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**THE RULE OF JUS COGENS AND OBLIGATION ERGA OMNES FOR
THE PROTECTION OF THE COMMON INTEREST OF THE
INTERNATIONAL COMMUNITY**- Elizabeth Sathish¹**ABSTRACT**

There are distinct methods to help identify what composes a community. Varying common factors like geographical location, interests, social identity, culture, and so forth indicates the presence of a community. The existence of an “international community” has been pondered upon over centuries by legal scholars. If there is one, there should be some common interest that acts as a binding force that holds the community together. The laws and regulations will be crafted to protect these common interests thereby ensuring the prosperity of the international community as a whole. To safeguard the fundamental common values, there are stringent obligations enforced against states to prevent any violation. Two such key regulations are the Rule of Jus Cogens and Obligation Erga Omnes. Even though the origin of these two principles can be traced decades back, they remain a mystery in the spectrum of Public International Law. This paper focuses on decoding the legal enigma surrounding the Rule of Jus Cogens and Obligation Erga omnes.

Keyword: International community, Common Interest, Jus cogens, Erga Omnes

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INTRODUCTION

The terminology “international community” and its definition have been contemplated throughout history; yet, this term is used ad nauseam while stipulating international law². The Vienna Conventions on the Law of Treaties tries to elucidate the meaning of the international community through Article 53, which states that; a community of states is what is collectively known as the international community³. On the other hand, the judgment rendered by the International Court of Justice in the case of the Barcelona Traction Company indicates that community interest plays a crucial part in defining the term international community. By the addition of the statement; “obligations of a State towards the international community as a whole”, the Court implies that all states have a community interest over certain tangible and intangible things and that they have a legal vested interest in their protection⁴. On the contrary, Italian jurist and renowned professor of international law; Roberto Ago claims that the international community cannot be considered as a community of states. Despite these confusions about defining the term international community, positive law has been successful in penetrating its various essential aspects like international responsibility⁵.

INTERNATIONAL COMMUNITY AND COMMON INTERESTS

The common interest of all states is protected from severe breach by upholding and safeguarding of the basic fundamental interests through Article 40 of Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). These interests tangible or intangible do not belong to any state in particular; instead, it is the legal interest and responsibility of all states together as a whole. Hence, each state is legally obliged to protect the common interest and core values of the international community, like environment protection, Human rights etcetera through the active prohibition of human trafficking, slavery, genocide,

² Gleider I. Hernández, A Reluctant Guardian: The International Court of Justice and the Concept of ‘International Community’, *British Yearbook of International Law*, Volume 83, Issue 1, 2013, Pages 13–60, <https://jguelibrary.informaticsglobal.com:2104/10.1093/bybil/brt003>.

³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331, art 53; Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 21 March 1986, 25 *ILM* 543, art 53.

⁴ Barcelona Traction, Light and Power Company Limited (New Application: 1962), Belgium v Spain, Judgment, merits, second phase, ICJ GL No 50, [1970] ICJ Rep 3, ICGJ 152 (ICJ 1970), (1970) 9 *ILM* 227, (1970) 64 *AJIL* 653, (1973) 46 *ILR* 178, 5th February 1970, United Nations [UN]; International Court of Justice [ICJ]

⁵ Anne-Laure Vaurs-Chaumette, The Law of International Responsibility, Oxford Scholarly Authorities on International Law [OSAIL], Part V The Implementation of International Responsibility, Ch.70 The International Community as whole

<https://jguelibrary.informaticsglobal.com:2136/view/10.1093/law/9780199296972.001.0001/law-9780199296972-chapter-88?rskey=Iy04BK&result=4&prd=OSAIL#law-9780199296972-note-4222>.

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and so forth⁶. These peremptory norms that constitute the fundamentals of international law are protected by the invocation of two crucial legal factors; the rule of jus cogens and obligation erga omnes⁷. The concept of jus cogens and obligation erga omnes is not well defined that it is often referred to by scholars as a mysterious ground of international law dealing with state responsibility⁸. This defect in elucidating what accounts for the rule of jus cogens and what results in the invocation of obligation erga omnes results in creating confusion regarding the usage of the two.

“These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. By their nature, the former is the concern of all States. Given the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes”⁹

DEFINING OBLIGATION ERGA OMNES

The dictum passed by the International Court of Justice in the case of Barcelona Traction Company stipulated in paragraphs 33 and 34 of the judgment, lays down the skeleton definition of obligation erga omnes. This renowned judgment resulted in the legislating of article 48 of the Articles on State Responsibility. As per the Article; any defaulter of the peremptory norms will be subject to severe international punishment arising out of breach of international responsibility¹⁰. From the excerpt of the Barcelona Traction case judgment quoted above, a key aspect which determines the obligations that fall within the scope of erga omnes is to ascertain whether the obligations arising out of the State’s actions has its ramifications on the entire international community as a whole. It should be duly noted that, for the principle of obligation erga omnes to apply, the State need not be directly affected. Erga omnes in layman understanding can be understood as the genre of obligations that flow from the “narrow bracket

⁶ *Supra note 4.*

⁷ Anne marieke Vermeer-Künzli: A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes. *The International and Comparative Law Quarterly*, vol. 56, no. 3, 2007, pp. 553–581. *JSTOR*, www.jstor.org/stable/4498089.

⁸ Carrillo-Salcedo, Juan-Antonio. *The American Journal of International Law*, vol. 92, no. 4, 1998, pp. 791–793. *JSTOR*, www.jstor.org/stable/2998150.

⁹ *Supra note 3.*

¹⁰ *Supra note 6.*

of jus cogens”. Erga omnes can be perused as an international crime that has been committed and the resulting repercussions rise to the level of jus cogens.¹¹

The open-ended and vagueness in defining the scope of erga omnes in the Barcelona Traction judgment has been criticized by various legal scholars. It has been debated over time whether the reference made to the obligation erga omnes was necessary or appropriate for the court to reach its conclusion on jus stand. Legal scholars and ex-members of the International Court of Justice have even gone to the extent of calling out the use of obligation erga omnes as an example of making a gratuitous statement as the facts and legal issues do not demand such pronouncement. Furthermore, the court’s definition of erga omnes is very constraining and the ambit of its application is restricted to just a few of the many international crimes like the outlawing acts of aggression prohibition of genocide, protection from slavery, and curbing racial discrimination¹². The International Court of Justice, in the case of Barcelona Traction, does not refer to Article 53 while explaining erga omnes and jus cogens. The Court also fails to address the bigger question of whether the principles that call for the invocation of erga omnes fall within the category of peremptory rules¹³. The two defining features that the International Court of Justice laid down as essential features of erga omnes were; universality and solidarity. Both these features, especially the first feature were criticized heavily on the account that it gives rise to “complex theoretical problems”¹⁴. This critique can be traced back to the lack of proper framing of the definition of obligation erga omnes and jus cogens which makes it hard to differentiate the former from the latter.

In his globally recognized work; “The concept of International obligations Erga Omnes”, Maurizio Ragazzi points out five features that can be used in identifying a state responsibility as falling under the category of obligation erga omnes as can be derived from the four elements that were mentioned in the dictum passed in the case of Barcelona Traction Company. Firstly, he claims that all the obligations that were listed were very narrowly defined. Secondly, he confers that all the actions taken are prohibitions and none renders the feature of positive obligation. Thirdly, he points out that all the four elements stipulated comes under the strict

¹¹Bassiouni, M. Cherif. “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes.’” *Law and Contemporary Problems*, vol. 59, no. 4, 1996, pp. 63–74. *JSTOR*, www.jstor.org/stable/1192190.

¹²*Supra note 3*

¹³ Paolo Picone. The Law of Treaties Beyond the Vienna Convention, Part V Jus Cogens beyond the Vienna Convention, 24 The Distinction between Jus Cogens and Obligations Erga Omnes. Oxford Public International Law. <https://jguelibrary.informaticsglobal.com:2136/view/10.1093/acprof:oso/9780199588916.001.0001/acprof-9780199588916-chapter-24?rkey=cpcuc&result=1&prd=OSAIL> .

¹⁴ Carrillo-Salcedo, Juan-Antonio. *The American Journal of International Law*, vol. 92, no. 4, 1998, pp. 791–793. *JSTOR*, www.jstor.org/stable/2998150.

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definition of what an obligation is and hence they are devoid of the various other essential legal concepts. Fourthly, the author notes that all these obligations that were mentioned, fall within the ambit of international law which is generic and in return comes under the umbrella category of state responsibility that is jus cogens. These obligations are binding as they are part of international treaties and most states have signed and become parties to the same. Fifthly, Maurizio Ragazzi emphasizes the importance of these obligations in the current political atmosphere. According to him, they represent the basic, guiding moral values. The fifth point raised by Ragazzi regarding the value orientation is crucial in understanding erga omnes as a medium of protecting the collective interest of the international community as a whole¹⁵. Maurizio Ragazzi was aware of the critique of the dictum passed in the Barcelona Traction case and emphasized that the above mentioned five features are not essential conditions that need to be satisfied because the four elements that were stipulated in the judgment about defining obligation erga omnes is overlapping of what comprises jus cogens¹⁶.

DEFINING THE RULE OF JUS COGENS

The Latin term jus cogens mean “the compelling law”. The position of those norms falling within the umbrella category of jus cogens is highest in the hierarchy when compared to the rest of the international norms. This title of highest stature in the hierarchy makes the jus cogens norms and principles to be referred to as “peremptory” and they cannot be violated. International crimes that can be categorized under the banner of jus cogens are; crimes of aggression, the practice of slavery, torture methods, and various other violations of human rights. Four recognized conditions are to be satisfied for a crime to be identified as coming under jus cogens. Firstly, the crime should be perceived as being part of the general customary law, in short, be part of international opinion Juris. Secondly, those crimes which are highest in the hierarchy of crimes such that they are mentioned in international treaties and the preamble will fall within the box of jus cogens crimes. Thirdly, a crime is viewed as coming under jus cogens if the said crimes are part of treaties that have been ratified by many states. Lastly, if the crime that was conducted fall within the ambit of jus cogens, then there will an ad

¹⁵ *Supra note 12.*

¹⁶ Denters, Erik. Interpretation: The IMF and International Law, by J. Gold, Kluwer Law International, London/The Hague/Boston, 1996, ISBN 90-411-0887-4, Xxxi and 641 Pp., US\$ 167,50/UK£ 99/Dfl. 291,50. *Leiden Journal of International Law*, vol. 11, no. 3, 1998, pp. 671–674., doi:10.1017/S092215659821048X. <https://jguelibrary.informaticsglobal.com:2202/core/journals/leiden-journal-of-international-law/article/interpretation-the-imf-and-international-law-by-j-gold-kluwer-law-international-londonthe-hagueboston-1996-isbn-9041108874-xxxi-and-641-pp-us-16750uk-99dfl-29150/B6FF56237B5820598D48B70F8CC84EA5>.

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hoc international investigation conducted along with just and speedy prosecution of the culprits involved in the carrying out of the offense¹⁷.

THE IMPORTANCE OF THE RULE JUS COGENS AND OBLIGATION ERGA OMNES

Jus cogens and obligation erga omnes together are designed to achieve three major things for the protection of the common interest of the international community as a whole and to preserve the interests of the states as individual players as well. These are; first, to protect the core internal values of each state, that is; human rights, environmental rights, and so forth of each state. Second, these rules are bound to protect the values that are outside the jurisdiction of states, in short, internationally accepted morals and values like the prevention of pollution of oceans. Third, these rules guarantee the protection of highly valued morals and goods such that if these goods are proved to be damaged, then the third party states will provide necessary aid to the injured state¹⁸. The list containing the peremptory and those fundamental values that cannot be breached is stipulated in Article 53 of the Vienna Convention of the Law of Treaties. In the instance where any treaty or agreement is entered into parties that violate these peremptory rules, then such treaties or agreements will be void ab initio.

CONCLUSION

Erga omnes obligations are often confused with the rule of jus cogens but unlike the popular assumption, both are not the same. While the erga omnes obligations are those obligations that the states owe to the international community in general as a whole, jus cogens are the peremptory, fundamental values and principles that cannot be violated in no circumstance what so ever¹⁹. The bracket category of erga omnes is wider and broader than the concept of jus cogens. While jus cogens have similar characteristics to that of erga omnes, the reverse does not stand to be the same. While obligation erga omnes is analyzed about the ambit of its applicability, the International Law commission elucidates the difference by stating that jus cogens deal with the problem of hierarchy. Another point of difference can be drawn from the difference liability the two rules incur. The breach of the jus cogens norm is met with the violating state being subject to certain responsibilities with accordance to the severity of the crime while in the instance of infringement to erga omnes obligations then such violation

¹⁷Supra note 10.

¹⁸Supra note 12.

¹⁹Supra note 3.

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fetches a right of enforcement²⁰. Even though obligation erga omnes and jus cogens have been proved to be vital in International law, these rules have not been properly addressed and defined and have so many gaps in the legislation that are not filled and hence often referred to as a mystery of Public International Law.



²⁰*Supra note 10.*

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