, follow and protect the vulnerable as an 'international community as a whole'.

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