

Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)

Simon Mateus

<https://orcid.org/0000-0002-9169-2799>

Centre for Human Rights

University of Pretoria

simon.mateus@up.ac.za

Abstract

The proposition that obligations *erga omnes* flow from peremptory norms of general international law (*jus cogens*) is generally accepted since no clear test for the identification and determination of obligations *erga omnes* exists. This article seeks to propose a tentative legal framework to govern the identification of obligations *erga omnes*, particularly for norms that have not reached the status of peremptory norms of general international law (*jus cogens*), or at the very least, determine *erga omnes* without placing reliance on whether the obligation in question arises from a norm with *jus cogens* status.

Keywords: Peremptory norms of general international law (*jus cogens*); obligations *erga omnes*

Introduction*

Scholars have generally shown support for the proposition that obligations *erga omnes* flow from peremptory norms of general international law (*jus cogens*).¹ Since no clear test for the identification and determination of obligations *erga omnes* exists, such obligations are normally defined by reference to the notion of *jus cogens* norms.² Although it is mostly agreed that *jus cogens* norms give rise to obligations *erga omnes*, it is generally also accepted that not all obligations *erga omnes* flow from *jus cogens* norms.³ Thus, although the use of *jus cogens* to identify, determine and assess obligations *erga omnes* might be fruitful,⁴ it is not always conclusive.

The concept of obligations *erga omnes* remains somewhat mysterious,⁵ especially when explored without reference to *jus cogens*. This is particularly true since there is very little authority on obligations *erga omnes* that are not qualified as *jus cogens*. However, this is not to say that obligations *erga omnes* do not exist outside of *jus cogens*.⁶ Although there are several important contributions by scholars with regard to the relationship between *jus cogens* and *erga omnes*, most of these contributions are made through the lens of *jus cogens*.⁷ On one hand, valuable contributions about the nature of *jus cogens* have been added to the body of legal literature on the subject,⁸ while on

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1 Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) *Nordic Journal of International Law* 211–239.

2 Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (2005) 150–155; Alina Kaczorowska, *Public International Law* (5th edn, Routledge 2005) 139.

3 Tams (n 2) 48.

4 *ibid* 145.

5 Christian Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) *Leiden Journal of International Law* 791.

6 Jure Vidmar, 'International Community and Abuses of Sovereign Powers' (2014) *UP Space Repository* 13–14; see also Erika de Wet, 'The International Constitutional Order' (2006) *International and Comparative Law Quarterly* 61.

7 Cherif Bassiouni, 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (1996) *Law and Contemporary Problems* 63–74; Karl Zemanek, 'New Trends in the Enforcement of *Erga Omnes* Obligations' (2000) *Max Planck Yearbook of United Nations Law* 1–52; Markus Petsche, '*Jus Cogens* as a Vision of the International Legal Order' (2010) *Penn State International Law Review* 233; Erica de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments Since *Barcelona Traction*' (2013) *South African Yearbook of International Law* 5–9.

8 Egon Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) *American Journal of International Law* 946; Mark Janis, 'Nature of *Jus Cogens*' (1987) *Connecticut Journal of International Law* 359; Gordon Christenson, '*Jus Cogens*: Guarding Interests Fundamental to International Society' (1987) *Virginia Journal of International Law* 585; Antony D'amato, 'It's a Bird, it's a Plane, it's *Jus Cogens*' (1990) *Connecticut Journal of International Law* 1; Gennady Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) *European Journal of International Law* 42; Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) *European Journal of International Law* 491–508; Jean D'Aspremont, '*Jus Cogens* as a Social Construct Without Pedigree' (2015) *Netherlands Yearbook of International Law* 85; Dinah Shelton, 'Sherlock Holmes and the Mystery of *Jus Cogens*' (2015) *Netherlands Yearbook of*

the other, the attention that *erga omnes* has received in scholarly writing is brief.⁹ To that extent, as to which specific obligations have an *erga omnes* but not a *jus cogens* character remains largely unclear.¹⁰ In view of this paucity, this article will consider the notion of *erga omnes* beyond *jus cogens*.

The Shared Identity between *Erga Omnes* and *Jus Cogens*

The starting point in comparing *jus cogens* and *erga omnes* is ‘so obvious that it runs the risk of being overlooked:’¹¹ *jus cogens* refers to norms whereas *erga omnes* refers to obligations.¹² Effectively, *jus cogens* must be understood as referring to the legal status that certain norms of international law reach whereas *erga omnes* must be understood as referring to the legal implications arising, for example, out of the characterisation of a norm, such as *jus cogens*.¹³

The central problem that gave rise to this contribution is the theoretical relationship between the concept of peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) defines a peremptory norm of general international law, for purposes of the Vienna Convention,¹⁴ as a norm that is accepted and recognised by the international

International Law 23; Stefan Kadelbach, ‘Genesis, Function and Identification of *Jus Cogens* Norms’ (2015) Netherlands Yearbook of International Law 147; Robert Kolb, ‘General Principles of Law, *Jus Cogens* and the Unity of the International Legal Order’ in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (2019) 60–64; Aniel De Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (2019); Atul Alexander, ‘Ulf Linderfalk: Understanding *Jus Cogens* in International Law and International Legal Discourse’ (2020) Liverpool Law Review 1; Ulf Linderfalk, ‘The Emperor’s New Clothes – What If No *Jus Cogens* Claim Can Be Justified?’ (2020) International Community Law Review 139; Dire Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Dispositions* (2021).

9 Martha Bradley, ‘Jus Cogens’ Preferred Sister’ in Tladi (n 8) 194–195.

10 See Tams (n 2) 175; Bassiouni (n 7) 63–74; Oddný Arnardóttir, ‘Res Interpretata, *Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgements of the European Court of Human Rights’ (2017) European Journal of International Law 211; Craig Eggett and Sarah Thin, ‘Clarification: Obligations *Erga Omnes* in the Chagos Opinion’ (2019) European Journal of International Law; Maria Alarcon, ‘Consequences of Recognizing Environmental Protection as an Emerging *Erga Omnes* Obligation in the ISDS Context’ (2021) Kluwer Arbitration Blog.

11 Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997) 190.

12 *ibid.*

13 International Law Commission (Report of the International Law Commission Seventy-first session 2019) 190–193; Bassiouni (n 7) 63.

14 Although Art 53 states that the definition it provides is for purposes of the VCLT, it is also generally accepted that the definition is applicable even beyond the VCLT itself. See Ulf Linderfalk, ‘The Creation of *Jus Cogens* – Making Sense of Article 53 of the Vienna Convention’ (2011) Heidelberg Journal of International Law 362; Thomas Weatherall, *Jus Cogens: International law and Social Contract* (2015) 6.

community of states as a whole.¹⁵ This provision was adopted eight months before the International Court of Justice's (ICJ) pronouncement of obligations *erga omnes* in its 1970 *Barcelona Traction* case,¹⁶ where the court recognised these obligations as obligations that are drawn and owed between states towards the international community as a whole.¹⁷

Since its pronouncement in the 1970 *Barcelona Traction* case,¹⁸ the concept of obligations *erga omnes* has been the subject of robust academic discussion and has surfaced several times in judgments, opinions, and arguments before the ICJ.¹⁹ However, the notion remains surrounded by a considerable lack of conceptual clarity. There is frequent conflation, even at the level of the ICJ,²⁰ between this concept and the concept of *jus cogens* norms.²¹ For example, the court's explanation of *erga omnes* as 'obligations owed to the international community as a whole' simply takes up the language used to define the concept of *jus cogens*, albeit, without reference to states.²²

Moreover, although the ICJ did not expressly refer to *jus cogens* in the 1970 *Barcelona Traction* case, the court implied *jus cogens* status when it referred to the types of obligations it gave as examples of *erga omnes*.²³ These were, namely: the outlawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination.²⁴ Each of these examples derive from *jus cogens*.²⁵ This fact is important and it confirms the overlap between the two concepts. Nonetheless, this list by the ICJ is not sufficient in itself to allow for the conclusion that all *erga omnes* are invariably *jus cogens*.

15 Vienna Convention on the Law of Treaties (1969) Art 53.

16 Case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* 'Judgment—ICJ Reports' (1970) paras 32–33.

17 See *Barcelona Traction* case (n 16) para 33; see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 324; Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (2012) 98 and De Wet (n 6) 61; Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (OUP 2012).

18 See *Barcelona Traction* case (n 16) paras 33–34.

19 *ibid* paras 32–34; *Case Concerning East Timor (Portugal v Australia)* Judgment, ICJ Reports (1995) para 29; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports (2012) paras 66, 103.

20 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports (2019).

21 See Eggett and Thin (n 10).

22 Tams (n 2) 140; AJJ De Hoogh, 'The Relationship Between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective' (1991) *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 193; Ian Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (2001) 124.

23 De Wet (n 7) 554–555.

24 *Barcelona Traction* case (n 16) para 34.

25 Ragazzi (n 11) 194.

In Draft Conclusion 17 on Peremptory norms of general international law (*jus cogens*), the International Law Commission (ILC) provides us with the starting point for understanding the shared identity between *erga omnes* and *jus cogens*.²⁶ Draft Conclusion 17 provides that these two notions share an identity in so far as *jus cogens* gives rise to obligations *erga omnes*.²⁷ In its Commentary to Draft Conclusion 17, the ILC takes the view that the relationship between *jus cogens* and *erga omnes* is supported in state practice.²⁸ In support of its conclusion, numerous examples are made.²⁹ Indeed, the conclusion that both concepts are somewhat related, is also supported by a considerable amount of circumstantial evidence and scholarly writings.³⁰

However, to suggest that *erga omnes* is to be defined by reference to *jus cogens* would be misleading on two counts. First, ‘the merits of defining one concept by reference to another depends on whether that other concept is itself well defined.’³¹ This suggestion fails to acknowledge that conceptually, the concept of *jus cogens* is not more clearly defined than *erga omnes*.³² Second, this conception fails to acknowledge that *erga omnes* may exist outside the scope of *jus cogens*. For example, the ILC’s report on the work of its seventy-first session illustrated the welcome view that all *jus cogens* norms were, by definition, *erga omnes*, although the reverse cannot be said to be correct.³³ An assessment of the negative inverse, that is, *erga omnes* beyond *jus cogens*, has remained, for a long period, virgin territory.³⁴ Although, there are multiple claims supporting the view that certain obligations, irrespective of their peremptory or dispositive status, are indeed *erga omnes*,³⁵ there is very little literature concerning how an obligation would

26 International Law Commission *Report of the Seventy-first Session* (2019) 190.

27 *ibid.*

28 *ibid.*

29 *ibid.*

30 See Tams (n 2) 139–140; De Wet (n 7) 554–555; Pierre-Marie Dupuy, ‘L’Unité de l’Ordre Juridique International’ (2002) *Recueil des Cours de L’académie de Droit International* 385.

31 Tams (n 2) 141.

32 See Tams (n 2) 141, who recalls the comment made by Krystyna Marek about the ILC’s attempt to rely on *jus cogens* to define international crimes. Marek noted that this would mean that one obscure notion serves as a basis for another obscure notion. With this comment in mind, Tams concludes that ‘one might wonder whether assessing obligations *erga omnes* by reference to *jus cogens* is more than a description of the unknown by reference to the unknown.’

33 International Law Commission, *Yearbook Volume II Part 2* (1998) 69 para 279; Alina Kaczorowska, *Public International Law* (2010) 48; see also for example Switzerland’s comment on Art 40, para 3 of the 1996 first reading of the Draft Articles, reproduced in UN Doc. A/CN.4/488, at 100; see also German Statement on article 40, para 3 of the 1996 first reading of the Draft Articles, reproduced in UN Doc. A/CN.4/488, at 137 and Italian Statement reproduced in: *Compilation of Statements Made Before the UN General Assembly’s Sixth Committee During the Assembly’s Fifty Fifth Session on State Responsibility* 69–70; see further International Law Commission *Conclusions of the Work of the Study Group on the Fragmentation of International law: Difficulties Arising from the Diversification and Expansion of International Law Finalized by Koskeniemi* (Report 2006).

34 See Tams (n 2) 151.

35 *ibid.*; see also the ILC’s *Yearbook* (n 33), where the ILC not only noted that ‘all *jus cogens* norms were by definition *erga omnes*’, but also that ‘not all *erga omnes* norms were necessarily [endowed with *jus cogens* status]’.

reach *erga omnes* status without first being *jus cogens*.³⁶ This article seeks to illuminate the process by which obligations *erga omnes* can be identified without depending on *jus cogens*. The cases discussed in the subsequent sections will be selectively examined, to the limited extent that they shed some light on the particular subject of this article.

The Analysis Regarding the Identification of *Erga Omnes* beyond *Jus Cogens*

Although the ICJ recognised a number of obligations as *erga omnes*, it has said very little on the process by which to identify new categories of similar obligations.³⁷ In other words, the court has not been particularly transparent on the process by which it decides which obligations qualify as *erga omnes*. Nevertheless, it suggests that obligations *erga omnes* are obligations of general international law and are traditionally distinguished from obligations *erga omnes partes* as well as other obligations of general international law on the basis of their importance.³⁸ For example, in paragraph 33 of *Barcelona Traction* the court stressed that in order for an obligation to be owed *erga omnes*, it has to protect important values, and in its own words, remarked that ‘[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.’³⁹ Similarly, in *East Timor*, the court considered the importance by which the international community views the right of a people’s self-determination and acknowledges that as a factor that makes such a right *erga omnes*.⁴⁰ Of course, this conclusion is not without criticism,⁴¹ and even though the court’s ‘importance requirement’ is inherently vague, the requirement is clearly established in its jurisprudence.⁴² Be that as it may, this is not to say that the requirement of importance is the only consideration in the determination of *erga omnes* status. In fact, Ragazzi argues that the weight of evidence placed in favour of the conclusion that an obligation is *erga omnes* differs depending on the specific merits of each case.⁴³

This article does not endeavour to evaluate whether specific obligations, such as those listed by the ICJ, have acquired *erga omnes* status, as this question has already received much attention in literature.⁴⁴ Rather, the author seeks to assess the process by which obligations *erga omnes* can be identified. Given the scarcity of authoritative guidance on this topic, there are widely divergent responses to this question. From the start, one must understand that obligations *erga omnes* are derived from a pool of general

36 Tams (n 2) 151.

37 Tams (n 2) 117.

38 Tams (n 2) 156.

39 *Barcelona Traction* case (n 16) para 33.

40 *East Timor* case (n 19) 102.

41 Tams (n 2) 129, 156.

42 See *Barcelona Traction* case (n 16) para 33; Tams (n 2) 156.

43 Ragazzi (n 11) 185–186.

44 Tams (n 2) 119.

international law rules.⁴⁵ This is also suggested by the ICJ in its *Barcelona Traction* decision where the court noted that all states have a legal interest in seeing obligations *erga omnes* observed.⁴⁶ With this in mind, two approaches can be identified to steer the debate on the identification of obligations *erga omnes*, the material and the structural approaches.

On the one hand, the material approach is found in the court's reference to 'the importance of rights involved,'⁴⁷ and is based on the simple proposition that in order to be *erga omnes*, an obligation has to protect important values.⁴⁸ This approach has been affirmed in the jurisprudence of the ICJ—examples from both the *Barcelona Traction* as well as the *East Timor* decisions have been quoted and cited in support of this conclusion.⁴⁹ Nonetheless, it is difficult to apply the approach in practice as it depends on the inherently vague and indeterminate notion of 'importance.'⁵⁰ On the other hand, the structural approach is founded on the idea that there exists 'an essential distinction' between obligations *erga omnes* and obligations in the field of diplomatic protection.⁵¹ According to this approach, since obligations *erga omnes* are essentially different from other obligations, they go beyond the reciprocal relations of states as all states have a legal interest in the observance of such obligations.⁵² Some scholars argue that the *erga omnes* status of an obligation is the consequence of the obligation's non-reciprocal structure of performance.⁵³ In other words, an obligation acquires *erga omnes* status because it has to be performed in relation to all states.⁵⁴ These two approaches are addressed in turn, starting with the structural.

Structural Approach

Adherents of the structural approach express two contrasting views. On the one hand, some believe that the determination of norms which give rise to obligations *erga omnes* is not an investigation as to which norms are most important. To them, all non-reciprocal obligations, regardless of their significance, are *erga omnes*.⁵⁵ On the other hand, some accept a double standard of qualification, that in order for an obligation to qualify as *erga omnes* it must be both important and non-reciprocal in nature.⁵⁶ This article finds the latter view more convincing than the former, particularly because the former ignores

45 Tams (n 2) 124.

46 *Barcelona Traction* case (n 16) paras 33–34; Tams (n 2) 122–123.

47 *Barcelona Traction* case (n 16) para 33.

48 Tams (n 2) 129.

49 *East Timor* case (n 19) 102 para 29.

50 Tams (n 2) 129.

51 *ibid.*

52 *ibid.*

53 *ibid.*

54 *ibid.*

55 Tams (n 2) 130–131, see Seiderman (n 22) 129.

56 Tams (n 2) 131; see Frank Biermann, 'Common Concern of Humankind': The Emergence of a New Concept in International Environmental Law' (1996) *Archiv des Völkerrechts* 426.

the one recurring theme in the ICJ's jurisprudence on the pronouncement of obligations with *erga omnes* status, namely, the importance requirement.

Despite the fact that the latter view acknowledges and accommodates the ICJ's affirmations on the importance requirement, Tams is of the view that the requirement of non-reciprocity cannot be reconciled with the ICJ's jurisprudence and thus concludes that even the latter proposal which considers both non-reciprocity and importance fails to establish a plausible test for the identification of obligations *erga omnes*.⁵⁷ He puts forth that the examples given by the ICJ as obligations *erga omnes* do not conform to the idea that in order to be conferred with *erga omnes* status, the obligation in question must be non-reciprocal.⁵⁸ In his argument, he gives an example, alleging that the prohibition against aggression is reciprocal in nature. Since aggression involves the use of force by a particular state against another state, every breach of the rule carries with it an injury suffered by the victim state in its *individual* capacity,⁵⁹ so his argument goes.⁶⁰

Although the breach of the obligation indeed results in the direct injury of 'one (victim) State in its individual capacity,'⁶¹ such a consequence must not be conflated with the nature of the primary obligation itself. Much like other obligations *erga omnes* identified by the ICJ, the prohibition against aggression contains a reciprocal component. However, since all states have an interest in its observance, it applies *erga omnes*. In other words, the obligation would be *erga omnes* precisely because it is not applied in a reciprocal manner.⁶² Put differently, one might even argue that the term '*erga omnes*' is exclusive of reciprocity as by its very definition, it mandates an application 'towards all' and not just particular states.⁶³ In conclusion, it appears to me that this version of the structural approach is irreproachable as not only is it reconcilable with the jurisprudence of the ICJ,⁶⁴ but is also sustainable.

57 See Tams (n 2) 133.

58 See Tams (n 2) 134–135.

59 *ibid.*

60 *ibid.* In his words: 'the moderate structural approach is not supported by the Court's jurisprudence and is ultimately unconvincing.' See also C Annacker, 'The Legal Regime of *Erga Omnes* Obligations Under International Law' (1994) *Austrian Journal of Public International Law* 149.

61 Tams (n 2) 134.

62 *ibid.*

63 Bradley (n 8) 199, who provides that the literal interpretation of *erga omnes* is 'applicable to all.' See how Ardit Memeti and Bekim Nuhija, 'The Concept of *Erga Omnes* Obligations in International Law' (2013) *New Balkan Politics* 31, describe the concept: 'In international law, the concept of *erga omnes* obligations refers to specifically determined obligations that States have towards the international community as a whole. In general legal theory the concept "*erga omnes*" (Latin: "in relation to everyone") has origins dating as far back as Roman law and is used to describe obligations [...] towards all.'

64 *ibid.*

Material Approach

The material approach supports the idea that in order to qualify as *erga omnes*, an obligation must enjoy some heightened level of importance.⁶⁵ This is firmly rooted in the jurisprudence of the ICJ.⁶⁶ While enjoying much support, the importance requirement is ambiguous and must be given some practical meaning.⁶⁷ To do this, one must ask how important an obligation must be in order to be elevated to *erga omnes* status.⁶⁸ The ICJ has not made it easy for scholars to make this assessment. In its 1970 *Barcelona Traction* case, the court held that an obligation acquires *erga omnes* status '[i]n view of the importance of the rights involved.'⁶⁹ This means the importance of the obligation is analysed in comparison to the quality of a specific right.⁷⁰ In other words, *erga omnes* does not depend on the intensity of a possible violation (the serious form of misconduct) or the grave consequences that follow after a right or an obligation has been violated, as was argued by various scholars.⁷¹ To the contrary, the severity of these violations would remain useful when assessing how states can react to such violations or to determine whether they should make use of possible rights of protection.⁷²

The question then shifts to what the required threshold of importance is. However, the court's express language does not spell out how important an obligation has to be in order for such an obligation to be considered to have *erga omnes* status, it simply requires that it protects an important right without determining the threshold of importance.⁷³ In addition to that, the court does not define what it means by 'important,' leaving the determination of the threshold even more difficult. Other concepts, such as 'essential principle[s]' or 'basic tenets' of international law have been used to narrate the importance requirement, however, these terms themselves have not achieved clear definitions and thus do not aid in this process.⁷⁴ In instances where a concept is rather vague, it would be wise to turn to practice in order to interpret its meaning, alas, the *erga omnes* concept has not been regularly invoked in formalised proceedings.⁷⁵

While not abundant, the ICJ's jurisprudence on the concept of *erga omnes* may provide some guidance as to what considerations must be made to determine *erga omnes* status. This point was made very clear by Tams when he noted that:

65 Tams (n 2) 136.

66 *ibid.*

67 *ibid.*

68 *ibid.*

69 *Barcelona Traction* case (n 16) para 33.

70 Tams (n 2) 136.

71 See Tams (n 2) 137; see also K Oellers-Frahm, 'Comment: The *Erga Omnes* Applicability of Human Rights' (1992) *Archiv des Völkerrechts* 35; Phoebe Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2000) 215–216.

72 Tams (n 2) 137.

73 *ibid.*

74 *ibid.*

75 *ibid.*

When recognising the *erga omnes* status of a particular obligation, the Court has relied on the following factors: recognition [of the obligation] in the UN Charter, in the practice of UN organs, in other treaties, preferably universal treaties, in general international law, or the jurisprudence of the ICJ.⁷⁶

These factors are not cast in stone and are not conclusive to the determination of *erga omnes* status; however, they provide us with an indicative value of an obligation's status. For example, in addition to the factors listed above, some authors propose that state responses against breaches of an obligation may be examined in determining the status of an obligation.⁷⁷ These considerations imply that the 'identification of *erga omnes* status is more than a simple application of [a] predetermined criteria.'⁷⁸ In contrast, it may be a complex exercise that necessitates a comprehensive examination of international practice.⁷⁹

The preceding paragraphs merely provide us with tentative means by which to start the analysis of obligations *erga omnes* beyond *jus cogens*. The contours of the importance test, as established by the ICJ will only become apparent when states frequently invoke the *erga omnes* concept.⁸⁰ Although this article favours the structural approach indicated above, it also accepts that the material approach forms a great part of understanding the first requirement of the structural approach and thus does not dismiss the approach as irrelevant, it merely regards it as a supplement or as part of the structural approach.

Tentative Examples of Obligations *Erga Omnes* not Flowing from *Jus Cogens* Norms, or at Least, the Identification of Such Obligations without Relying on *Jus Cogens*

Certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations independent of peremptory status. Over the years, the notion of the common heritage of mankind has received considerable attention and evoked international discussion and debate,⁸¹ with the result that some authors have concluded that the principle has attained the status of customary international law.⁸² Others are of the opinion that such an assertion is too bold in view of the indeterminacy of the principle as well as the lack of accompanying state practice and *opinio juris* to support the conclusion that the principle has gained acceptance as a rule of customary

76 *ibid* 153.

77 *ibid* 154.

78 *ibid* 155.

79 *ibid* 156.

80 *ibid*.

81 Christopher Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) *The International and Comparative Law Quarterly* 190.

82 See Rüdiger Wolfrum, 'The Common Heritage of Mankind' (2009) *Max Planck Encyclopedia of Public International Law* 25; see also Gbenga Oduntan, 'The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space' (2003) *HLJ* 64–84.

international law.⁸³ In addition, some authors have taken it to the extreme, by stating that the principle is a *jus cogens* norm.⁸⁴

This article argues that whatever the import of the principle may be, obligations *erga omnes* can be identified to flow from such a principle, albeit without having to rely on the normative status of the principle. Some of the most common features of common heritage spaces are that these spaces are not subject to any claim of sovereignty and that any state that exploits any natural resources from such spaces must share the (economic) benefits with all other states.⁸⁵ Or simply, that all states have a common interest in the protection of such spaces.⁸⁶ This article will assess whether obligations *erga omnes* can be identified independent of *jus cogens* norms using the structural approach. To achieve this, two examples of obligations *erga omnes* will be assessed.

The Non-Appropriation Principle

Outer space may be regarded as the common heritage of mankind, an area falling within the regime of common spaces.⁸⁷ The Outer Space Treaty⁸⁸ sets out the following in Articles I and II:

ARTICLE I

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the *benefit and in the interests of all countries*, irrespective of their degree of economic or scientific development, and shall be the *province of all mankind*.

Outer space, including the moon and other celestial bodies, shall be *free for exploration and use by all States* without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be *free access to all areas of celestial bodies*.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

ARTICLE II

83 See Joyner (n 81) 197–199; see also Kudirat Magaji W Owolabi, ‘The Principle of the Common Heritage of Mankind’ (2013) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 54.

84 Seokwoo Lee and Jeong Woo Kim, *Applying the Principle of the Common Heritage of Mankind: An East Asian Perspective* (Brill 2018) 15.

85 Joyner (n 81) 191–192.

86 *ibid* 190–199.

87 *ibid*.

88 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1966.

Outer space, including the moon and other celestial bodies, *is not subject to national appropriation by claim of sovereignty*, by means of use or occupation, or by any other means. (own emphasis).

These provisions evidence a non-appropriation principle. Recent developments in customary international law show that the scope of the principle allows for the ownership of *extracted* space resources,⁸⁹ and prohibits *in situ* claims of ownership by any actor in international law.⁹⁰ This article proposes that the obligation placed on states not to claim any *in situ* ownership in outer space is *erga omnes*. One would recall that in order for an obligation to qualify as *erga omnes*, two basic requirements must be fulfilled in terms of the structural approach according to which (1) the obligation involved must protect important rights and (2) the obligation must be applicable beyond reciprocal relations. I will address these two requirements in turn.

Importance Requirement

When recognising the importance of an obligation (*erga omnes*), the ICJ has placed reliance on a number of factors including; the recognition of the obligation in question in the ‘UN Charter, in the practice of UN organs, in other treaties, preferably universal treaties, in general international law, or the jurisprudence of the ICJ.’⁹¹ The principle of non-appropriation is codified in Articles I and II of the Outer Space Treaty, the primary universal instrument that establishes the fundamental rules that govern states’ activities in space.⁹² The same principle is evidenced in Article 11 of the Moon Agreement:⁹³

89 Originally, the principle of non-appropriation was broadly interpreted under customary international law to prohibit all forms of appropriation of space materials, including not only celestial bodies but also extractable space resources. However, a shift has occurred to allow for the appropriation of extractable space resources, but retain the prohibition on *in situ* claims of ownership of space property. For a thorough discussion of this shift, see Abigail Pershing, ‘Interpreting the Outer Space Treaty’s Non- Appropriation Principle: Customary International Law from 1967 to Today’ (2019) *Yale Journal of International Law* 149–178; see also Anel Ferreira-Snyman, ‘Challenges to the Prohibition on Sovereignty in Outer Space - A New Frontier for Space Governance’ (2021) *Potchefstroom Electronic Law Journal* 1–36.

90 See Pershing (n 89); UNGA ‘International Co-operation in the Peaceful Uses of Outer Space’ UNGA Res 1721 (XVI) (1961); see also UNGA ‘Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space’ UNGA Res (XVIII) (1962).

91 Tams (n 2); *East Timor* case (n 19) 102 para 29; Dissenting Opinion of Judge Skubiszewski (1995) 266 para 136; Dissenting Opinion of Judge Weeramantry (1995) 194–195 and 213–216; see also International Law Commission *General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur Draft Conclusion 7* (Second Report 2020).

92 Jill Stuart, ‘The Outer Space Treaty Has Been Remarkably Successful – But Is It Fit for the Modern Age?’ *The Conversation* (2017).

93 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979. Although an argument can be made that this Agreement has very little practical effect due to the fact that it has been ratified by a limited number of states and because it has not been ratified by any country that has or that currently engages in self-launched manned space exploration, the provision envisaged above is not referred to as a stand-alone provision, but rather referred to in support of the

Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or nongovernmental organization, national organization or non-governmental entity or of any natural person. (own emphasis to demonstrate that the prohibition is not a blanket prohibition, it prohibits specifically *in situ* claims of property ownership).

The preceding paragraphs show that the principle of non-appropriation underlies general rules of conventional international law, and the subsequent paragraphs will show that the principle also amounts to a general principle of law as it underlies customary international law.⁹⁴ In *North Sea Continental Shelf*,⁹⁵ the ICJ identified two requirements for the identification of customary international law, namely state practice and *opinio juris*.

In respect of the first requirement, state practice, it is deduced that states currently act in compliance with the current interpretation of the non-appropriation principle insofar as that they have not encouraged nor permitted individuals' claims to *in situ* property in space (as opposed from allowing property rights to resources after extraction).⁹⁶ For example, in the case of *Nemitz v United States*,⁹⁷ Gregory Nemitz submitted claims that the National Aeronautics and Space Administration (NASA) owed him money for their use of 'his' asteroid, when they landed on an asteroid in the sun's orbit,⁹⁸ Eros. He made submissions that claimed ownership over Eros, effectively asserting *in situ* property rights over the asteroid.⁹⁹ The United States (US) argued that international law prohibits *in situ* claims of ownership to space property and to hold otherwise, would be in contravention of the Outer Space Treaty.¹⁰⁰ Indeed, the court found in favour of the US on the basis that international law does not allow for *in situ* claims of ownership in space.¹⁰¹

Another example can be found in the context of the Bogotá Declaration wherein representatives of Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire (the present-day Democratic Republic of the Congo) with Brazil as an observer state, met in

Outer Space Treaty, which is ratified by over 110 state parties including all the major space fairing states.

94 Draft Conclusion 7 (n 91).

95 *North Sea Continental Shelf (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark) Judgment* ICJ Reports (1969); International Law Commission, *Identification of Customary International Law by Michael Wood Special Rapporteur* (Fifth Report 2018).

96 Pershing (n 89).

97 *Nemitz v United States*, No CV-N030599-HDM (RAM), 2004 WL 3167042; Robert Kelly, 'Nemitz v. United States, A Case of First Impression: Appropriation, Private Property Rights and Space Law Before the Federal Courts of the United States' (2004) *Journal of Space Law* 297.

98 NASA 'Flashback: NEAR on Eros' (2008).

99 See letter from Gregory Nemitz, Chief Executive Officer of Orbital Development, to Dan Goldin, NASA Administrator (2001) <<http://www.orbdev.com/010216.html>> accessed 3 October 2021>.

100 See letter from Edward Frankle, NASA General Counsel to Gregory Nemitz, Chief Executive Officer of Orbital Development (2001) <<http://www.orbdev.com/010409.html>> accessed 3 October 2021.

101 *Nemitz v United States* (n 97).

Bogotá, Colombia in 1976 and signed the Declaration, thereby claiming sovereignty over *in situ* space property by claiming control over the segment of the geosynchronous orbital path that corresponds to each country.¹⁰² However, ‘the Bogotá Declaration’s attempted appropriation of geostationary orbits was rejected internationally as inconsistent with Article II of the Outer Space Treaty.’¹⁰³ Subsequently, claims concerning the appropriation of *in situ* space property have been largely abandoned.¹⁰⁴

In respect of the second requirement of *opinio juris*, this article advances that states have expressed their commitment to the non-appropriation principle, within the ambits of the scope discussed above. For example, the United States Spurring Private Aerospace Competitiveness and Entrepreneurship (SPACE) Act of 2015 does not allow for territorial claims of sovereignty, the Act accepts this principle by providing that ‘... the United States does not ... assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body.’¹⁰⁵ In Luxembourg, a similar Act, the Law on Use of Resources in Space was enacted.¹⁰⁶ Even more notable is NASA’s release of the Artemis Accords which seeks to provide principles for cooperation in the civil exploration and use of the Moon, Mars, comets, and asteroids for peaceful purposes. Section 10(2) of the Artemis Accords provides that:

the Signatories affirm that the extraction of space resources does not inherently constitute national appropriation under Article II of the Outer Space Treaty, and that contracts and other legal instruments relating to space resources should be consistent with that Treaty.¹⁰⁷

Moreover, as of February 2021, the Outer Space Treaty had 111 states parties, indicating the states’ acceptance to be bound by such principles and obligations that flow from it. Therefore, given the fact that the obligation not to appropriate outer space by any claim of sovereignty seeks to protect the fundamental rights of all states to freely access all areas of celestial bodies,¹⁰⁸ this article concludes that this obligation seeks to protect important rights and this is evidenced by the substantial acceptance of this obligation as

102 Dan St. John, ‘The Bogotá Declaration and the Curious Case of Geostationary Orbit’ (2013) *Denver Journal of International Law & Policy*.

103 Pershing (n 89).

104 *ibid*.

105 United States Spurring Private Aerospace Competitiveness and Entrepreneurship Act 2015 s 403.

106 Luxembourg: Law on Use of Resources in Space (2017); see Laurent Thailly and Fiona Schneider, ‘Luxembourg Set to Become Europe’s Commercial Space Exploration Hub with New Space Law’ (2017) <shorturl.at/IJLO3> accessed 18 October 2021.

107 Section 10(2) Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes (2020). The Artemis Accords has already been signed by the USA, Australia, Canada, Italy, Japan, Luxembourg, the United Arab of Emirates and the United Kingdom.

108 UNGA Res (1962). For example, see E Rathore and B Gupta, ‘Emergence of *Jus Cogens* Principles in Outer Space Law’ (2020) *The International Journal of Space Politics & Policy* 11, who indicate Frans von der Dunk’s view that space ‘is owned by none, no one can colonize it, but everyone can fish in it.’

binding upon and by states. The fact that no major space-faring state has claimed sovereignty in outer space elucidates the widespread acceptance of the non-appropriation principle.¹⁰⁹ In short, this analysis reveals that the non-appropriation principle is an important rule of international law.

The Applicability of the Obligation Beyond Reciprocity

The obligation placed on states not to appropriate outer space by any claims of sovereignty is an obligation that goes beyond reciprocal relations between states and brings about an obligation to which all states in the international community have a legal interest in protecting. In other words, if any state acts in any manner inconsistent with the principle of non-appropriation as discussed above, the consequences that flow are not of an *inter-partes* interest, but rather an *erga omnes* interest.¹¹⁰ Oralova succinctly captures this by indicating that:

Potential derogation from the principles of non-appropriation of outer space and of freedom of exploration and use of outer space...should be regarded as a breach of obligations toward [the] international community as a whole (*erga omnes* obligations) and [an] invasion of [the] “global public interest” and “province of all mankind”. Any State is entitled to claim a protest against such activities and to invoke the responsibility of the offending State.¹¹¹

It would seem therefore, that the obligation not to appropriate by claims of sovereignty qualifies as *erga omnes*, even if it has not reached the status of *jus cogens* yet. This article comes to the conclusion that the obligations derived from the principle are *erga omnes* without flowing from a norm with *jus cogens* characterisation for the reasons provided herein. Notwithstanding the evidence that customary international law currently prohibits claims of *in situ* ownership of space property, there is an advancing shift in the interpretation of the non-appropriation principle, which would allow for such *in situ* ownership.¹¹² The likelihood of this shift emerges from ‘the sheer magnitude of the economic incentives private corporations will have to urge such a recognition.’¹¹³ Moreover, Pershing notes that:

[Should] States seek to establish *in situ* ownership, they will have at their disposal emerging legal arguments pointing to cracks in the theories that the non-appropriation principle bars private ownership of *in situ* property. Although not yet the basis for any

109 Pershing (n 89) 164.

110 Cestmir Cepelka, ‘The Application of General International Law in Outer Space’ (1970) *Journal of Air Law and Commerce* 40.

111 Yevgeniya Oralova, ‘*Jus Cogens* Norms in International Space Law’ (2015) *Mediterranean Journal of Social Sciences* 426–427.

112 Pershing (n 89) 165–166.

113 Pershing (n 89) 166.

State action, the increasing momentum of these theories portend a second shift in customary international law to allow for in situ ownership of space property.¹¹⁴

In view of the evolution of the non-appropriation principle and in light of new age technology and the diverging views as regards the scope of the non-appropriation principle, it is highly doubtful that the non-appropriation principle has attained the status of *jus cogens* as proposed by some commentators.¹¹⁵ In particular, Tronchetti compellingly suggests that:

Despite playing a fundamental role within the system of space law and despite being aimed to protect the interests of all mankind in relation to the utilization of outer space, the non-appropriation principle does not have the requisites and importance to be considered a *jus cogens* rule. Therefore, a hypothetical interpretation of the non-appropriation principle in terms of a peremptory norm should be refused. On the contrary, the non-appropriation principle shows the characteristics required to be classified as a customary rule.¹¹⁶

The same conclusion was supported by Xinmin, the then Deputy Director General in the Department of Treaty and Law, Ministry of Foreign Affairs for the People's Republic of China in a speech made at the United Nations Asia Pacific Space Cooperation Organization (APSCO) Workshop on Space Law, when he said 'principles of space law are obligations *erga omnes* which do not have the character of *jus cogens* norms.'¹¹⁷

The Obligation to Protect the Environment

In recent years, the duty of states and their citizens to care for and protect the environment, has become a common concern of mankind.¹¹⁸ Although environmental law has now been accepted into the corpus of international law, it is still largely

114 *ibid.*

115 See Steve Freeland and Ram Jakhu, 'Article II' in Stephan Hobe and others (eds), *Cologne Commentary on Space Law* (2009) 44–63; M Manoli, 'Mining Outer Space: Overcoming Legal Barriers to a Well-Promising Future' (2015) *International Institute of Space Law* 746; Ferreira-Snyman (n 91) 36, who poses that the increasing involvement of private entities in outer space exacerbates the legal problems facing society and creates numerous legal uncertainties, including the source that must be ascribed to rules of international space law governing the non-appropriation of *in situ* space properties; see further Fabio Tronchetti, 'The Non-appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in its Defence' (2007); International Astronautical Congress E6.5.13 that proposes 'an interpretation of the non-appropriation principle that appropriately expands upon its classic definition in terms of a customary rule and suggest to consider it something more than a usual customary rule *but less* than a *jus cogens* norm.'

116 Tronchetti (n 115) 4.

117 MA Xinmin, 'The Development of Space Law: Framework, Objectives and Orientation' (UN Asia Pacific Space Cooperation Organization Workshop on Space Law 2014) 3.

118 Nicholas Robinson, 'Environmental Law: Is an Obligation *Erga Omnes* Emerging?' (Permanent Mission of Colombia to the United Nations Panel Discussion at The United Nations 2018) 2.

fragmented.¹¹⁹ Nonetheless, this article assesses whether the broad obligation to protect the environment is *erga omnes*. To do this, the same structural test as applied in assessing the non-appropriation principle is applied below.

Importance Requirement

The importance given to environmental considerations is reflected in the status of ‘essential interest’¹²⁰ that the ICJ has recognised with regard to the protection of the environment.¹²¹ In addition, the court in *Gabcikovo-Nagymaros* recognises the link between the obligation to protect the environment and its emergence in customary international law.¹²² The court makes reference to its *Nuclear Weapons Advisory Opinion* to recognise the importance that it attaches to the obligations to respect and protect the environment,¹²³ thus accepting the heightened importance of the obligation to protect the environment. In 1927, about 113 member states of the United Nations Stockholm Declarations agreed that the protection of the environment is a global concern and requires all governments to act with a duty of care towards the environment.¹²⁴ Oral indicates that the Stockholm Conference culminated in many other consensus-based global declarations that ‘demonstrate the extent of the recognition by the international community as a whole of the importance and need to protect the environment.’¹²⁵ I will now determine whether the obligation is applied beyond an *inter-partes* relationship.

The Applicability of the Obligation Beyond Reciprocity

The obligation to protect the environment is applicable beyond reciprocal relations.¹²⁶ Dupuy and Vinuales have come to the same conclusion, that in the current state of international law, some principles and obligations regarding the environment may be

119 Pierre-Marie Dupuy and Jorge Viñuales, *International Environmental Law* (2018) 52.

120 See *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports (1997) para 53 7; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports (2010) para 72 14.

121 Dupuy and Viñuales (n 119) 53.

122 See *Gabcikovo-Nagymaros Project* (n 120); Jorge Viñuales, ‘The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment’ (2008) *Fordham International Law Journal* 232.

123 Legality of the Threat or Use of Nuclear Weapons ‘Advisory Opinion—ICJ Reports’ (1996) 226 para 29.

124 UN ‘Report of the United Nations Conference on the Human Environment’ (Stockholm, A/Conf 48/14/Rev 1) 1972) paras 2 and 7.

125 See Nilufer Oral, ‘Environmental Protection as a Preemptory Norm of General International Law’ in Tladi (n 8) 592.

126 See *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, ITLOS Case No 23, Order of 25 April 2015 paras 68–73; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Case No 21 paras 111, 120; *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v People’s Republic of China)*, PCA Case No 2013-19, Award (12 July 2016) para 927.

considered to have *erga omnes* status in that they apply beyond inter-state relations.¹²⁷ However, they go further by indicating that in the current state of law, the obligation to protect the environment cannot be seen as having a peremptory nature, at least not yet.¹²⁸ Indeed this view is supported by a substantial number of other commentators.¹²⁹ However, it is worth noting that some of the most recent literature on the subject suggests that some specific obligations to protect the environment have been elevated to *jus cogens* status, namely, obligations to climate change.¹³⁰

This author is of the view that whatever the import of the literature is in respect of the status of the obligation to protect the environment, it is clear that one does not need to place reliance on whether it has *jus cogens* status to come to the conclusion that it applies *erga omnes*.

Concluding Remarks

This article set out to investigate the extent to which peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* relate. Throughout the article, strong points were made in favour of the commonly accepted proposition that from *jus cogens* flow obligations *erga omnes*, however, not all obligations *erga omnes* invariably flow from *jus cogens*. This frustrates the method by which some authors identified obligations *erga omnes*, that is, through *jus cogens*, precisely because not all *erga omnes* is qualified through *jus cogens*. In other words, although both the concepts of *jus cogens* and *erga omnes* obligations are part of some broader notion of norms that seek to protect the fundamental values of the international community, they are separate subcategories of the same fundamental values. Nonetheless, however separate and independent these concepts may be, they are still somewhat related and overlap.

Since the concept of *erga omnes* is recognised as independent from *jus cogens*, the attention shifts to the assessment regarding how obligations *erga omnes* may be identified without placing reliance on *jus cogens* norms and/or when an obligation acquires *erga omnes* status without first acquiring *jus cogens*. This is by no means an easy assessment as there is not enough authoritative literature on the method to support it. Even the ICJ's landmark decision regarding *erga omnes*, the *Barcelona Traction* case, does not address the process by which we can identify obligations *erga omnes* that

127 Dupuy and Viñuales (n 119) 53; Jutta Brunnée, 'International Environmental Law: Rising to the Challenge of Common Concern?' 2006 *American Society of International Law* 307.

128 Dupuy and Viñuales (n 119) 52.

129 Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (2011) 287; Louis Kotzé, 'Constitutional Conversations in the Anthropocene: In Search of Environmental *Jus Cogens* Norms' (2016) *Netherlands Yearbook of International Law* 249.

130 For a detailed discussion see Oral (n 125) 594–599 who suggests that there are emerging *jus cogens* norms in relations to the protection of the environment. More specifically, Oral concludes that the protection of the environment has elevated to *jus cogens* status and should now be recognised as such.

are independent of *jus cogens* norms or at least, without placing reliance on *jus cogens*, irrespective of whether such norms have acquired *jus cogens* status or not.

In fact, after the *Barcelona Traction*, the court has had the opportunity to clarify this process when it recognised new categories of obligations as *erga omnes*. However, the court still failed to elucidate the process by which it decided that those obligations qualified as *erga omnes*. At the backdrop of this *lacuna*, this article reveals that although there is no uniform or single accepted conclusive test for the determination of obligations *erga omnes*, there is a working test that may be useful—the structural approach test. The structural approach test requires a double standard of acceptance in order for an obligation to qualify as *erga omnes*. First, the obligation must be non-reciprocal. Second, the obligation must have some heightened level of importance.

Therefore, although having placed focus on the complexities surrounding the *erga omnes* concept and the threshold for which an obligation must meet in order to acquire *erga omnes* status, this article cannot claim to have fully resolved the mysteries surrounding the concept of *erga omnes* altogether, as such a conclusion, would be overly ambitious. However, it may have succeeded in shaping the manner in which the concept is understood without placing reliance on *jus cogens*. The author hopes to have succeeded in establishing a legal framework which provides for the understanding and identification of obligations *erga omnes* for norms which have not reached the status of *jus cogens* or whose *jus cogens* status is uncertain or simply, without placing reliance on *jus cogens* in order to determine whether a norm has *erga omnes* effect.

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